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RESUMÉ

2006 REVIEW AND A LOOK AHEAD TO 2007

MOTOR CARRIER INDUSTRY

Looking back over the initial half of the decade, the early years each had defining moments; terrorist attacks, hurricanes, tsunamis, and political scandals, which impacted the future of the country and overshadowed the less significant general events. The start of the second half of the decade was different. Perhaps we have become immune to the shock of those types of events, which were relatively unknown before then, and therefore more alarming. Terrorist attacks, on a smaller scale, continue. War is now just a part of the news. While in 2006 we did not have the fury of hurricanes, the helter skelter pattern of weather, with warmth in the cold areas, cold in the warm areas, dry in rainy areas and wet in dry areas seems almost to be a metaphor for the rest of the events in our society. This year the eyes of the country were focused on the continuing war in Iraq, the daily toll of loss, the ever changing weather patterns and the changing political climate. Each played its role in the overall economic picture and consumer confidence.

At the end of 2006, economically the country is sluggish. Strong demand earlier in the year, consolidation and tight capacity helped increase profits overall for the year for some truckers. However, the broad industrial slowdown as the year progressed has filtered down and affected the trucking industry. 2006 started as a good year; however a faltering economy resulted in a softening in the trucking market. Consumer spending fell, leading to a weakening manufacturing sector, which led to reduced freight tonnage. A stalled housing market and troubles in the automotive sectors have also resulted in reduced freight. Fuel prices were erratic throughout the year. Freight tonnage plunged as 2006 drew to an end and motor carriers report that the annual peak season simply never occurred. On the up side, fleet operators bought record numbers of tractors, in part to avoid buying new models in 2007, which have more stringent emissions regulations. There is an expectation that the industry will readjust and rebound. From a financial standpoint, many publicly traded companies continue to be profitable businesses as successful truckers change the focus of their operations to select better freight and to offer more tailored services to select customers. Just as the insurance industry tightened its belt to reduce the impact of reduced investment results, trucking is moving to operate more efficiently

The results of a GE Capital Solutions survey conclude that fuel prices and the driver shortage are two of the most serious concerns facing trucking companies. The survey indicated that roughly 70 percent of respondents believe that fuel prices are putting their businesses at the most risk. Sixty-nine percent felt that driver shortages were the top concern for business, while another 40 percent said that excessive regulations were the biggest threats to business performance. Of course insurance premiums are always on the list.

Politics, as always, plays a factor in industry changes. The Democratic party has taken control of the reigns of Congress the first time in 12 years. The possible changes are being carefully considered by all industries. For trucking, the incoming Congress is expected to favor fuel taxes over tolls and is not inclined to support the privatization of public highways. Industry groups are gathering forces to seek acceptance of tax incentives for low emission engines and increased safety technology, which have long been favored by Democrats. Elections in Canada and Mexico resulted in new leadership in those countries with expectations that the new leadership will continue to promote trade with the United States. Whether the Democratic Congress will continue keeping the borders closed remains to be seen.

The Port Security bill was signed into law, authorizing $3.4 billion over the next five years to bolster cargo security. Answering a question many cargo underwriters can answer without further investigation, a $75 million dollar study by Department of Homeland Security found that cargo containers can be opened secretly during shipment without government alert and cargo can be added or removed. Of interest to underwriters will be Transportation Workers Identification Card which will assist in conducting threat assessment of drivers. As port security is high on the agenda of the incoming Congress, additional cargo security features may be forthcoming this year. Campaign promises during the recent election indicated that homeland security, and by definition, port security, would be a major concern of the incoming Congress. Increased scrutiny of cargo is expected, but not necessarily welcomed, by the marketplace.

Overall, insuring truckers is still a good business option for insurers with a knowledgeable staff and quality underwriting

guidelines. ISO reports that the frequency of auto claims from 2001-2004 has dropped 20% nationwide. The slowdown is attributed to a general economic slowdown, but also to improvement in risk management and safety.

Federal transportation agencies saw a number of leadership changes this year. After various reports were issued raising questions about the failure of the Federal Motor Carrier Safety Administration to complete its many assigned tasks, Annette Sandberg resigned as head of the FMCSA, with John Hill taking over the reigns and refocusing the department. President Bush's cabinet then lost its last Democratic member when Norman Mineta resigned as Secretary of Transportation. Mr. Mineta was originally tapped by President Clinton as his Secretary of Commerce and later by President Bush as Secretary of Transportation. Mr. Mineta oversaw the department during the 9/11 events and was a facilitator in creating and implementing many of the security departments and regulations which we see on a daily basis as a result of the attacks. Mary Peters has recent replaced Mr. Mineta. Ms. Peters, at least initially, has indicated opposition to changes in size and weight restrictions for trucks.

With fuel prices still a tremendous part of any trucker's operations, eyes have turned to find ways to reduce those costs. Motor carriers are projected to have spent $98.3 billion on fuel in 2006. There is an increased interest in alternative fuels. Hot fuel challenges are the newest target. Nearly a century ago fuel companies and regulators determined that fuel should be held at 60 degrees and fuel pumps are set at that standard. However, in a community where temperatures routinely exceed 60 degrees the fuel will ultimately heat above 60 degrees, resulting in higher costs to the consumer. Suits have been filed in various states seeking class action status and modification of these rules in order to drive down costs. While fuel costs remain high for commercial and personal users, it apparently is not keeping Americans off the road. The most recent statistics reflect that Americans drove almost 3 trillion miles in 2005, nearly a 25 percent increase over 1995 numbers.

January 1, 2007, saw the repeal of the Single State Registration System. The Unified Carrier Registration was supposed to be in place in time to simply step in as a replacement. As the program was not ready for implementation, efforts were undertaken to extend the SSRS for an additional year, however Congress adjourned without passing the extension, creating much confusion on exactly what exists at this point. Under SSRS, now repealed, only regulated for-hire motor carriers had been covered. But the UCRA, when implemented, will require all motor carriers to register with the U.S. Department of Transportation including private, for-hire and exempt carriers, as well as brokers, freight forwarders, and leasing companies. Purely intrastate motor carriers are not subject to UCRA. However, they must pay UCRA fees if a state participating in UCRA elects to extend the requirements of UCRA to its intrastate carrier population.

Tort reform also remains a joint focus of insurers and truckers alike. The Supreme Court has recently heard arguments on whether punitive damages can be supported when the damages are not associated with the harm suffered by the actual plaintiff in the suit. U.S. tort costs in 2005 reached $261 billion——approximately $880 per person and $4 less per person than in 2004——according to the "2006 Update on U.S. Tort Cost Trends" released by Towers Perrin. The Fulbright litigation trends survey finds that large U.S. companies face an average of 305 pending lawsuits, with the biggest litigation burden borne by the insurance industry. They have an average of 1,696 lawsuits pending at any one time.

The U.S. government, long recognized as the largest shipper of household, general and military commodities, has begun efforts to streamline its transportation operations. The Defense Transportation Coordination Initiative was implemented to allow the government to select a logistic management team to handle all logistics and moves. Joint venture proposals have been put together by many larger organizations. Obviously the selected winners will have a lucrative future, although many smaller carriers and logistics providers could be downwardly effected by this program. At the end of November the Government Accountability Office (GAO) rejected a protest against the program filed by 90 motor carriers and the Transportation Intermediaries Association, paving way for the operation to proceed. It is anticipated that a contract will be awarded this coming year.

Hours of service remain an issue, both here and in Canada. Canada's new hours-of-service regulations take effect Jan. 1. In Canada the maximum driving time for truck drivers was reduced from 16 to 13 hours in a 24-hour period, decreasing the daily maximum on-duty time from 16 to 14 hours and increasing the minimum off-duty time from eight to 10 hours. Confusion is expected as the rules have not been enacted in all provinces and may be enforced in different fashions in each province. In the U.S. another suit has been filed seeking to have the court review the revised hours-of-service (HOS) rule. The suit alleges that the revised rule increases both the number of hours that truckers may drive without a break and the number of hours truckers may drive per week. A recent survey released indicates that 77% of drivers who responded indicated that they currently violate the hours of service rules. 78% log off duty time when on-duty, 21% have duplicate log books, and 11% report team driver operations when only one driver is used. The responding drivers report that they intentionally violate the rules on average 5 days a month, with an additional 6 days of unintentional violations.

The transportation of hazardous materials remains in the forefront of regulatory concern. Increased regulations by various government agencies has created much confusion and further increased cost for the trucking industries. According to government officials, more than 3 billion tons of regulated hazardous materials (hazmat)--including explosive, poisonous, corrosive, flammable, and radioactive materials--are transported in the United States each year. Many additional products have been classified as hazardous materials, putting trucking companies in a bind as they need increased insurance limits and more certified drivers. Haz-mat transportation and relevant violations are a consideration for any underwriter as there is an increased safety risk for those carriers

As we end off this section of the resumé, it has become almost a tradition to note that the Mexico/U.S. border is still not opened for full operations for trucks. In the fall, press releases indicated that a possible pilot program for 100 Mexican carriers would be implemented, however that has still not happened. With a Democratic Congress the border is not expected to open any time soon, as possible leaders of the relevant committees have already expressed opinions against opening the borders. Issues which continue to prevent full access include operations for on-site safety reviews by U.S. inspectors, the inability of the Mexican government to perform the new criminal history record checks for Mexican drivers who haul hazardous materials, along with needed improvements in safety monitoring of Mexican driver records. U.S. truck unions and safety coalition groups continue to fight the border opening. Meanwhile border operations on the other side of the country have become a bit contentious as U.S. Department of Agriculture seeks implementation of fees for carriers. Overall trade between the three nations continues to grow. The Bureau of Transportation Statistics reports that surface transportation between the United States, Canada and Mexico was 4.5 percent higher in October 2006 than in October 2005, reaching $66.8 billion.

Government Activity

A number of different government agencies are involved in implementation of programs and rules which will impact trucking in the coming year. As noted earlier the Department of Defense is seeking to revamp its use of carriers. Also as noted earlier, the USDA has sought imposition of fees on all truckers entering the U.S. from Canada. This user fee is ear-marked to pay for border inspections of agricultural products entering the country. The fee, originally scheduled to start January 1, has been pushed back to March as trucking organizations seek withdrawal or reduction of the new fee. Apparently truckers crossing the border into the country also face penalties for failing to declare the contents of their lunch box as they enter the country.

The DOT also rolled out its Framework for a National Freight Policy. The lofty goals of the program seek to target ways to reduce congestion, increase freight capacity and protect the environment. The proposed national policy recognizes that the DOT does not have the funding to implement the appropriate programs to achieve the steps necessary and therefore its proposal includes direct participation by public and private sources.

Following implementation of the highway act, questions were raised as to whether the DOT would continue to register and monitor brokers and freight forwarders of non-household goods. The FMCSA has issued a clarification of its intention, confirming that it does intend to continue to regulate these groups. The notification also indicated that there are 16,930 general commodities brokers who are already registered to operate.

As you are aware from the many bulletins released by CAB over the last year, there was a government glitch in the handling of carrier financial information. The program had been transferred to the Bureau of Transportation Statistics without funding. The program, and all requisite regulations, has been transferred back to the FMCSA. Class I and Class II motor carriers remain required to file annual reports with the DOT.

The FMCSA is also looking into a number of issues this coming year which will affect insurers of motor carriers. At year’s end they accepted a petition to add a policy territory limitation to the MCS-90 endorsement in response to litigation which extended the protection to shipments in Mexico. Canadian insurers have also been successful in getting the FMCSA to consider their petition to allow Canadian insurers to make filings without the need for U.S. fronting companies

The FMCSA also appears poised to begin addressing various regulations which had been put on hold following the Mineta-Peters transition. The proposed rules on intermodal containers were published at the close of the year. The FMCSA proposal would subject intermodal equipment providers (IEPs) to federal safety regulations governing motor carriers. They would be required to register and file with FMCSA an Intermodal Equipment Provider Identification Report (Form MCS-150C); display a dot number, establish a systematic inspection, repair and maintenance program to ensure the safe operating condition of each intermodal container chassis; maintain documentation and provide a means to effectively respond to driver and motor carrier reports about intermodal problems.

The FMCSA continues moving forward on its Agency's Comprehensive Safety Analysis 2010 initiative (CSA 2010), a comprehensive review and analysis of FMCSA's current

commercial motor carrier safety and enforcement programs. Public meetings have been held as the FMCSA seeks information. Studies and proposals as a result of this initiative are expected this year. The FMCSA also announced the establishment of the Motor Carrier Safety Advisory Committee. The advisory committee will provide advice and recommendations to the FMCSA Administrator on the needs, objectives, plans, approaches, content, and accomplishments of motor carrier safety programs and motor carrier safety regulations. The FMSCA has proposed a modification to its current safety ratings to include only "continue to operate" or "unfit". With an elimination of a middle category, it becomes all that more important for underwriters to monitor the safety of its carriers.

The OMB has also cleared the way for the FMCSA to issue its rules for the use of on board recorders as a means to insure compliance with hours of service rules. As the proposed rules have not yet been issued it remains uncertain as to whether the FMCSA will mandate use of the records or limit the use to motor carriers with certain requirements, or simply allow their use for those carriers who make that election.

FMCSA has also issued new proposed rules for new motor carriers, identifying 11 regulations that it believes are essential elements of basic safety management controls necessary to operate in interstate commerce. Violation of any of the regulations will fail the entrant, which is a new policy change. The 11 regulations include: failing to implement an alcohol and/or controlled substances testing program; using a driver who has refused to submit to an alcohol or controlled substances test required under part 382; using a driver known to have tested positive for a controlled substance; knowingly allowing, requiring, permitting or authorizing an employee with a commercial driver's license that is suspended, revoked or canceled by a state or who is disqualified to operate a commercial motor vehicle; knowingly allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle; operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage; using a disqualified or a physically unqualified driver; failing to require a driver to make a record of duty status; requiring or permitting the operation of a commercial motor vehicle declared "out-of-service" before repairs are made; and using a commercial motor vehicle not periodically inspected.

The Federal Highway Administrative has approved standards for a new program to provide additional information to truckers on where to park their rigs and receive general services. Although this new program, authorized under last year's highway authorization program, will spend considerable monies on providing directions to truckers, it contains no funds for the creation of more parking for trucks, which are often forced to park alongside highway roads.

The Motor Carrier Industry

The later part of 2006 saw a sharp downturn in freight tonnage. Accordingly to the American Trucking Associations, November 2006 marked the single worst month of for-hire truck tonnage since the last recession. While 2006 began with acceptable freight numbers, they plummeted in February and March, with average freight volumes through October flat as every gain since May was followed by an equal or greater loss the next month. Since September the numbers have steadily dropped. As the trucking industry has long been viewed as an indictor of economic activity, as it represents nearly 70 percent of tonnage carried by all modes of domestic freight transportation, it is expected that any economic turnaround in 2007 will be slow, at best.

Overall the forecast for the future of trucking still remains high, with the expectation that these end year numbers are simply an adjustment in the marketplace, similar to that facing the housing industry. The recently released ATA transportation forecast still foresees increased freight tonnage and increased revenues for truckers in the coming years, although the start of 2007 may be somewhat sluggish.

Driver shortages continue to be a major focal point for the trucking industry. At least one large internet employment agencies places trucking on the list of the top 25 job opportunities. Most motor carriers see turnover in excess of 100% each quarter. The national shortage for truck drivers stands at around 20,000. If current trends aren't reversed the shortage could reach 111,000 by 2014. Third quarter reports on turnover for 2006 showed a 121% increase for large LT carriers, with a 114% increase for smaller carriers. In 2006 the focus changed to finding solutions to the problem. The efforts of larger companies are centered on providing additional services to drivers in order to retain their current staffing levels. For example, students at Carnegie Mellon University were provided funds by industry organizations to come up with incentives for drivers, such as racks to permit mobile scooters to be stored on trucks. The ATA has begun a marketing campaign to attract older drivers and there has been a push in the industry to make driving a more attractive option for women. The ATA has also announced that it will provide low-interest loans for students attending driving schools

Fuel prices were volatile, starting the year at $2.442 per gallon, with a high of $3.065 by August, and then dropping in the fall. The end of 2006 has seen at least five weeks of increased costs, with fuel ending the year at $2.62. The Department of Energy reports that the average price next year will be higher, at $2.659, with a spring peak at $2.742, resulting in more expense to truckers. On a different, but

interesting, note the ratio of trailers to tractors has declined for each of the past 5 years. This reduction is attributed to earlier increased freight demands, and the desire of motor carriers to avoid purchase of new equipment, with new engine requirements.

Jimmy Hoffa was reelected as head of the Teamsters. Indications are that the organization, looking to expand its work base, is focusing on owner-operators. Organizations, including the Teamsters, are challenging the concept that owner-operators, as contractors, can not unionize.

Possible implementation of speed governors on new heavy duty trucks has created division in the trucking industry. Owner operator organizations have opposed implementation of 68 mph governors. However the ATA has petitioned the National Highway Traffic Safety Administration and the FMCSA for these governors to be required.

The National Motor Freight Classification, the largest single motor carrier classification, has adopted the North American Uniform through Bill of Lading. Under this new bill of lading, designed to cover shipments from Mexico to Canada, the carrier's liability will be determined according to the liability regime of the originating country. Mexico, the U.S. and Canada each maintain separate liability standards. The impact of this bill of lading is not yet known, as cargo loss and damages claims under the bill of lading will not come under judicial scrutiny for a year or so.

In further efforts to create some uniformity in transportation, the Transportation Intermediaries Association (TIA) and the National Industrial Transportation League have created a model broker-carrier contract for intermodal freight. The TIA and the ATA have competing model broker-carrier contracts for truck transportation. Underwriters for both auto and cargo would be wise to review these proposed contracts to evaluate the current assumption of liability and insurance requirements for carriers and brokers alike

The FMCSA Safety Progress Report indicates that large truck fatalities decreased in 2005 from the previous year, but were up from 2003. The 2005 figures are still preliminary, but fatalities currently number 5,212, a rate of 2.34 per 100 million truck miles driven. 222,826 million miles were driven by trucks. The FMCSA has set goals to reduce fatalities to 2 per million truck miles driven The Large Truck Causation Study was also released this year which was a first nationwide look at all factors involving accidents with commercial vehicles. It was determined that driver or other failure of the passenger vehicle was more often the critical cause of the accident in two vehicle crashes, a result disputed by Advocates for Highway and Auto Safety, which also opposes the current hours of service rules.

Insurance Underwriting

It is clear that the industry is and will continue to go through some dramatic changes over the coming months and years, due to increased competition, changes in regulation, more public disclosure and the demands of customers for value added services. The property/casualty industry is expected to report record profits, and potentially the lowest combined ratio ever recorded. While the absence of large insurance hits from catastrophes plays a part in these numbers, favorable pricing also continued in 2006, at least for many areas of insurance. Insurers have also addressed the unfavorable reserve issues of prior years which also contributed to the reduction in the combined loss ratio. However that pricing is expected to take a downturn in 2007, as the market appears to be softening and cat models indicate some increased activity in 2007.

Insurers continued to be a focus of scrutiny by state attorney generals. The later part of 2006 saw additional efforts to resolve many of the suits and complaints related to commissions and insurer operations, paving the way for insurers to move on to correct those business practices and focus their energy on underwriting and investment.

Catastrophe losses were relatively small for insurers this year, after two years of hard hits. Third quarter catastrophe losses were estimated to be $971 million, compared with 48 billion during the Katrina-Rita hurricane season and 24 billion in 2004. However, a recent decision affording coverage for manmade floods may further increase losses for insurers who otherwise believed that floods were excluded from their policies.

In part as a result of the impact of some of these larger losses in recent years, Standard & Poor has indicated it will complete its major overhaul of its insurance capital model. The increased complexity of insurance products and volatility in the market are cited as the reasons for the changes. It is expected that insurers will be required to maintain increased capital to insure that they meet financial security requirements.

Statistics currently show that risk managers who have not had large losses are not increasing policy limits despite lowered or stable insurance rates. Having paid substantially higher premiums over the last few years insureds appear to be keeping the additional premium monies in hand. The same is not true, however, for those you that have felt the impact of large liability claims, in recognition that the greater limits provide increased financial security for their companies.

From a trucking perspective, some brokers are reporting that increased competition is resulting in reduced premiums for truckers. Whether that projection is true or not remains to be seen. According to one trucking organization, the average cost of insurance for a single vehicle carrier, including cargo, physical damage, trucker's auto and bob-tail is approximately $9,000 a year.

With excess capital, and a strong year behind them, insurers are one again focusing on strengthening their underwriting and claims operations. One of the biggest challenges is the need to recruit and train new insurance talent. Transportation insurance, whether it is auto or cargo, is a unique business and the success of any company's book of business lies, in part, with having a knowledgeable staff.

Central Analysis Bureau

Since its inception over 60 years ago, Central Analysis Bureau"s primary focus had been on the analysis of the financial condition of motor carriers for the benefit of insurance underwriters. In order to keep to our commitment to provide subscribers with the necessary information and resources to better "***know your insured"*** CAB has launched several new products to enable us to provide a more complete profile of motor carriers. These include management tools such as the ***Safety Monitoring*** program and the ***Insurance Filing Monitoring*** program, and underwriter tools such as our ***Renewal*** and ***Submission*** reports. This new package of products contains valuable information relating to a motor carrier"s safety status and insurance filings, and consists of a slew of products specifically tailored to all the different levels of a company"s underwriting operation. Used in conjunction with the ever-important financial information and rating provided as part of our ***Financial Analysis*** service, this information will effectively allow underwriters to make better underwriting decisions and minimize an insurance company"s liability under regulatory filings.

The information we provide in our products is aggregated from a number of different sources and databases, some proprietary and some publicly available. It would be easy to get buried under the mountain of raw, sometimes conflicting, data available, not to mention the amount of time needed to collect all this information from their various sources. Therefore, we have put maximum effort into assembling and presenting all this information in an easy to follow format and to highlight items of concern and items which require further investigation. We believe that we have achieved this goal but we are continuing to listen to our clients and to use the feedback we receive to further tweak the information we provide and the way in which we provide it.

We also recognize that in order to get maximum value out of the products we offer that education is important. We are proud to announce that, for the first time, there will be a session at the annual seminar that is presented jointly by the law firm of Schindel, Farman, Lipsius, Gardner & Rabinovich LLP and Central Analysis Bureau, Inc. to introduce participants to the frequently underutilized yet accessible tools which can enable underwriters to more effectively underwrite motor carriers and vastly improve their results, along with providing advanced information for more in depth investigation during the claim process. More details about this seminar are available in the S, F, L, G & R portion of this resume, on-line at www.sfl-legal.com or in brochures that will be mailed out early in February 2007.

Many insurance companies are already using and reaping the benefits of subscribing to all of our products. For those of you not familiar with all our products, space only allows a short introduction so we encourage you to contact Shuie Yankelewitz at 212-244-6575 x225 or syankelewitz@cabfinancial.com for more in-depth information.

Also, Central Analysis Bureau now has the capability to arrange web conferences and would be pleased to provide a demonstration of our products to any interested party, in addition to the free-of-charge training on the use of our products that is available to subscribers. If you are interested in scheduling or attending a demonstration or training session please contact Shuie.

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 websites and the raw data is so voluminous as to be of little use without consolidation and analysis. The ***Safety Monitoring*** program compiles all this information together on one report in an easy-to-follow format and provides warnings and visual clues to highlight items of potential concern. It consists of three parts. First is the ***Renewal Report,*** which is provided at a specified interval prior to the renewal date so the underwriter will have a complete formatted report just at the time it is most needed. Second and third, more as a management tool, there is ***a Baseline Report*** followed by weekly ***Update Reports*** which monitor and highlight problems and items of concern from a safety perspective for an insurance company's entire book of business where DOT information is available. 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.

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 expose an insurance company 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 DOT 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 a report which lists all of these potentially problematic filings, and a spreadsheet with all outstanding filings for the subscriber"s insurance companies. This report also has a special section dedicated to a "real time" analysis of all new filings, allowing an insurance company to fix errors quickly and to trace how these mistakes occurred. 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 ***Financial Analysis*** service: The original and still essential way in which CAB has helped underwriters to know their insureds. For over 60 years CAB has been performing financial analysis on motor carriers. Our analysis is designed specifically for motor carriers and the concerns of insurance companies. No other source can provide this type of specific and targeted analysis. In addition to the direct financial responsibility insurance companies assume under their regulatory filings, financial condition has been shown to be directly correlated with safety performance. The motor carrier industry continues to be volatile, with the FMCSA issuing over 50,000 new docket numbers each year and a similar number of motor carriers ceasing to exist.

These programs are now available on a cost efficient package basis. Automatic subscribers to the ***Financial Analysis*** service have always had access to our ***"clearinghouse"*** to access the most current information in our files. Now ***Premium Subscribers***, those who subscribe to a package of our programs, receive our ***Submission Report*** by e-mail immediately after making an inquiry on our ***"clearinghouse".*** This report includes financial, safety and insurance information all summarized and clearly presented. It provides valuable tools for underwriters, for example by indicating states in which the motor carrier"s vehicles have been inspected and a list of VIN numbers of vehicles inspected which can be compared with information provided to the underwriter by the motor carrier. The pricing for our ***Premium*** package is based on one low annual charge based on volume of carriers written to encourage underwriters to make maximum use of our services. There are no additional fees other than the basic fee so an unlimited number of inquiries can be made, an unlimited number of financial statements can be sent to us for our review, and unlimited number of submission reports can be obtained.

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 affect 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 2007 we will continue to seek out new information to help underwriters to know their insured and work to provide this information in the most effective manner possible. We will also continue to solicit feedback and to incorporate that feedback into our products.

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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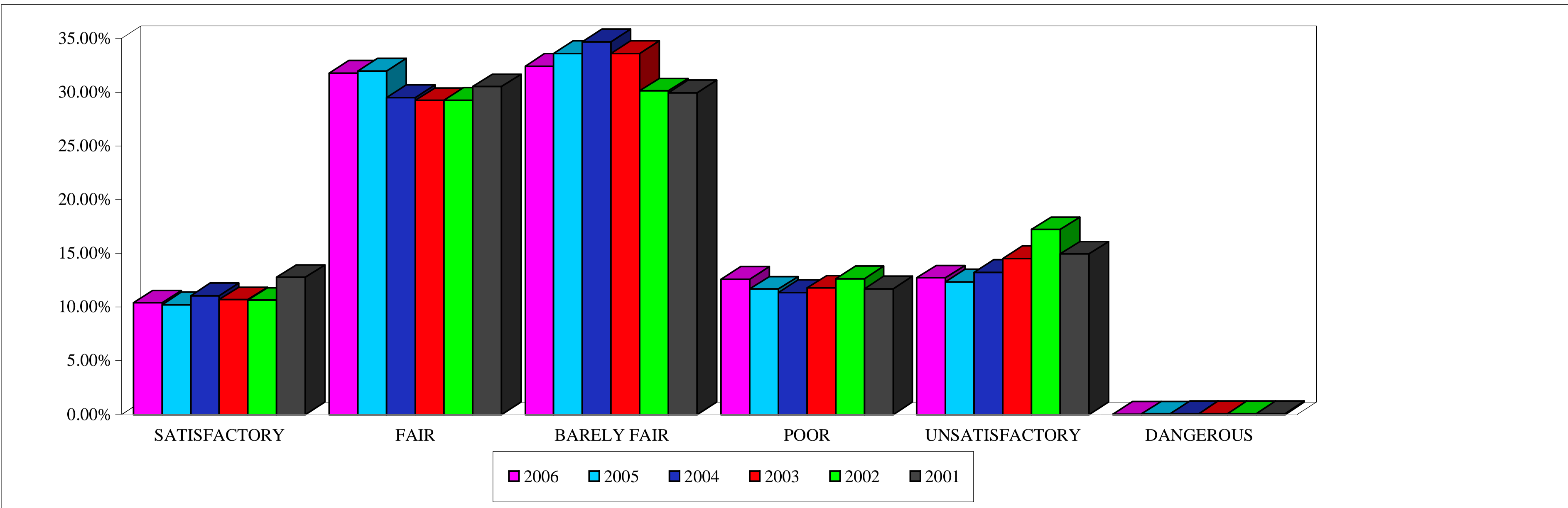
Ratings

Breakdown of ratings for the year 2006 and prior:

	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
SATISFACTORY	10.40%	10.24%	11.08%	10.69%	10.64%	12.77%	14.81%	15.63%	16.11%	15.65%	15.61%
FAIR	31.80%	32.00%	29.52%	29.26%	29.28%	30.54%	31.70%	31.98%	30.77%	30.70%	31.33%
BARELY FAIR	32.45%	33.64%	34.71%	33.63%	30.14%	29.96%	29.57%	28.94%	28.49%	27.53%	27.98%
POOR	12.59%	11.69%	11.38%	11.79%	12.64%	11.71%	10.54%	10.90%	11.42%	12.04%	11.24%
UNSATISFACTORY	12.72%	12.34%	13.23%	14.53%	17.23%	14.95%	13.30%	12.49%	13.15%	13.97%	13.66%
DANGEROUS	0.02%	0.06%	0.08%	0.07%	0.07%	0.07%	0.08%	0.06%	0.06%	0.08%	0.15%



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.

RECENT DEVELOPMENTS IN TRANSPORTATION AND INSURANCE LAW

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MCS-90 & STATE FILINGS

A series of novel issues relating to filings were addressed by the court in Kolencik v. Progressive Preferred Insurance Co., 2006 WL 738715 (N.D. Ga.). T.I. Wood Enterprises had held federal operating authority in the past and Progressive, its insurer, had made a filing with the USDOT; at the time of the loss, though, the company held only Georgia authority, although the federal filing remained in effect. Wood hired a contractor named Yarbrough, who controlled three trucks, to haul dirt to a dumpsite, and the loss occurred as the contractors drove to their local campsite after a day of work. Two of those trucks were involved in a fatal accident with Mrs. Kolencik. The court concluded that the relationship between Wood and Yarbrough was one of lessee/lessor and that Wood bore vicarious liability for the negligence of the contractors.

The contractor's vehicles, though, were not covered by the Progressive policy. The estate and the widower sought recovery based on both state and federal filings. The court rejected the argument that the federal filing applied. Since the trip was purely intrastate, and since the company held no federal authority, the MCS-90 and the federal filing were inapplicable. Only the Georgia filing applied.

The court then turned to plaintiff's claim that he was entitled to recover multiple awards under the Georgia filing Progressive made for Wood. In the first place, plaintiff argued for a doubling of the limits on the basis that he had claims as both an individual and an administrator. On top of that he argued for tripling the award because there were claims against two truck drivers and Yarbrough. And on top of that he argued that the award should be doubled again because Progressive had not only made a state filing for the year in which the accident occurred, but had failed to cancel the filing for a previous year. The court rejected all of these arguments – Progressive owed only $100,000, the per-person limit of the Georgia filing. Our firm represented Progressive in the litigation.

A second Kolencik litigation, Kolencik v. Stratford Insurance Company, 2006 WL 2466182 (11th Cir.), involved Yarbrough's insurer or, to be precise, former insurer. As a result of Yarbrough's delinquency, his premium finance company cancelled his policy five months prior to the accident. Kolencik, citing to Georgia's Public Service Commission (PSC) motor carrier regulations and the decision in Progressive Preferred Insurance Co. v. Ramirez, 277 Ga. 392 (2003) (discussed in our 2004 Summary) argued that Stratford's cancellation was ineffective because no notice of cancellation was given to the PSC. Stratford had never made a Form E filing with the PSC, but Kolencik noted statutory language which makes clear that the failure to file a form required by the PSC does not extinguish a claimant's right to collect from the motor carrier's insurer.

The Eleventh Circuit, though, affirmed the district court's ruling and rejected Kolencik's argument. Yarbrough was not registered with the PSC as a motor carrier: had Stratford attempted to file a form E – or, for that matter, to cancel such a filing – the PSC would simply have bounced the communication. The law does not require an impossible act; Stratford, therefore, bore no exposure.

An impossible act was precisely what had been demanded of the insurer in a matter that had been slowly winding its way through the state and federal courts of Connecticut since the late 1990's. In 2004 a federal judge had ruled that by failing to cancel an MCS-90 the insurer remained exposed to the public. Barbarula v. Canal Insurance Co., 353 F. Supp. 2d 246 (D. Conn. 2004). As stated the decision may not seem remarkable, but in fact it was highly problematic. At policy inception, no filing was requested and none was made. In mid-policy term Canal had, to its later regret, faxed an MCS-90 to a facility where the insured's truck had been stopped by the USDOT inspector for failure to produce an MCS-90 on demand. Months later the policy was cancelled but, since there was no filing, Canal took no special steps with respect to the MCS-90. The court, noting that the MCS-90 was never cancelled, found that even though the policy had been cancelled effective the morning of the accident, Canal was exposed because of the MCS-90. The 2004 decision ignored the fact that since there was no filing there was no way to effectively notify the USDOT that the MCS-90 was no longer in effect.

The motor carrier had never been authorized by the USDOT to haul goods interstate and appears to have been operating illegally. (There is a class of motor carriers, under the current regulatory system, which does not require federal motor carrier authority but still requires an MCS-90. In demanding that the carrier produce an MCS-90 – but not closing it down for operating without authorization – the USDOT field inspector may have believed that the insured was in this class of carriers). Canal insisted that the MCS-90 was cancelled along with the rest of the policy, pointing out that sending a cancellation notice to the USDOT would have been futile since there was no filing to cancel and the insured was not a USDOT carrier. In its 2004 decision the Connecticut district court had rejected the argument. Fortunately, the district court's decision has now been withdrawn by the court, thereby facilitating settlement of the suit. It will have no precedential value. Our firm was working with Canal's counsel in anticipation of an appeal when the case was settled.

The Barbarula court had also weighed in on an issue that has been attracting particular attention from lawyers representing victims of motor carrier accidents: whether the insurance company which writes a liability policy for a trucker has a separate obligation to find out whether the trucker needs a filing, and how much coverage it is obligated to carry. It has traditionally been understood that it is the motor carrier, not the insurer, which is obligated to prove compliance with the relevant insurance requirements imposed upon the motor carrier by statute or federal regulation. In fact, in a 1981 rulemaking relating to the MCS-90, the USDOT observed that it has no jurisdiction over insurance companies.

That, though, has not stopped attempts by bodily injury plaintiffs to argue that the motor carrier's insurance limits were too low and that the court should reform the limits to assure compliance with the regulation. A recent attempt along these lines is described in Thompson v. Eroglu, 2006 WL 3849286 (Ohio Ct. App. Dec. 29, 2006).

Hasan Eroglu was hauling a load of waste from New York City to a landfill in Ohio when he collided with a passenger vehicle causing bodily injury. Eroglu had been insured at one point by Empire Fire & Marine Insurance Company. The policy, though, had been cancelled prior to the loss. The injured party filed suit against Eroglu, who defaulted; he then secured permission from the court to proceed directly against Empire.

The thrust of plaintiff's argument was that, under controlling New Jersey law, the cancellation of Eroglu's policy was ineffective because Empire had failed to notify the USDOT of the cancellation in accordance with 49 U.S.C. §13906 and 49 C.F.R. §387.15. The court rejected the argument noting that plaintiff "fails to explain why Eroglu and Empire are subject to these federal regulations."

The cancellation process was initiated by the premium finance company after the insured failed to make a scheduled payment. Empire had not made a filing for Eroglu and no MCS-90 had been attached to the policy.

An Empire underwriter testified that the policy was not issued to satisfy the federal requirements. The court found nothing in the record indicating that Empire had actual or constructive knowledge of Eroglu's business practices other than what he revealed when he applied for the coverage. The underwriter indicated that so far as she knew Eroglu had no federal carrier authority (that was true) and that she was unaware he was doing any interstate hauling. The court rejected plaintiff's argument that the "out of state extensions" section of the policy form indicated an awareness that Eroglu operated interstate. "Further, Appellant fails to direct this Court's attention to anything tending to indicate that Empire, as Eroglu's insurer, had an obligation to determine if its insured was hauling in interstate commerce and then issue the requisite coverage."

This, it seems to us, is useful language, imposing no duty on the insurer to check what the insured is actually doing – it is apparently permitted to rely upon what it is told in the application. It is possible, though, that if the insurer had actual knowledge that the insured is engaged, legally or otherwise, in interstate commerce, the result would have been different.

The first two decisions which fully discuss the applicability of an excess MCS-90 arise out of some anomalous circumstances. Both cases involved Builders Transport, a South Carolina based motor carrier, which in the 1990's was certified by the I.C.C. as a self-insured carrier. Since it was so certified, there was no need for it to secure a filing. However, the company purchased layers of excess insurance: Reliance Insurance provided the first layer of coverage over the self-insurance, although the Reliance policy itself was subject to an annual aggregate deductible which ranged from $1 million to $1.65 million over the years. Above the Reliance layer was a $13 million umbrella policy issued by Gulf Insurance, and another layer was purchased above that. Thus, depending on the year, the Gulf policy attached at $3 million or $3.65 million.

As noted Builders was a certified self-insured carrier and no filing was made by either Reliance or Gulf with the I.C.C., or later the USDOT, on its behalf. Yet, for no apparent good reason, both Reliance and Gulf prepared MCS-90 endorsements – although it was not completely clear that the Gulf MCS-90 was attached to the policy – and in each endorsement the second, or excess, box was checked. Each endorsement had the same amounts typed in the two spaces left open on the form: "This insurance is excess and the company should not be liable for amounts in excess of $1 million for each accident in excess of the underlying limit of $1 million, for each accident".

In the two cases described below Gulf acknowledged coverage. However, Builders Transport filed for protection under the Bankruptcy Code in 2001. (Reliance, of course, followed closely on its heels). Plaintiffs argued that Gulf was liable for the first $1 million of the judgment under its MCS-90, in addition to its regular coverage which attached at $3 million or more.

The complaint in Kline v. Gulf Insurance Co., 466 F. 3d 430 (6th Cir.), was filed after a consent judgment for $3.2 million was entered against Builders. Gulf acknowledged that its coverage attached at $3 million, and paid $200,000. Kline was able to recover $1 million from Reliance. Kline argued, though, that in light of the Gulf MCS-90, Gulf should also pay $1 million under its MCS-90 in place of the self-insurance Builders was unable to pay.

The court noted that the phrase "underlying limit of $1 million" in the MCS-90 was ambiguous in light of the complex self-insurance and insurance program the insured had created. However, that ambiguity could not be held against the insurer since the USDOT, not the insurer, had promulgated the endorsement. The court found that in issuing the endorsement, albeit unnecessarily, Gulf was not changing the attachment point of its coverage. "Read as a whole, the MCS-90 incorporated the limits of liability in the original insurance policy; it did not replace them."

There were several factual variants between Kline and McGirt v. Gulf Insurance Co., 2006 WL 3456369 (4th Cir.) which also arose out of an accident involving Builders Transport. The declaratory judgment action was tried first – to date there is no judgment against Builders Transport. If such judgment is ever entered, Reliance is not around to pay its share of coverage. Finally the amount of the aggregate deductible was some what higher for the policy year in question. The Gulf policy attaches, therefore at $3.65 million.

The plaintiffs in McGirt argued that precisely because Reliance was no longer available to pay, Kline was distinguishable and Gulf must drop down to pay the first million dollars. The district court so held, finding that Gulf would pay the first million of any judgment, and then pick up again at $3.65 million with the remainder of its $13 million coverage. There would, then, be a gap of over two and a half million dollars between the bookends of Gulf's exposure. Both sides appealed.

The Fourth Circuit, in an unpublished opinion, found that Gulf's attachment point was $3.65 million and that the excess MCS-90 did not change that. The court rejected the argument that a different result was required than in Kline because in McGirt there was no possibility of securing $1 million from other sources. Reviewing the legislative history, the court found that the requirements of the federal regulatory framework were satisfied by the certification of Builders as a self-insurer. The regulatory history made clear that the USDOT understood that in permitting self-insurance there was a certain element of risk that in any particular case the public could go unprotected.

Turning to the words of the MCS-90, the court stressed that only judgments "within the limits of liability described herein" are encompassed by the endorsement; since the Gulf policy would attach at $3.65 million, that is where the excess MCS-90 attaches. Our firm worked with the counsel of record for Gulf in these matters.

Love-Diggs v. Tirath, 911 A. 2d 539 (Pa. Super. Ct.), is a useful reminder that the Form E filing and Form F truckers endorsement, promulgated originally by the Interstate Commerce Commission for use by state agencies, may be mandated for taxies as well as trucking companies. The decision itself is straightforward: an insurer may be liable under a filing even if the vehicle involved in the accident is not scheduled on the policy at issue.

POLICY EXCLUSIONS

Several decisions dealt with standard exclusions. Wilson v. Nationwide Mutual Insurance Co., 395 Md. 524, 910 A. 2d 1122, dealt with the fellow employee exclusion. Wilson suffered serious bodily injury in a collision while riding in a vehicle operated by a colleague. Both Wilson and the driver were employed by Allegheny Industries and were acting within the scope of their employment. Allegheny maintained a business auto policy and a worker's compensation policy with Nationwide. The auto policy contained the fellow employee exclusion, but because the policy was delivered in Maryland, a state with a broad compulsory insurance statute, the insurer had amended the exclusion so that it applied only after the insurer paid the state's mandatory insurance limits. Plaintiff argued that since the legislature had not specifically authorized the fellow employee exclusion it was unenforceable and, therefore, that Nationwide should be obligated to pay any judgment up to its $1 million limit. In a 1989 decision, Maryland's Court of Appeals had indeed voided a standard fellow employee exclusion, even though the injured party was able to recover worker's compensation benefits. In this case, though, the insurer acknowledged its responsibility to pay the state's minimum limits under the liability coverage. Accordingly there was no public policy blocking the enforceability of the fellow employee exclusion for the portion of the liability coverage not required as a matter of law.

Penske Truck Leasing Co. v. Republic Western Insurance. Co., 407 F. Supp. 2d 741 (E.D.N.C.), addressed the employee and worker's compensation exclusions in light of the "severability of interests clause", and also considered the completed operations exclusion. Bridgeways Company, Inc., leased vehicles from Penske and arranged, as required in the lease agreement, to have Penske added as an insured to its policy with Republic Western. Willie White, a Bridgeways employee, was injured in the course of his employment when he fell from a tractor-trailer rig owned by Penske. After qualifying for worker's compensation benefits, White filed an action for bodily injury against Penske alleging that he had fallen out of the tractor while attempting to repair a light attached to the exterior of the vehicle. He alleged that Penske had negligently failed to attach a hard bar to the tractor. Republic denied coverage. Penske successfully defended the case at its own expense, although it ultimately settled for $15, 000 in the course of a mediation ordered by the appellate court. Penske then sued Republic Western to secure reimbursement of its defense costs and the settlement payment. Republic argued that since White was an employee of the named insured Bridgeways, recovery was precluded by the employee and worker's compensation exclusions. Republic relied in particular on a 1961 North Carolina appellate decision which had indeed enforced the employee and worker's compensation exclusions where an employee of the named insured dealership was injured through the negligence of an additional insured who was test–driving a vehicle.

The federal court observed, however, that the 1961 decision made no reference to a severability of interests clause. Such clauses were in existence then and it was plausible that the policy at issue had such a clause. Since, however, the earlier decision had failed to even cite, let alone analyze, the severability language, the court concluded that the earlier case could not be dispositive. The severability of interests clause explicitly mandates that each insured be considered independently for a determination of whether coverage applied. The employee exclusion, for instance, referred to "an employee of the insured." In order for the exclusion to apply, the claimant must be the employee of the insured against

whom the claim is made. The court, as others have over the years, suggested that a different result could be required if the exclusion were modified to refer to the employee of "any insured."

Also of interest is the decision in Harleysville Mutual Insurance Co. v. Zelinski, 393 Md. 83, 899 A. 2d 835, in which the court enforced a "named driver" exclusion.

NON-TRUCKING USE

In Canal Insurance Co. v. Underwriters at Lloyd's London, 435 F. 3d 431, the Third Circuit affirmed a district court decision reviewed on these pages two years ago. As noted there, the relationships between the motor carrier BIR and the owner of the motor vehicle was not the typical one. In the Third Circuit's words Singh, the owner-operator, "enjoyed a business relationship" with BIR (he appears, in fact, to have been one of its owners). Singh had received no dispatch order for several days. On the date of loss, with the knowledge of BIR, Singh hired a driver to drive his tractor to a Kenworth dealership with the hope of selling it or trading it in. However, just in case BIR were to get a load for him to carry, Singh directed the driver to take along an empty trailer. The loss arose as the driver was headed toward the dealership.

Underwriters had issued a non-trucking policy to Singh. The non-trucking endorsement contained somewhat broader exclusionary language than the standard ISO version. Underwriters argued, and the district court had agreed, that the attempt to sell the vehicle constituted an excluded "business use" which was broadly defined as "any use of the covered auto that promotes the business purposes of the insured." On appeal Canal argued that the exclusion was overly broad and also ambiguous. Relying on several Pennsylvania cases, although not trucking cases, the Third Circuit found a reasonably clear line between business use and personal use, and affirmed the decision of the district court. The court also rejected a variety of public policy and equitable arguments raised by Canal. The court was unimpressed with public policy arguments. It cited the reaction of a Pennsylvania court to public policy objections to the absolute pollution exclusion: the only issue before a court is how to interpret the contractual language in the specific context. Questions of whether the provision violates public policy must be left to the legislature and the Insurance Commissioner.

We note that courts over the years certainly have looked to policy concerns. Judge (now Justice) Alito, who is well known for his deference to Congress in reviewing legislation, was on the panel. This particular non-trucking clause may have been upheld because the Canal policy, as mandated by Congress, provided a safety net. But is it true that Congress, by setting up a system in which coverage for the motor carrier is guaranteed, was taking a position on the scope of non-trucking coverage? We are not convinced.

HOW MANY LIMITS?

Zurich American Insurance Co. v. Goodwin, 920 So. 2d 427 (Miss) - An eighteen wheeler operated in the business of West Side Transport, an Iowa-based trucker, plowed into a row of stopped traffic on Interstate 20 in Lauderdale County, Mississippi. The rig collided with a total of eight other vehicles causing two deaths and other injuries and damage. West Side was insured by Zurich for auto liability with limits of $1million. Three separate lawsuits were filed and it was immediately apparent that the Zurich limits would be insufficient to cover all of the losses.

The trial court found a way around this problem. Under Mississippi law, an accident is viewed from the perspective of the injured party unless the policy specifically provides that "accident" is to be viewed from the perspective of the insured. The question of whose perspective controls has been central to the debate over whether an intentional act can qualify as an accident (leading ISO, long ago, to add the definition that the controlling perspective is that of the insured). What is truly astounding about the trial court's decision is the conclusion that each injury constitutes a different accident under Mississippi law in spite of the inclusion in the Zurich policy of the standard provision limiting recovery to the amount set out in the declaration, regardless of the number of vehicles involved in the accident or the number of claimants. The court concluded that Zurich's exposure was $8 million, a million for each accident victim.

The Supreme Court reversed, not because the trial court's analysis of Mississippi was wrong but because it concluded that Iowa law controlled under the "center of gravity test." The implications of the case are not likely to escape the plaintiff's bar, however.

FEDERAL LAW

The first decisions under the regime of Congress's 2005 enactment (the Safe, Accountable, Flexible Efficient Transportation Equity Act) ("SAFETEA") have begun to appear. The Graves Amendment to that statute prohibits states from imposing vicarious liability against car owners who rent or lease vehicles which are then involved in accidents. The New York court in Infante v. U-Haul Co. of Florida, 815 N.Y.S. 2d 921, held that a claim against U-Haul for vicarious liability (permitted by New York's ownership liability statute) was precluded by the new federal statute.

Another New York based court, though, held that in invalidating New York Vehicle and Traffic Law §388, and similar statutes, the federal legislation is unconstitutional. Graham v. Dunkley, ____ NYS 2d _____, 13 Misc. 3d 790 (Supreme Court, Queens County) found that the law, by relieving lessors of vicarious liability imposed by state law,

exceeded Congress's powers under the Commerce Clause. The court relied on the Tenth Amendment which provides that powers not delegated to the federal government are reserved to the states or the people. New York's ownership liability law is a part of the substantive law of torts, and is not substantially related to interstate commerce. We eagerly await the next shot in this battle.

Empire Fire & Marine Insurance Co. v. Continental Casualty Co., 426 F. Supp. 2d 329 (D. Md.) considered the meaning of the phrase "standard time" as used in liability policies. The loss occurred in New Jersey on May 7, 2004 at 12:28 a.m. daylight savings time. May 7, 2004 was the anniversary date of the policy issued to Coleman Trucking whose rig was involved in the accident. In the 2003-2004 policy year Coleman was insured by CNA. Coleman opted to insure with Empire for the 2004-2005 policy. The Empire policy period was specified as May 7, 2004 to May 7, 2005, "12:01 a.m. standard time at your mailing address."

Empire argued that the loss occurred at 11:28 p.m. on May 6 according to the (theoretical) standard time. This was certainly a clever argument, but citing to the Uniform Time Act of 1966, the court held that during the period that daylight savings time is in effect it becomes the standard time. Acknowledging the existence of some precedent leaning in the opposite direction, the court noted that had the insured's home state enacted legislation (as Hawaii and Alaska have done) exempting the state from daylight savings time, the case would have been decided differently.

Musarra v. Digital Dish, Inc., 454 F. Supp. 2d 692 (S.D. Ohio), focused on the scope of the Fair Labor Standards Act, but also involved the definition of private carrier under the federal Motor Carrier Act, and the question of shipper's intent for purposing of determining whether a particular shipment is moving in interstate commerce. FLSA requires that employees engaged in commerce or production of goods for commerce be paid time and a half for all time worked over forty hours per week. However, employees subject to the Secretary of Transportation's power to establish qualifications and maximum hours of service for those in the transportation industry are exempt from FLSA rules.

As part of the 2005 "SAFETEA" act, the definition of private motor carrier was modified; under the current definition an entity wishing to qualify as a "motor private carrier" must conduct business in commercial vehicles (that is vehicles weighing over 10,000 lbs. or used to transport hazardous commodities). Before the statutory amendment, though, there was no need for the driver to be operating a commercial auto: an entity qualified as a private carrier whenever it hauled property that it owned (the private carrier can also be the lessee or bailee of the cargo) and when that property was being transported in interstate commerce for sale or lease or to further any commercial enterprise.

Employees of Digital Dish, the Ohio regional service provider for Dish Network, filed suit claiming that the company was in violation of the FLSA. The company responded that its technicians – who installed and repaired satellite dishes and receivers – were subject to the regulations of the Secretary of Transportation and, therefore, exempt from FLSA, because they picked up the dishes and other items and carried them in the company's business, in interstate commerce.

The bulk of the decision is directed at the question of shipper's intent and determining when a particular shipment is moving in interstate commerce, an issue of general importance for those involved in the motor carrier business and related insurance matters. The technician–plaintiffs never left the State of Ohio in Dish's business. However, citing to a line of United States Supreme Court cases, the court pointed out that transportation within a single state may be interstate in character when it forms part of a "practical continuity of movement" across state lines. In determining the shipper's fixed and persisting intent as to whether a particular shipment was interstate in nature, the court adopted the seven-part test formulated by the I.C.C. in 1992 in Policy Statement No. MC-207, 8 I.C.C.2d 470.

NOTICE TO EXCESS INSURER

A recurring difficulty in insurance litigation (perhaps chronic in the case of insureds with high exposures) is when notice must be given to an excess or umbrella insurer. Several recent New York decisions have spoken to this issue.

Morris Park Contracting Corp. v. National Union Fire Insurance. Co. of Pittsburgh, PA., 822 N.Y.S. 2d 616 (2d Dep't), involved a personal injury action filed against the insured with an ad damnum clause seeking $10 million. Morris Park's primary liability coverage was in the amount of $1 million; National Union, which provided umbrella coverage, argued that by not notifying it at once of the complaint, Morris Park forfeited its coverage.

The complaint was filed in July, 2002. The insured (presumably through its primary insurer) answered the complaint and served discovery demands. In November, Morris Park learned that the plaintiff had filed a bill of particulars in a related case against several municipal defendants alleging severe injuries. Plaintiff's bill of particulars, served on Morris Park in late January, 2003, set forth a list of serious injuries, allegedly suffered as a result of Morris's negligence. Within days of receiving this (second) bill of particulars, Morris Park put National Union on notice. About a month later National Union declined coverage based on late notice.

The dissent felt strongly that for three separate reasons National Union should have been granted summary judgment. Firstly, with respect to Morris Park's claim that until it received the January bill of particulars it held a good faith belief that excess coverage would not be triggered, an insured must establish that the timing of its notice was the result of a

deliberate determination. The record contained no evidence that the insured, after receiving a complaint demanding $10 million, and then again, in November, when it learned that plaintiff was specifically alleging serious injuries, ever made a deliberate determination that no notice to the excess insurer was necessary.

Secondly, the dissenter felt that the bill of particular from the related case made it impossible to believe in good faith that the $10 million ad damnum clause was pure puffery. The dissenter referred to a letter from defense counsel to the primary insurer on November 27, 2002, describing the injuries based on the bill of particulars in this case, as a "smoking gun" showing that it was aware of the severity of the injuries. Finally, there was simply no good excuse for delaying from November through the end of January before notifying the excess insurer.

The majority did not completely disagree with the dissent's analysis. However, it was unwilling to rule as a matter of law that there had been unjustified delay. Moreover, the last sentence of the majority opinion raised another issue – whether the insurer's declination for late notice was itself late. Particularly in states such as New York, where no claim of prejudice needs to be asserted by the insurer in declining for late notice, it is hard to gauge how a particular judge or jury will interpret the evidence.

Also discussing the question of notice to an excess insurer was Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, ____ N.Y.S. 2d ____ (Dec. 19, 2006). The Wilson, Elser law firm was hired by the primary insurer Lloyds to defend Shaya B. Pacific in a bodily injury action. Lloyds's liability limits were $1 million; the complaint sought damages of $52,500,000. Lloyds wrote an "excess letter" to its insured in January, 2001, suggesting that it contact its agent to learn whether any excess coverage was in force. The accident was in April, 2000; Lloyds had hired Wilson, Elser that July to represent the insured in the expected lawsuit.

In February, 2003, the underlying plaintiff was awarded summary judgment on the issue of liability. In April, 2003, as the trial on damages was approaching, Wilson, Elser, on behalf of its client, tendered the matter to the excess insurer National Union. National Union declined the tender on the basis of late notice, and also noted that it had no information indicating that Shaya Pacific was an insured under its policy.

A judgment is excess of $6 million was entered against Shaya Pacific, which then filed an action for legal malpractice against the law firm for failure to advise National Union of the underlying action. The trial court granted the law firm's motion to dismiss on three grounds: 1) the client had failed to establish that it was an insured on the excess policy; 2) any negligence by the firm could not have been the proximate cause of the loss of excess coverage, since the client, assuming that it did qualify as an insured under the excess policy, should have notified the excess carrier of the loss even before the firm was hired; and 3) since it was hired by the primary insurer to represent the company, the law firm had no duty to advise its client with respect to coverage issues (and, in fact, should not get involved in any coverage issues.)

To the firm's and the legal community's surprise, the appellate division, in a split decision, has now reversed in part, finding that the firm must defend itself at trial on the question of malpractice. The matter may go to the state's highest court before any trial is scheduled.

The majority felt that a question of fact exists with respect to the scope of the law firm's duties, noting that the firm did, in the end, send a tender to the excess carrier. Moreover, it was not obvious that the client knew enough about the details of the damages before the law firm was hired so that its duty to notify the excess insurer pre-dated the firm's involvement.

The court then turned to what it described as the central questions of the appeal: does a law firm hired to defend an insured have an obligation to investigate whether excess coverage is available and to see to it that timely notice is filed?; and does it makes any difference if counsel is hired by the primary insurer?

The court noted that there is at least one New York decision which found that a malpractice action against an attorney may be maintained for failure to investigate insurance coverage or for failing to give notice to the insurer. The question simply is whether it would be the standard practice for an average attorney in the community to make such an inquiry. Wilson, Elser, though, argued that when counsel is hired by an insurer it need not, in fact must not, investigate coverage issues since that would violate the principles embedded in the tri-partite relationship between insurer, insured and defense counsel. The court understood that to mean that Wilson, Elser was asserting that it had an attorney-client relationship with both the insurer and the insured and that since those interests conflict the attorney must steer clear. The court responded that even if such a relationship existed with both entities there is no conflict – a primary carrier simply has no interest in whether its insured has additional coverage.

The dissent pointed out that notice to the excess insurer was something the broker (who had presumably notified the primary insurer) would have been expected to do. The attorney clearly would have less knowledge than the client about the client's own insurance. We suspect that the focus of the appeal to the Court of Appeals will be the duties of defense counsel and the question of having defense counsel involved in coverage issues. We also wonder whether any connection will be made between an attorney's duty, and the question of whether a primary insurer has a duty to notify the excess insurer.

UNINSURED MOTORIST

Allianz Insurance Co. of Canada v. Sanftleben 454 F. 3d 853 (8th Cir.), presented a choice of law question that crossed an international border. Husband Richard, a

Canadian citizen, owned a GMC truck insured by Allianz with liability limits of $1 million and the Canadian equivalent of underinsured motorists coverage. At the time of the loss he was driving his American wife's Ford Explorer insured by Farmers with limits of $50,000. The wife Carolyn was a passenger in the vehicle and suffered bodily injury when Richard lost control of the vehicle as they were driving in Minnesota en route to Canada.

Since Richard was an insured under Farmer's policy, Farmer's paid its $50,000 limits to Carolyn. Then Carolyn sued Richard. Allianz defended him under reservation of rights. After the couple entered a consent judgment for $650,000 Carolyn conceded that the Allianz policy provided no liability coverage for Richard, but argued that she was entitled to UIM benefits under the policy. Allianz sought declaratory judgment that its UIM coverage was not applicable.

The court first determined that Canadian law governed the determination of whether Carolyn was entitled to UIM coverage under the Allianz policy. The court enforced a contractual provision that liability questions be determined pursuant to the law of the place of the accident while "issues of quantum" (which the court identified with the amount of coverage) be determined under the law of the place where the policy was delivered.

Ultimately, the court concluded that Carolyn was not entitled to coverage. The Allianz policy defined uninsured motorist (actually "inadequately insured motorist") as one driving a vehicle for which the combined coverage of the owner and driver is less than the UIM benefits provided by Allianz. Since the combined liability limit of the owner and the driver was $1,050,000, there was no UIM claim.

Two different approaches can be found in the statutes of the various states with respect to the problem of the "phantom vehicle." Some states require physical contact before permitting an insured to collect on a UM claim arising from the negligence of a driver who flees the scene or is otherwise unidentified; other states do not. In an interesting twist, Dehart v. Wisconsin Mutual Insurance Co., 719 N.W. 2d 518 (Wis. Ct. App.) held that Wisconsin's physical damage requirement was satisfied where the tortfeasor's vehicle collided with a third vehicle, and the insured vehicle was forced off the road causing injury to the insured. So long as there was actual contact between two vehicles, even if the contact was not between the phantom and the claimant, the fear of fraud abates, at least somewhat. The decision will be reviewed by the Wisconsin Supreme Court.

In Howell v. USF&G, 636 S.E. 2d 626, the Supreme Court of South Carolina held that where a policy covered only hired and non-owned vehicles but not owned autos, there was no need for the insurer to offer UM/UIM coverage.

Son of Scott-Pontzer? The New Mexico Supreme Court has granted certification in the matter of Rehders v. Allstate Insurance Co., 135 P. 3d 237 (N.M. Ct. App.) Robbie Rehders, the passenger in a vehicle involved in an accident, collected UM benefits from the insurer of the accident vehicle (as an occupant) as well as under his parents' personal vehicle policy (as a class 1 insured – family member). The parents were the sole shareholders of a subchapter S corporation which maintained a corporate policy with Allstate covering seven company vehicles with $250,000 of UM. Rehders sought to stack the 7 coverages and the trial court agreed, awarding him $1.75 million.

The appellate court, however, agreed with Allstate that the trial court had jumped the gun by analyzing stacking without considering whether he was even an insured. The company policy had been issued to a d/b/a for several years and had only recently been changed to reflect its incorporation with no substantive change in premium. Nonetheless, the appellate court had no difficultly concluding that since the named insured was not a corporation, Rehders (and his parents for that matter) could not be a class 1 insured. Only someone occupying a covered auto could qualify for UM/UIM under the policy. No expectation could outweigh the plain language of the policy.

APPLICATION OF COGSA TO INLAND TRANSPORTATION

The hot issue in 2006 appears to be the application of the Carriage of Goods by Sea Act ("COGSA") to the inland portion of ocean import shipments. After the decision of the United States Supreme Court in the Kirby case, (Norfolk So. Railway. Co. v. Kirby, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004)), it was generally understood that COGSA, which includes a package limitation of liability, as well as other provisions regarding the bringing of suits, would apply to inland transportation under ocean bills of lading which obligated the ocean carrier to deliver the goods the inland destination (a "through" bill), and which contained a provision extending the benefits of the ocean bill to inland carriers (a "Himalaya" clause). The issue was "clarified" by an interminable opinion in Sompo Japan Insurance Company of America v. Union Pacific Railroad Company, 456 F.3d 54, (2d Cir.). The Sompo case, in which, like Kirby, the inland carrier was a railroad, holds that the liability of the inland carrier under COGSA, and pursuant to the Himalaya clause in the ocean bill of lading, is subject to the requirements of the Carmack Amendment. The package limitation will not apply, the Court said, unless "the shipper be given an opportunity to receive full Carmack liability coverage before accepting alternative terms." No consideration is given to the circumstance that any shipper who has ocean marine coverage for the actual value of the cargo, as is the usual case, will have no incentive to pay extra for full value to any carrier of the cargo.

Shortly after the Second Circuit Sompo opinion, the Eleventh Circuit issued a contradictory opinion in Altadis USA v. Sea Star Line, 458 F.3d 1288, (11th Cir.). The shipper argued that the two-year Carmack suit limitation period should apply rather than the COGSA one-year suit provision. The Court held that the Carmack provision would apply only if the inland carrier issued a domestic bill of lading upon receipt of the cargo from the ocean carrier. We understand that the United States Supreme Court has agreed to hear an appeal from this decision.

LIMITATION OF CARRIER LIABILITY

There were some interesting cases on our favorite subject, limitation of liability, in 2006. The common thread in these cases is that the carrier did not, or may not have, limited its liability for cargo loss and damage. The most notable of the new cases is Emerson Electric Supply Company v. Estes Express Lines Corp., 451F.3d. 179, (3d Cir.). Estes claimed that its tariff, which did not offer a choice of rates, limited its liability to 10 cents a pound. The Court of Appeals affirmed the District Court's holding that the changes to the Carmack Amendment made by the Interstate Commerce Commission Termination Act of 1995 did not affect the prior requirement that a motor carrier offer a shipper two or more rates with corresponding levels of liability. This case was followed by the federal court in Oregon in Shielding International v. Oak Harbor Freight Lines, 442 F.Supp.2d 1092, (D.Or.), in which the carrier's tariff did not offer a choice of liability levels. The Court also rejected the motor carrier's argument that it had procedures in place which could have allowed the shipper to choose between different liability levels on the grounds that the carrier did not bring these procedures to the shipper's attention.

In addition to offering a choice of rates, the carrier must provide the shipper with an opportunity to make a choice. In Spray-Tech, Inc., v. Robbins Motor Transportation, Inc., 426 F.Supp.2d 875, (W.D. Wisc.), the motor carrier's tariff provided for a choice of rates, and the bill of lading properly incorporated the tariff. However, the Court said that there was a question of fact as to whether the shipper had actual knowledge of the choice of liability levels. The Court appears to hold the carrier had to do more than just refer to the tariff in the bill of lading in order to enforce the limitation set forth in the tariff. In Zolo Technologies, Inc., v. Roadway Express, Inc., 2006 WL 2092072 (D.Colo.), the shipper requested a value declaration, but it was not reflected on the bill of lading, which incorporated a limitation of liability. In denying summary judgment motions, the court held that there was a question of fact as to whether the parties had actually agreed to the limitation. Likewise, the court in Audio Visual Services Corp. v. Felter International, 2006 WL 2382285 (S.D. Tx.), denied summary judgment motions because the shipper may not have known about the carrier's limitation. The same issue was involved in Polesuk v. CBR Systems, Inc., Fed Carr. Cus. P 84, 469, 2006 WL 2796789 (S.D.N.Y.). In that case, the limitation was not contained in a tariff. Rather, the carrier claimed to have given the shipper notice of the limitation and an opportunity to make a choice in its pick-up receipt and other pre-shipment documents. The actual knowledge of the shipper created a fact issue.

OTHER CARGO CASES OF INTEREST

We often hear a driver say the shipper told him it was all right to take a load which he felt might become damaged. This issue was raised in Man Roland, Inc. v. Kreitz Motor Express, Inc., 438 F.3d 476, (5th Cir.). The shipper insisted that printing machinery be tarped over the carrier's objection that it be protected in a more expensive manner. Of course, it got wet. The Court held that the carrier could avoid liability only if it could establish that it was free from negligence in tarping the cargo and that the shipper was negligent in ordering the tarping. The Court said that the shipper would not be negligent if in fact the cargo could be carried safely by tarping it. Presumably, the carrier could avoid liability if tarping could not protect the cargo and the carrier tarped it competently. To be sure, these are burdens are difficult for the carrier to bear.

In one of those increasingly rare cases where the carrier is found to avoid liability, Miracle of Life, LLC, v. North American Van Lines, 444 F.Supp.2d 478, (D.S.C.), the federal court in South Carolina dismissed a claim against a household goods carrier because the shipper failed to make a written claim within 9 months of the date of loss. The Court also rejected the shipper's argument that the carrier's failure to provide claim forms and its direction to the shipper to seek recovery elsewhere constituted an estoppel. On the other hand, a federal court in North Carolina held that a written claim for "in excess of $75,000" complied with the claim requirement for a specific amount, in Buckley v. North American Van Lines, Fed. Carr. Cas. P84, 449, 2006 WL 1875329 (W.D.N.C.)

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their twentiet Annual Transportation Seminar in the New York City area on May 7 & 8 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 Blima Levine at (212) 563-1710, Ext. 217. Information and an application are also available on our web site.