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**C**hange was the word for 2008. The election of Barack Obama was a divining moment and change, whether welcomed or not, was on the way. But while the election was expected to be the big story of the year, ultimately the catastrophic economic downturn knocked politics down the chart. The tumultuous change in the economy was not welcome by any. Freight demand has dropped considerably. The credit crisis has affected both shippers and motor carriers. In an industry which is very competitive and operates on a thin profit margin, motor carriers are scrambling to revamp operations to survive the recession. The development of ancillary and value added services to increase profit without substantial cost increase is considered a key element to the success of any motor carrier in the coming year. The desire for corporate efficiency and high productivity, which was a core focus early in the year, is an absolute requirement now as it is not the way to grow, but rather the way to weather the storm.

**R E S U M É**  
**2008 REVIEW AND**  
**A LOOK AHEAD TO 2009**  
**MOTOR CARRIER**  
**INDUSTRY**

carrier bankruptcies has created a glut in the used equipment market, as there are 127,000 fewer trucks in operation, most of which are now up for sale. Insurers should consider the impact of aging equipment on a motor carrier's safety and operating standards.

Bankruptcies in the manufacturing, retail and motor carrier sectors have risen to new levels. The domino effect is apparent as shippers file for bankruptcy protection, leaving motor carriers with large virtually uncollectible receivables which seriously impacts the motor carrier's bottom line. That, together with their own economic issues, has resulted in the loss of many motor carriers. Over 2,500 carriers have reportedly filed for bankruptcy this year and there are an untold number of carriers who have simply shut their doors as they have no operating capital and lines of credit are reduced or limited. The numbers are expected to continue into the New Year and recovery, while hoped for, may be a long way down the road.

The credit squeeze has tightened up the ability for carriers to buy or lease equipment. Current reports indicate that banks have limited capacity for truck equipment financing due to lack of capital. Equipment manufacturers report a drop in sales as financing becomes more difficult and more motor carriers elect to forgo the purchase of new equipment pending an upswing in the economy. The large number of motor

The political battle of 2008 is already a thing of the past. President Obama is the focus of the future as all eyes turn to him for a solution to these difficult times. In what is perhaps considered a return to an earlier time, he has indicated that restoring our nation's crumbling infrastructure will stimulate economic growth and early indications are that funding, in large amounts, will be made available quickly. While the transportation industry will be happy with better roads and bridges, they will be even happier with the increase in manufacturing and freight which will likely be generated by increased building. Various trucking leaders have met with the DOT transition team and addressed the critical issues facing trucking, including infrastructure changes, hours of service and the size-weight limit of trucks. Rep. Ray LaHood has been tapped as choice for Secretary of Transportation. Mr. LaHood has been on the House Transportation and Infrastructure Committee for many years and is expected to bring significant experience to the table.

Historically the transportation industry has always been a key economic indicator in the stock market. There has always been a direct correlation between total truck miles traveled by the publicly traded motor carriers and economic growth. If motor carriers do well the economy is generally doing well. The downturn in the economy is reflected in the stock prices of major carriers. The Dow Jones Transportation Average, the oldest average in the country, was down 27% at year's end. On the plus side the Transportation Average fared better than the overall stock averages. The Transportation Average is based upon an analysis of 20 different transportation entities, encompassing all aspects of transportation, including truck, air and rail.

Overall logistics costs are up. In the annual State of Logistics report issued midyear, it was reported that

logistics spending hit a record high of \$1.4 trillion, a 7% increase over the prior year. Cost management is a key, At this point there is little insight into how these numbers will look in the coming year with the interplay of the new economic factors. Last year's numbers have little reflection on what is facing the manufacturing and retail markets in the coming year.

In some good news, the transportation industry has begun serious efforts to "go green". The American Trucking Association has launched the program "Trucks Deliver a Cleaner Tomorrow." The program has detailed proposals to reduce fuel use and save over 900 million metric tons in carbon emissions over a ten year period. Reducing carbon emissions is also being used to bolster the ongoing argument to permit the use of longer combination vehicles, including double and triple trailers.

While forecasts for the immediate future may be a bit gloomy, if motor carriers can withstand this crunch, the future holds good news. The American Trucking Association, in its 'U.S. Freight Transportation Forecast to...2018' analyzed current data and anticipated that truck transportation's total share of revenue will be 83.4%, with primary freight shipments in the U.S. jumping to 19.85 billion tons. At the time of the report total transportation revenue is reportedly expected to increase to \$1.33 trillion, with most of the increase in trucks operations.

To the satisfaction of insurers and motor carriers alike, the FBI has indicated that it would complete the process of adding cargo-theft as a separate category to the Uniform Crime Reporting database. Cargo crimes were previously placed in with burglary, larceny, and robbery. This separate categorization will allow law enforcement to properly allocate its resources and will assist the insurance and motor carrier industry by providing better data to evaluate risk. Federal legislation is now in place which increased prison terms for cargo theft convictions to three years for cargo valued under \$1,000 and 15 years for cargo valued over \$1,000.

The ATA's American Trucking Trends report indicates that Class 8 trucks traveled 139.3 billion miles in 2006, up from 130.5 billion in 2005. The trucking industry employs 8.9 million people and in 2006 used 53.9 billion gallons of fuel and paid \$37.4 billion in taxes.

The American Transport Research Institute released its report on the costs for carrier operations. The ATRI

determined that the Total Marginal Cost per mile was 1.73, and the Total Marginal Cost per hour was \$83.68. When considering these costs it should be noted that the costs will be higher for specialized carriers, in part because of the special equipment needed, and the lower tractor miles per gallon. The report also reveals that the largest majority of truckers operate less than twenty trucks but medium to large carriers handle the largest portion of freight operations. Truck insurance premium averaged 6 cents per mile, with truck load carriers at the lowest average and specialized carriers 130% higher than the truck load carriers.

The "2008 Update on U.S. Tort Costs Trends", released by Towers Perrin, indicates that tort costs are on the rise, up 2.1%. That is the largest increase since 2003, and is believed to be caused by the rise in auto accident frequency, the first rise since 1999. The tort system cost \$252 billion in 2007, or \$835 per person, a \$9.00 increase over last year. The Fulbright Litigation Trends Survey supports the expected rise in overall litigation as most large companies anticipate growing litigation. Insurance companies were reported as the main target for new litigation in the past year – two-thirds of insurers faced at least six new lawsuits, including 29% facing more than 50 new actions. Historically litigation increases when there is an economic downturn so the coming year may see increases in all of these numbers.

The American Tort Reform Foundation has released its 2008 report revealing the winners of the judicial hellholes. West Virginia has reclaimed the title of the worst location, followed closely by South Florida, Cook County, Illinois, Atlantic County, New Jersey, Montgomery & Macon County, Alabama and Clark County Nevada. Los Angeles, California has also once again joined the ranks of the top judicial hellholes. The U.S. Tort Liability Index, prepared by Pacific Research Institute claims that Colorado, Texas, Ohio, Georgia, Indiana, Florida and Michigan have the best tort rules, while Pennsylvania, Illinois, Maryland, New York, Vermont and Rhode Island have the worst rules.

For years we have ended this section of the resume with the current status of border operations between the U.S. and Mexico. The border remains closed and the whether new political leadership will change that remains unknown. President Obama had selected Bill Richardson to head the Department of Commerce. He was a big supporter of free trade, however shortly after the new year he declined the position under a possible political cloud. President Obama indicated during his run

for office that he would look to renegotiate certain aspects of NAFTA.

Current economic conditions call into question the value of reports on prior year operations as it is anticipated that all relevant numbers which impact motor carriers and overall freight movement will change radically in this declined market. The reports do continue to provide some insight into baselines while changes occur this year. The most recent statistics indicate that cross border freight shipments continued to grow through 2007, with the total value of U.S. freight shipments with Mexico growing 8.4 percent annually. Goods shipped in trade with Canada grew 8.6 percent annually. Over 61 percent of this freight, measured by value, was hauled by trucks. The ATA Trends report discussed above indicates that in 2007, trucks transported 57.8 percent of the value of trade between the United States and Canada, up 3.4 percent from the previous year, and transported 66.2 percent of the value of trade between the United States and Mexico, up 4.8 percent.

The cross border trucking pilot program implemented by the FMCSA was a sore subject this year as snipes were exchanged over efforts by Congress to terminate the program. The FMCSA did keep it going but its overall impact was negligible as motor carriers simply did not elect to participate and undertake all of the requirements necessary to be part of the program. When the most recent numbers on the program were released the FMCSA reported that there were no crashes involving these trucks and less than 1% of the trucks were taken out of service during inspections. The question ultimately is whether these statistics would continue if the border was fully opened to all motor carriers. The DOT advised that the program would be extended for two additional years. The House of Representatives immediately voted again to shut down the program.

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## Government Activity

**N**ew governmental regulations flowed from the FMCSA this year. Many of the regulations were long in coming.

Hours of Service rules continued to be a sore subject over the last year. At year's end the FMCSA issued its new final rule, supporting the final rule which was placed into effect in 2006, after 2 years as an interim rule. However even the finality of the rule remains in question as core opposition to the increased hours remains and legal attacks continue. There has been

some indication that Congress may undertake to legislate the rules. The critical opposition to the rule stems from the increase in maximum driving hours from 10 to 11. Opponents contend that the regulatory agencies have failed to properly analyze the impact of driver fatigue from these extended hours. In one study funded by the FMCSA the first hour after a driver starts working, regardless of the amount of time off, is the hour in which most accidents occur. The report suggests that this may be due to the complex driving situations which occur when the drive begins, as well as traffic conditions and sleep inertia.

In mid-year there was a serious bus accident in New Mexico resulting in a large number of fatalities. It was discovered by the FMCSA that an unsafe carrier had entered the bus industry by simply reforming and obtaining authority under a new name. In a quick response the FMCSA suspended the authorization of any new bus carriers while it evaluated this issue. We have, unfortunately, seen this happen with passenger and general freight motor carriers. This serious accident compelled the FMCSA to undertake new steps to prevent this from happening. Rulemaking has now been put into place which requires new carriers seeking entry into the transportation market to comply with additional rules to insure that they operate safely. These new rules are considered the most stringent since deregulation and are designed to respond to the growing criticism over a perceived reduced concern over the operations on the roadways. The rules, which have been dubbed the "16 deadly sins", include numerous drug and alcohol rules, CDL requirements, failing to have proper insurance, using disqualified drivers, using vehicles which have been put of out service or not properly inspected. The FMCSA has reached out to CAB to assist them in vetting out these unsafe carriers. With our extensive database and our ability to timely monitor carrier's safety rating we have been able to provide the FMCSA with added information to shut these unsafe carriers down.

The long awaited chassis rules were released at year's end. For many years motor carriers have borne the risk of injuries caused by defective intermodal equipment. The new rules will make intermodal equipment providers subject to the Federal Motor Carrier Safety Regulations. No longer will motor carriers bear sole responsibility for defective equipment as the regulations provide for joint responsibility among intermodal equipment providers, motor carriers, and drivers. In the coming years owners will be required to implement

regular and systematic inspection, repair, and maintenance programs and will ultimately have to have placard their equipment with their DOT number for recognition.

The FMCSA also implemented rulemaking which requires states to merge the commercial driver's license (CDL) and the driver's medical examination certificate into a single electronic record. Once this program is implemented, state and federal agencies will have immediate access to a driver's medical certificate. FMCSA also has proposed rulemaking to establish a National Registry of Certified Medical Examiners. It would create standards, including a training and testing program, and a National Registry of Medical Examiners who are qualified to conduct examinations of interstate truck and bus drivers in order to insure continuity in examinations.

While the economy is a major issue for all, focus on the transportation of hazardous materials remains high. The FMCSA has decreed that it will now consider whether an accident could have been prevented when reviewing crash data and establishing SafeStat scores. Under current regulations a motor carrier can not be granted a safety permit for transport of hazardous materials when it has a crash rate or driver, vehicle or hazardous material out of service rate in the top 30% of the national average. If a permit is denied because of the crash rate the motor carrier can then petition to establish that a crash was not preventable by the driver and seek a modification of its SafeStat score.

In the post 9-11 world many items were categorized as hazardous. The Pipeline and Hazardous Materials Safety Administration has proposed rulemaking to reclassify items which are not considered serious safety risks. If enacted, the PHMSA would evaluate security threats associated with specific types and quantities of hazardous materials and would reduce the list of materials subject to security plan requirements, thereby reducing costs to the transporting entity.

Other government agencies were also focused on security in the transportation chain. The GOA issued a report indicating that the Customs-Trade Partnership against terrorism program has a number of gaps which leaves open the ability for security breaches in the transport of containerized freight into the U.S. Once things settle down with the economy this is expected to be addressed in Congress this year.

The EPA has issued its final rule requiring heavy truck manufacturers to install onboard diagnostic systems by the year 2010. The systems are required to alert drivers when engine emission systems are malfunctioning. If successful the program will reduce overall diesel emissions by more than 90%.

A bill was introduced in the Senate, the Safe Truck Operations and Preservation Act which, if passed, will require that trucks have a maximum weight of 80,000 pounds and would establish a maximum length of 43 feet for trailers. There is substantial opposition to the bill as another coalition, which includes the ATA, seeks to set weight limits at 97,000 pounds. It is likely that this will be a battleground in the coming year.

Legislation was also introduced to insure that fuel surcharges are passed directly to the company or individual actually paying the fuel costs. The most recent version mandates penalties up to three times the amount of damages, payable to the government, along with treble damages and attorney's fees for the motor carrier. Transportation brokers have joined together to fight the legislation which they anticipate will, if passed, force them to post profit margins for each load to be hauled.

There has been a backlash over the number of drivers who are unable to speak the English language. Federal regulations require a commercial driver to be able to communicate well enough to address matters with the police. Last year authorities issued 25,230 tickets nationwide for this violation, often taking the driver out of service. The FMCSA has now advised that anyone applying for a CDL must speak English during their road test and vehicle inspection, without using an interpreter. A number of states have enacted legislation requiring that that written tests be taken in English, as a further push to force all drivers to become more proficient in the language.

Household goods carriers remain a focus of scrutiny as the FMCSA undertook investigations into unacceptable operations by some carrier and issued serious fines to those carriers. For the U.S. Government, the Families First program was finally implemented, on a small scope, in November. There are over 500,000 military service members and civilian employees moved each year and the government remains the largest shipper of household goods. Underwriters are reminded that motor carriers authorized to operate under this program have

agreed to full replacement value for property lost or damaged and agreed to a stream lined claims process.

Looking forward, the FHWA is testing different methods to calculate border congestion by monitoring the number of trucks crossing into the U.S. The index, once completed, will track volume and advise carriers as to the anticipated time needed to cross the border and complete delivery on time. It is anticipated that if proper information is obtained interested organizations will also be able to ascertain the impact the delays have on the U.S. economy.

The FMCSA has indicated that it will have a proposal for a drug testing database ready for consideration by the new administration. While most truckers recognize the need for such a data base the concerns over privacy issues will make this a contentious rule once it is published.

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## Motor Carrier Industry

The U.S. Census Bureau released its 2007 Commodity Flow Survey. They found that trucks were used to haul 70.7 percent of the total value of the commodities shipped in 2007, representing \$8.4 trillion and 9 billion tons. Of interest is that fact that more than half of all tonnage traveled less than 50 miles. More than \$1.5 trillion worth of shipments were sent by parcel delivery (including the U.S. Post Office and courier services). The Commodity Flow Chart, available on the U.S. Census Bureau web site, or by clicking this [link](#), is an excellent resource for insurers as it breaks down the statistics by commodity, distance and mode of transportation and can provide excellent modeling information.

Early in the year fuel costs were one of the most critical issues in the trucking industry as soaring costs began to idle small carriers Diesel costs were at an unprecedented high and the increased fuel costs hit every aspect of manufacturing, further impacting the transport of those products. Operating costs were high, as fuel replaced labor costs as the reported top operating expense for many carriers. However in the later part of the year fuel costs dropped substantially while the economy worsened. Diesel costs dropped 31% following the summer highs. Economic conditions, which was originally the number two concern of motor carriers is likely to have jumped over fuel costs to take the top spot.

It is reported that fuel prices will rise again in 2009. The ATRI report on the critical issues on the trucking industry for 2008 lists driver retention, government regulations, hours of service, road congestion, highway funding, environmental issues, tort reform and on-board truck technology as the remaining categories of the top ten concerns for motor carriers.

Theft has always been an issue for motor carriers. In this past year identity theft has become a focal point for carriers as new scams abound. Internet postings for freight, and the relative ease in stealing copies of operating authorities and insurance certificates has resulted in shippers and carriers alike being hoodwinked. We have received many reports of cargo theft where the actual carrier had no knowledge of the transport, as well as many reports of fraudulent freight brokers collecting freight charges and disappearing without payment to the motor carrier. The FMSCA has incurred the ire of many companies as the licensing and insurance website is not secure and can be hacked and changed by unsavory entities looking to steal a carrier or a broker's identity.

The impact of the decline in the housing market has trickled down to the household goods moving industry. As fewer homes sell, fewer homeowners move. Whether business moves or personal moves, the number of moves has dropped considerably and a number of large motor carriers have reported staff reductions. The only area in the household goods movers industry which has increased are military moves. The deployment of military overseas requires a large numbers of household transfers.

The ATA lost its grant from the Department of Homeland Security, necessitating the shut down of its Highway Watch call center. The trucking security grant was given over to HMS Company, which provides management, technical, security, training and administrative services to government, non-profit and private sector clients.

A mid-year report released by the GAO garnered substantial public outcry and press. The report indicated that perhaps hundreds of thousands of U.S. commercial driver's license holders also qualify for full federal disability payments, with many of those suffering from severe health problems. The report was newsworthy enough to make its way to virtually all main stream newscasts. The GAO report also indicated that drug and alcohol abuse can increase the risk of truck crashes from two to six fold. The GAO also found that some carriers

have no drug testing program at all, drivers undertake common steps to avoid drug testing and that drivers who test positive may continue to drive by changing trucking companies. The GAO report also concluded that the FMCSA conducts limited compliance reviews, approximately 13,000 annually, leaving the other 687,000 registered carriers unexamined.

The DOT released its mid-year report on truck fatalities. The number of deaths fell to 4,808 last year, a 4.4% drop. This is the lowest level in 15 years. The overall fatality rate fell to 1.37 fatalities per 100 million miles traveled. It is anticipated that numbers will drop further as total miles traveled will be even lower than the .06% drop last year.

Food safety in transport is expected to be one of the issues which will be focused on by the new administration and changes will be important to motor carriers. Food transport safety regulations are currently under the auspices of the U.S. Department of Agriculture, DOT and the U.S. Department of Health and Human Services, creating confusion for motor carriers as they attempt to navigate these many rules. Terrorist concerns are the main reason for consideration of expanded regulations, however, additional regulations may help reduce the \$35 billion in food which is lost or damaged in transit, which includes one-third of all perishable commodities transported. This is a critical area for cargo underwriters as losses for consumables continue to rise simply because the product is not transported in accordance with government regulations and good manufacturing practices.

One of the few pluses to the economic crisis is the reduction in driver turnover. With unemployment at an all time high and motor carriers reducing capacity and equipment, drivers seem to be staying put in larger numbers than in earlier years. Unfortunately after years of increased payrolls, reports indicate that trucking companies have reduced payrolls this year, hiring fewer drivers. The recession has led to job cuts at many companies, creating a larger pool of applicants. While less than truck load turnover rates have always been lower than truck load turnover rates, due to the greater availability of "at home" time, even truck load turnover rates have dropped below 100%. The concern over keeping jobs is reflected in the more recent union re-negotiations, including some proposed wage cuts in exchange for ownership interest.

Overall the trucking industry faces challenges. However this is an industry which has responded well over the years when put to the test. Yes, there will be losses as more carriers close due to lack of capital. Yes, there will be increased costs and expenses as the industry becomes more environmentally friendly. However those motor carriers that remain will hopefully grow stronger and more productive. This is not an industry which will go gently into the night. It is a needed and vital part of our economic recovery and is, in many cases, the backbone of our country. It will weather this storm.

For insurers, it is crucial to underwriting to consider the financial and safety of a motor carrier. It is anticipated that some carriers will simply disappear overnight, while others will operate on a thin shoestring, something long known to result in increased loss and inattention to safety. In addition, carriers will look to change their own operation and provided value added services, or expand into various logistics operations. These changes will affect the risk that you are underwriting and it is critical to "*Know Your Insured*" so that both parties to the insurance contract understand what risk is being undertaken.

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## Insurance Underwriting

Looking back over news articles this past year it is readily apparent that the insurance industry is not a quiet, in the background, business any longer. Starting with federal trials for various insurance violations, continuing with the downfall of Governor Eliot Spitzer, to the AIG bailout, to the possibility of greater regulation by the incoming President, insurers were routinely "in the news". On the plus side property/casualty insurers seem to have been less affected by the sub-prime mortgage issues as they tended not to have much exposure in that area. The assets of most property casualty insurers appear to be better protected, although they too will be impacted by the overall economic downturn.

Apparently there is hope for the future. An end of the year report released by Advisen Ltd. reports that the market will start to harden and insurance rates will increase for commercial insurance beginning in the fourth quarter of 2009 or first quarter of 2010.

Earlier in the year saw the introduction of legislation seeking a federal insurance department. The Insurance Information Act of 2008 seeks an Office of Insurance

Information within the Department of the Treasury which would collect and analyze data on insurance and ensure that state insurance laws remain consistent with federal policies. The proposed legislation did make it out of the sub-committee but appears to have languished since that time. It is expected that with the financial industry crisis additional legislation providing for oversight of all financial industries, including insurance, will be quickly forthcoming under the new Administration.

Even insurers are recognizing the “greening” of America. Internally efforts are being made to go paperless and reduce carbon emissions. In addition to their own efforts to “go green”, many insurers have released policies in inland marine, commercial auto and a range of other operations which provide green coverage. These policies are designed to protect the expenses incurred by companies which go green and suffer a loss, or simply to rebuild green after a loss event.

After a few years of excellent combined loss numbers, the insurance industry has suffered some serious setbacks this year. ISO reports that net written premiums dropped \$1.4 billion, or 0.4 percent, to \$336 billion through nine-months 2008 from \$337.4 billion through nine-months 2007. Net earned premiums rose \$1.2 billion, or 0.4 percent, to \$330.4 billion for the first nine months of 2008 from \$329.2 billion for the first nine months of 2007. These are the weakest numbers in recent years. The market has clearly softened and rates, at this point, are still dropping. According to the Council of Insurance Agents and Brokers rates declined approximately 11% and underwriters report that requests for reductions in premium are routine. The combined loss ratio, which last year was at 93.8 at this time, is 105.6 percent, the worst since the horrific results following the 9/11 attack. ISO also reports that net loss and loss adjustment expenses (after reinsurance recoveries) jumped \$39.7 billion, or 18.1 percent, to \$258.8 billion. Excluding estimated net catastrophe losses, ISO estimates that net loss and loss adjustment expenses increased \$23.1 billion, or 10.8 percent, to \$237.2 billion for nine-months 2008.

Guy Carpenter released its end of the year report on catastrophe losses for 2008. Insured catastrophe losses totaled \$38 billion for 2008, a 7% increase over 2007 and one of the costliest to date. The report cites hurricanes Ike and Gustav as the primary causes of insured losses, with combined losses of \$12.8 billion.

Fires, floods and manmade catastrophes also contributed to the high numbers.

Underwriting motor carriers, in any capacity, is a big business. It remains a market which requires sophisticated underwriting and a unique understanding of the transportation industry and all of its intricacies. Those underwriters who have that knowledge will survive a soft market and will, we believe, ultimately increase their book of business. Retaining staff experienced in this field, and training new staff in the complexities of this business is critical for long term growth. We urge you to utilize the unique knowledge available through CAB to make your book of business the best it can be.

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## Central Analysis Bureau

As CAB celebrates its 70th anniversary, we look back with amazement at how the company has evolved. As a small operation, with all the work done almost exclusively by Kal Schindel and Hy Cooper, CAB began to gather data to provide detailed financial analysis to underwriters in this industry. Seventy years later our core remains intact, but we have now grown to fill an even greater need in the industry. CAB is the industry source for providing critical financial and safety information on the motor carrier industry. No longer simply an underwriting tool, our database of information, and our unique analysis, provides valuable support for all departments within an insurance company, including actuaries, underwriting, loss prevention and claims.

The number of insurance companies who recognize the value to our enhanced services is reflected in the growing number of Premium Subscribers. Many new companies have joined CAB and current subscribers have upgraded to the Premium level. We continue to actively solicit feedback from the different departments within these subscriber insurance companies, including underwriting, claims, loss control, SIU and management while we continue to fine tune and enhance our array of tools to better reflect, focus and highlight the information that is most relevant to the insurance industry. Whereas the initial launch of our “*Know Your Insured*” program nearly four years ago focused on a defined set of management and end-user tools, over the past year we have expanded our development to include a set of fully customizable reports thereby giving our clients full control over the information they wish to see. By combining our three primary programs – the

Insurance Filing Monitoring Program, Safety Monitoring Program and Financial Analysis Program into a single package, insurance companies can rest assured that they have access to the most comprehensive data available about the motor carriers they currently insure or are considering for insurance.

Given the highly competitive, fast paced nature of the motor carrier insurance industry, underwriters are afforded a minimal amount of time to evaluate the risk factors associated with a particular account. Since underwriting is inherently an educated analysis of risk based on available information, the accuracy and completeness of the reviewed information will have a direct impact on the accuracy and completeness of the risk assessment. Unfortunately, utilization of the various government websites can be time consuming and confusing as underwriters discover inaccuracies, misleading or conflicting information in those databases. CAB's own proprietary system was designed to merge, isolate and identify anomalies in, and create a means of cross referencing and cross checking this data. Issues that might otherwise have been overlooked are now caught by CAB's systems and highlighted for review. We have created a presentation which creates an easy to read and navigate report, whether you are an underwriter, a claims adjuster, an actuary or an investigator.

Recognizing the need for education, CAB provides full service along with its products. Our trained analysts are available to help users understand the reports and ratings provided by CAB. Web based demonstrations are available upon request and can be performed on a one-to-one basis, or through simultaneous broadcast to 15 different locations. We would also be pleased to provide a demonstration of our products to any interested party not currently subscribed to our services.

CAB will also once again be present at the seminar jointly hosted with the law firm of Schindel, Farman, Lipsius, Gardner & Rabinovich, LLP. We will provide our unique insight and understanding of available information including frequently underutilized yet accessible tools which can enable underwriters to more effectively underwrite motor carriers and vastly improve their results, as well as provide advanced information for more in depth investigation during the claim process.

Many insurance companies are already reaping the benefits of subscribing to all of our products. For those of you not familiar with all of our products, space only

allows a short introduction of each product below so we encourage you to contact Laib Roberts at 212-244-6575 x227 or [lroberts@cabfinancial.com](mailto:lroberts@cabfinancial.com) for more in-depth information.

**Safety Monitoring Program:** Beginning with the initial application, throughout the term of the policy, and at the point of the policy renewal, **CAB's Safety Monitoring Program** will help you research and track all potential and current risks. Information collected by the USDOT at weigh stations and roadside inspections, accident reports, audits and other government operations are collected and assembled by CAB's systems. Upon demand, whether to assist an underwriter with an initial application or renewal, or for claims and loss control researching an account, our **Submission Report** is available. This report, which can be viewed by premium subscribers directly from our website, is unparalleled in the information displayed, and includes financial and safety ratings, operating authority, current and historical insurance information, filing requirements, detailed out-of-service statistics, reported and derived power units, trailers, states where inspections have taken place, as well as a list of individual VIN numbers of vehicles inspected and all associated violations. Alerts are prominently displayed on the front of the report to alert warn the user of any issues of concern. For even greater analysis, the reports are equipped with controls to which determine how the information is displayed allowing the user to hide and display information as needed. With this report in hand, there is no longer a need to spent precious time reviewing potentially irrelevant data on the various government websites. Given that the industry is constantly changing, we continue to add new features to the reports based on feedback we receive. Because any successful operation should not end with the issuing of a policy, CAB will continue to monitor the insured with our **Baseline Report** followed by our weekly management **Update Reports**, which highlight any significant changes in a carrier's safety performance. In addition, CAB provides monthly custom monitoring reports which can track many different issues related to their insureds during the policy terms such as Mexican border inspections, alcohol, drug, or any violation specified.

**Insurance Filing Monitoring Program:** Insurers are routinely faced with unanticipated exposures because U.S. Department of Transportation filings have not been cancelled, filings are made with greater limits than required or filings are made for carriers that did not even require filings. Improper filings are a ticking time bomb

for any insurer. Every day that any incorrect filing remains in place, you increase your risk and potentially affect your bottom line. CAB is the only company to offer the management tools that would allow for a company to eliminate problematic filings, as well as real-time tracking of all new filings the month they are issued. On a monthly basis, we scan through all the outstanding filings that an insurance company has registered with the FMCSA. Each individual filings is analyzed to determine whether or not it falls under any of the following categories: 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 FMCSA 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 as much as \$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.

**New Programs Available:** The backbone to CAB's services is its massive data warehouse which contains not only all current information related to the safety, insurance and financial standings of current motor carriers, but also contains the motor carriers historical data as well. As part of our mission to help the industry "Know Your Insured", we continue to look for ways to utilize this data to benefit the industry. Subscribers to our Premium service are offered the opportunity to tap into this data for the benefit of predictive modeling or any other analysis. Our highly trained analysts are able to execute complex queries and joins against the data for the benefit of our subscribers to allow our subscribers to benefit from our experience and understanding of the data. In our attempt to further expand the list of end-user tools offered to our subscribers, we are currently developing a website, which is currently operating as a fully functional beta site, whereby subscribers are able to deep search the database for complete or partial VIN or license numbers with various filter options. Preliminary

feedback for users of this site has been extremely positive with all users in all departments report success in gathering additional information from this simple search, including use by SIU tracking stolen vehicles, adjusters seeking to determine whether a vehicle is a "replacement vehicle", as well as underwriters viewing a complete safety and operating authority history of a given unit. Ultimately, this site will be completely merged with our Submission Report to make it quicker and easier to perform the ultimate analysis of the data.

The **Financial Analysis** service: The original and still essential way in which CAB has helped underwriters to know their insureds. For 70 years CAB has been performing financial analysis and providing ratings 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. Subscribers can submit financials to be rated, or use our website to look up ratings and information already in CAB's database. With over 2600 carriers filing bankruptcy in 2008, financial underwriting is critical.

In 2008 the motor carrier industry was buffeted by soaring fuel prices in the first half of the year and collapsing economic activity in the second half. 2009 is sure to bring more such challenges. With over 2600 carriers filing bankruptcy in 2008, financial underwriting is critical. It is important to closely monitor the financial condition of the motor carriers you write of quote. With the economic environment changing rapidly, now more than ever an analysis of current financial information is essential. CAB is there to analyze any additional financial information you may have, along with our own generated information. Whether you are an Automatic or Premium subscriber there is no additional fee above the normal change for your subscriber category to have us analyze any information you submit to us. The [breakdown of rating](#) included with this resumé indicates that the percentage of carriers rated SATISFACTORY has declined substantially while there has been a large increase in the percentage rated UNSATISFACTORY.

We continue to be gratified by all the positive comments

we receive about our monthly e-mail newsletter, "***Bits & 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. Over the last year subscribers have begun submitting information they want the industry to be aware of. We invite you all to submit any news or cases you may come across which you believe would be of interest. You can submit that information to Jean Gardner at [jgardner@cabfinancial.com](mailto:jgardner@cabfinancial.com). If you do not currently receive this newsletter, but would like to, please e-mail Mark Schweber at [mschweber@cabfinancial.com](mailto:mschweber@cabfinancial.com).

In 2009 we will continue to seek out new information to help underwriters and claims 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.



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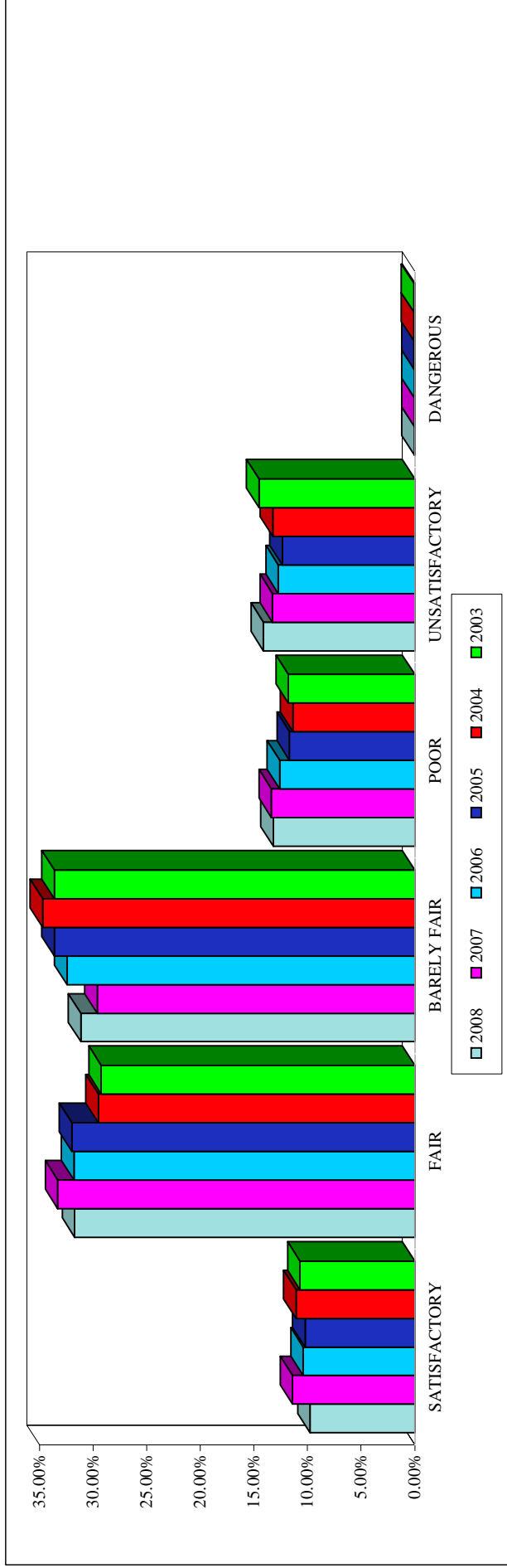
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## Ratings

Breakdown of ratings for the year 2008 and prior:

	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
<b>SATISFACTORY</b>	9.76%	11.39%	10.40%	10.24%	11.08%	10.69%	10.64%	12.77%	14.81%	15.63%	16.11%
<b>FAIR</b>	31.73%	33.31%	31.80%	32.00%	29.52%	29.26%	29.28%	30.54%	31.70%	31.98%	30.77%
<b>BARELY FAIR</b>	31.16%	29.61%	32.45%	33.64%	34.71%	33.63%	30.14%	29.96%	29.57%	28.94%	28.49%
<b>POOR</b>	13.19%	13.37%	12.59%	11.69%	11.38%	11.79%	12.64%	11.71%	10.54%	10.90%	11.42%
<b>UNSATISFACTORY</b>	14.11%	13.27%	12.72%	12.34%	13.23%	14.53%	17.23%	14.95%	13.30%	12.49%	13.15%
<b>DANGEROUS</b>	0.02%	0.02%	0.02%	0.06%	0.08%	0.07%	0.07%	0.07%	0.08%	0.06%	0.06%



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.

## Non-Trucking Coverage

In separate decisions, two of the federal circuit courts held in 2008 that a leased driver far from home remains in the business of the lessee motor carrier even after completing delivery of his load and while driving to find a place to sleep.

*Auto-Owners Insurance Co. v. Redland Insurance Co.*,    F.3d    (6<sup>th</sup> Cir.) analyzed a non-trucking policy issued by Redland to R&T Trucking which covered a truck that was under lease to Everhart Trucking, a USDOT-registered motor carrier. Everhart gave the driver David Gale all of his assignments.

Everhart's customers were concentrated in Ohio, Michigan, Illinois and Pennsylvania and the driver became familiar with certain patterns of assignments. For example, Everhart had an arrangement with US Steel whereby Everhart would receive \$600 for each business day that one of its vehicles was physically at an East Chicago facility whether or not a load was actually tendered. The East Chicago run was generally given to the company driver who had completed delivery the day before in Western Michigan.

On the day of the loss Gale was assigned to haul a load of steel from Ohio to Grand Rapids, MI. The unloading was not completed until around 11p.m., long after Everhart had gone home. Gale left a message for Everhart that since it was so late he did not want to be dispatched too early the next morning and informing Everhart that he was going to head towards Gary-East of Chicago looking for a place to sleep. Before he found a motel Everhart apparently dozed off and crashed into

### RECENT DEVELOPMENTS IN TRANSPORTATION AND INSURANCE LAW

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another vehicle killing its occupant. The estate filed suit against Everhart, Gale and the lessor; Auto Owners paid

its policy limits to settle the lawsuit, then filed an action for indemnification against Redland. The District Court granted Redland's motion for summary judgment and the Sixth Circuit affirmed the judgment.

The exclusionary language of the Redland non-trucking endorsement was not identical to the standard ISO endorsement, although the key language – which excludes coverage when the covered auto is used “in the business” of the lessee-motor carrier- is identical in the two forms. The Redland form also explicitly excluded certain other scenarios from coverage. Thus had there been an explicit dispatch by Everhart for Gale's next load, or had Gale begun to return to his home (i.e., the place where the truck was regularly garaged) the loss would have fallen within explicit exclusions. The question for the Sixth Circuit was whether the catch all phrase (as the Court called it) of “in the business” excluded coverage as the driver was headed in the direction of his next presumed, but not confirmed, load and while looking for a place to sleep.

The Sixth Circuit observed that the driver was not engaged in a “frolic and detour, heading somewhere for his own purposes and no other.” Rather, after spending the day carrying a load and then waiting hours for it to be unloaded, Gale's plan, conveyed to the motor carrier in a voice mail left after 11p.m., was to head toward the location of the next day's expected loading location, find a place to sleep, then call in the morning to received his precise dispatch instructions. “Whether we choose to characterize the accident as occurring while Gale was driving somewhere to get some sleep (which, as it turns out he tragically needed) or while heading in the direction of [the presumed next assignment] Gale was operating “in the business” of Everhart. In either case Gale was furthering the commercial interests of Everhart. The court held that it would reach the some

conclusion under Ohio Code §2307.34 which permits the motor carrier's insurer to recover from the non-trucking insurer "while the operation was engaged in a 'non-trucking activity.'" Here Gale was not so engaged, and Auto-Owners was not entitled to recover from Redland.

Larry Rabinovich and Phil Bramson of our firm represented Redland.

*National Union Fire Insurance Co. of Pittsburgh, PA v. Connecticut Indemnity Co.*, 52 A.D.3d 274, \_\_ N.Y.S.2d \_\_ (1<sup>st</sup> Dep't 2008). Held that, where "bobtail" exclusion was void as a matter of law, savings clause which limited coverage to statutory minimum was also unenforceable. (*Contra, Connecticut Indem. Co. v. Hines*, 40 A.d.3d 903, 837 N.Y.S.2d 183 (2d Dep't 2007)).

*Liberty Mutual Fire Insurance Co. v. Axis Surplus Insurance Co.*, \_\_ S.E.2d \_\_, 2008 WL 4813757 (Ga. Ct. App. Nov. 6, 2008). Smith, the owner-operator, leased his tractor to Bennett Truck Transport. Smith customarily garaged his tractor either at Bennett's terminal or at his home. On the date of loss, he picked up a mobile office trailer from Bennett's terminal, delivered it, and was on his return trip when the accident occurred. At the time of the loss, Smith's tractor was pulling one of the vehicles which had been used to escort him on his outbound run. The court had no difficulty finding that, at the time of the accident, Smith's tractor was still being used in Bennett's motor carrier business, since the return trip was in his normal business routine and not for personal reasons.

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## MCS-90

**A**s we have reported in the past, the USDOT advised, in October, 2005, that the MCS-90 attaches only when judgment is entered against the named insured. This pronouncement was made in response to several court decisions (*e.g., John Deere Ins. Co. v. Nueva*, 229 F.3d 853 (9th Cir. 2000)) which held that an MCS-90 requires the issuing insurer to pay a judgment against the driver and, in one case, even against the owner of a trailer which had transferred the vehicle to the named insured. The great difficulty this line of cases causes to insurers is obvious enough. The MCS-90 applies even if "the insured" gives no notice of loss to the insurer. If suit is filed only against the driver, the insured motor carrier, and its insurer, may not even hear of the suit before judgment – a consent judgment, or a default – has been entered against the driver. If the

driver qualifies as an insured under the MCS-90, then the insurer will be required to pay the judgment. Several cases working their way through the judicial system may offer an opportunity to challenge the *Nueva* line of cases on the basis of the USDOT comment.

Among them is *McClurg v. Deaton*, --- S.E.2d ----, 2008 WL 4963995 (S.C. Ct. App. Nov. 20, 2008). Ann McClurg was injured in a multi-vehicle accident involving a truck owned by New Prime and drivers by its employee Harrell Deaton. New Prime gave its insurer Zurich timely notice of the loss, and Zurich began its investigation.

Communications between Zurich and plaintiff's lawyer began a few months after the accident; the attorney sent along a draft complaint naming New Prime and Deaton as defendants, and threatened to file suit unless the case was settled soon. Settlement discussions followed between October, 2004 and June, 2005, when contact apparently broke off.

While those negotiations were going on, plaintiff's counsel, without telling Zurich, prepared and filed a lawsuit naming only Deaton as a defendant. Deaton had left New Prime's employ shortly after the accident and was not in touch with New Prime. The suit was served on the South Carolina Department of Motor Vehicles, as permitted by statute which then forwarded the complaint to Deaton in Texas by return receipt mail. Deaton, thus, apparently received notice of the suit but did not appear and a default judgment was entered against him for \$80,000. Zurich and New Prime were intentionally not told about this action, presumably in the hope that Deaton would default.

That is precisely what happened. Zurich (and New Prime) first heard that suit had been filed against Deaton only after the default had been entered. Zurich tracked down Deaton who executed an affidavit in which he denied that he had received service of the complaint or notice about damages hearing Deaton and New Prime (which successfully moved to intervene in the action) moved to court to set aside the default judgment but the trial court denied the motions and let the default stand.

On appeal the appellate court considered a range of issues including whether the default was obtained by fraud or misrepresentation. New Prime had intervened because, under the *Nueva* approach, it has serious direct exposure. Were Zurich to pay the judgment against Deaton under the MCS-90 endorsement it would then

(arguably) have a right to reimbursement from New Prime. (We say arguably because once the MCS-90 is pushed beyond its intended limits, as by the *Nueva* decision, a variety of question that never should have arisen need to be confronted. There is only supposed to be one insured under the MCS-90: the named insured. Once, though, it is held that there may be multiple insureds we face this dilemma: can an insurer which pays a claim under the MCS-90 for one insured secure the reimbursement to which it is entitled from a different insured?) In light of this potential exposure to New Prime, the appellate court held that the trial court was wrong in treating New Prime as a non-party. The trial court should have found that New Prime had the right to receive notice of the lawsuit against Deaton. The court found that based upon the fact that plaintiff's attorney had been in touch with both New Prime and Zurich concerning settlement, Zurich and New Prime would reasonably have believed that New Prime would be named as a defendant in any suit, or at least that Zurich and New Prime would receive a copy of the complaint of any unit that was filed.

Rule 60(b) of the South Carolina Rules of Civil Procedure permits a court to relieve a party of judgment entered against it when it finds that the opposing party had been guilty of fraud, misrepresentation or other misconduct (b)(3), or even mistake, inadvertence or surprise (b)(1). The appellate court also cited to a 1970 decision by the South Carolina Supreme Court in which a defendant's insurer successfully moved for an order setting aside a default judgment where the insurer was involved in settlement discussions while the plaintiff's attorney, without notifying the insurer, sued the insured and secured a default.

Here, too, since negotiations were ongoing, and the attorney filed suit without telling New Prime or Zurich, the latter were, in principle, entitled to relief under 60(b)(1) (mistake, surprise), and also "quite possibly under the misrepresentation standard of 60 (b)(3)." However, the court noted that in order to have the judgment voided, the defendant needs to show that it has a meritorious defense. The court observed that New Prime had never argued to the trial court that it had a defense. There was nothing in the record suggesting that the loss arose out of anything but Deaton's negligence [for which New Prime would be responsible]. New Prime argued on appeal that it had a meritorious defense on the issue of damages. The court found no evidence that the issue had been raised below and accordingly

declined to consider it on appeal in light of the failure to make a prima facie showing of meritorious defense.

The court seemed disinclined to believe, in any event, that simply pointing out the discrepancy between what the claimant was awarded by the jury (\$800,000) and what it had demanded in settlement negotiations (\$170,000) was enough to be considered a meritorious defense on damages. However, it left open the possibility that a trucker or insurer could get a default reopened if they presented evidence suggesting that the award was not in line with the actual injury. The difficulty that occurs to us is that the trucker or insurer may not have done much or even anything in the way of discovery when the surreptitious default is entered, and may not have much information with which to challenge the award of damages. It may only have whatever medical documents it received from the claimant's counsel during the negotiations. Will that be enough, though, to constitute a "prima facie showing or a meritorious defense." That question remains open.

We are told by attorneys involved in the case that the South Carolina Supreme Court is considering, as we go to press, a grant of certiorari on the basis of the partial dissent by the chief judge of the appellate court, who voted in favor of opening the judgment. If the judgment stands, the next stop is likely to be an attempt by the claimants to recover from Zurich on the judgment secured against Deaton. That is likely to turn into a battle on the question of whether an MCS-90 attaches when judgment is entered against a driver, but not against the named insured. Keep your seatbelt fastened.

The case of *Basha v. Ghalib*, 2008 WL 3199464 (Ohio Ct. App. Aug. 7, 2008), reflects, though indirectly, another challenge to the view of the MCS-90 espoused by the Ninth Circuit in *Nueva* and adopted by Supreme Court of Ohio in *Lynch v. Yob*, 93 Ohio St.3d 441 (2002). In *Lynch v. Yob*, the Ohio court, in determining whether the MCS-90 applied to a judgment against the driver, agreed with *Nueva* that "finding the driver and owner of the tractor ... to be insureds under the MCS-90 endorsement allows the MCS-90 endorsement to serve the purpose it was expressly designed to serve...." In *Basha v. Ghalib*, Basha and Ghalib were co-drivers for motor carrier Daryel Express Trucking. Basha was injured while a passenger in a tractor-trailer operated by Ghalib. Basha argued that he was entitled to be compensated pursuant to the MCS-90 endorsement attached to the Canal Insurance Company policy issued to Daryel Express.

On its face, the MCS-90 "does not apply to injury to or death of the insured's employees while engaged in the course of their employment...." Basha argued that, since he was not an employee of Ghalib, this exclusion was inapplicable and he was still entitled to collect under the MCS-90 for his claim against his co-driver. The Ohio appellate court, however, rejected this argument, and found that the only relevant "insured" in the context of the exclusion in the MCS-90 was the named insured motor carrier. The court came to this conclusion by citing 49 C.F.R. § 387.5, which defines "insured" 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." Arguably, however, this holding flies in the face of *Lynch v. Yob*, which held that "insured" under an MCS-90 also includes a driver for the named insured motor carrier.

Issues regarding the scope of mandatory insurance for motor carriers also arise where a policy is issued to a motor carrier with liability limits that are less than the statutory minimums, but that policy is not intended to satisfy the financial responsibility requirements imposed on the motor carrier as a condition of operating authority. We have noticed a trend by counsel for plaintiffs injured in accidents with trucks to argue that the insurance policy issued covering the truck should be rewritten to comply with federal or state motor carrier law and related financial responsibility requirements. Progressive Insurance Company successfully fought off a variation of such an attempt in *Waters v. Miller* \_\_ F. Supp. 2d \_\_, 2008 WL 2357752 (M.D. Ga. June 5, 2008).

The case arose out of a collision between a passenger car operated by Bobby Waters and a tractor-trailer rig being driven by Mel Miller. Miller was insured under a liability policy issued by Progressive. Miller, though, failed to make his premium payments and Progressive cancelled the policy.

The accident occurred two and a half months after the cancellation. Waters sued Miller and Progressive under Georgia's direct action statute (Progressive removed the case to federal court) alleging that Progressive's policy remained in effect because it had failed to notify the Florida Department of Highway Safety that it was canceling the policy. That turned out to be correct; of course, Progressive had never informed the department that it had issued a policy in the first place.

Waters argued, alternatively, that he was entitled to coverage under the MCS-90 endorsement. This, too,

encountered a small technical problem. Progressive had not issued an MCS-90, nor had it made a federal filing. Water, though, insisted that Progressive should have made a filing since Progressive knew, or should have known, that Miller needed to comply with the USDOT financial security requirements, and that Progressive, therefore, had the obligation to ensure Miller's compliance. Waters pointed to the fact that the policy permitted use within a three hundred mile radius of the terminal in Keystone Heights, FL.

The court rejected Waters' argument and declined to reform the policy to include an MCS-90. Citing to the 2003 *Dupont* decision by the Fifth Circuit (discussed in these pages in January, 2004), and several other decisions, the court concluded that it is the responsibility of the motor carrier, not the insurer, to comply with the financial responsibility requirements. The insurer has no duty to advise the motor carrier about those requirements, and should not face greater exposure than is required by the terms of the policy, merely because the insured did not ask for the correct coverage.

The court went on to address the claim by Waters that Progressive should have realized that the insured was engaged in interstate commerce in light of the permitted radius of use which extended into neighboring states. Here the court, citing a Progressive representative, found that the radius may have signaled that interstate commerce was possible, but not more than that. The court concluded that, "[i]n light of the foregoing authorities, the mere possibility that Miller may have traveled out of state at some point after the inception of the policy is insufficient to warrant the type of burden-shifting that Plaintiff urges." The question that remains is whether, in a scenario in which the insurer could be said to have actual or constructive knowledge that an insured that did not request a filing (or that purchased less than \$750,000) of coverage was engaged in interstate commerce, the court could indeed reform the policy to include an MCS-90 or higher limits.

The district court in the parish of Jefferson, LA, also concluded that the duty to obtain the appropriate amount of coverage rests with the motor carrier and not the insurer. *Terrebonne v. Babb* (Case 637-863, Div. "D", 24<sup>th</sup> Judicial District Court). Interstate Indemnity insured Econo Waste, an Atlanta-based carrier, under a policy with liability limits of \$100,000. The company's vehicle was operating in Louisiana doing some post-Katrina work. Plaintiff argued that the policy should be reformed to meet the USDOT required limits of

\$750,000. The court, though, held that the vehicle was not engaged in interstate commerce (even though it had crossed state lines to get into Louisiana) and that, in any event, securing mandated insurance is the responsibility of the motor carrier, not the insurer. Larry Rabinovich and Phil Bramson of our firm worked on the matter in conjunction with George Hall and Pablo Gonzalez of the Phelps Dunbar firm, on behalf of Interstate.

An interesting MCS-90 case to watch in 2009 will be *Carolina Casualty Insurance Company v Yeates* which Tenth Circuit has agreed to hear en banc (that is by the full court). The case arises out of a 2003 accident in which the Yeates couple suffered a head-on collision with a livestock truck owned by Bingham Livestock. State Farm had issued an auto liability policy to Bingham, with limits of \$750,000, which scheduled the truck involved in the accident. State Farm paid its limits to the Yeates. Bingham was also covered under what the court called a general liability policy issued by Carolina. (Presumably this was a policy with multiple coverages including auto liability coverage, but one can not be certain from the description). While no coverage was provided for the livestock truck under the Carolina policy, Carolina had attached an MCS-90 to its policy.

Carolina argued that its MCS-90 exposure was not triggered since the limits required for Bingham by USDOT (\$750,000) had already been paid by State Farm. Both the District Court (District of Utah) and, in its initial opinion, the Tenth Circuit, rejected Carolina's argument in light of the decision in *Empire Fire & Marine Ins. Co. v. Guaranty National Ins. Co.*, 868 F.2d 357 (10<sup>th</sup> Cir. 1989).

*Empire* had presented a primary/excess dispute between insurers of two motor carriers; the Empire policy covered the accident vehicle (it had been issued to the lessor) and, by its term, provided primary coverage. The Guaranty policy issued to the lessee motor carrier did not cover the accident vehicle but included an MCS-90. The issue before the Tenth Circuit was how to apportion the loss between the two policies.

As background for the *Empire* court's 1989 analysis it is important to note that in a series of cases in the early 1970's the Tenth Circuit had held that the MCS-90 always provides primary coverage and must be exhausted before any other policy could be reached.

In 1975 the decision by the United States Supreme Court in *Transamerica Freight Lines, Inc. v. Brada Miller*

*Freight Sys., Inc.*, 423 U.S. 28, essentially rejected the Tenth Circuit's decision on the MCS-90, and in the years that followed various other circuit courts ruled that the MCS-90 was quite irrelevant in resolving coverage disputes between two or more insurers. In 1987, a Kansas District Court in *American Gen. Fire & Cas. Co. v. T.I.E.*, 660 F. Supp. 557 suggested a modification of the Tenth Circuit's view – what the MCS-90 does, the District Court suggested, was to negate any 'limiting provisions' (meaning exclusions, but also any excess language). That meant that the policy to which the MCS-90 was attached was a primary policy; however there could be other primary policies as well.

Two years later, when *Empire* reached the Tenth Circuit, the court pretended that there were three views in the existing case law about how to treat the MCS-90, but there were really only two: the majority view of the other circuits, or the Tenth Circuit view as modified by the Kansas District Court. The Tenth Circuit opted for the modification of its approach, declining to join the majority view.

For twenty years, as the *Yeates* case pointed out, the Tenth Circuit reiterated its holding that an MCS-90 amends any policy to which it has been attached into a primary policy. However, other policies can also provide primary coverage if that is what their terms provide. That, presumably, leads to a pro-rata between the insurers. We will follow the further appeal of *Yeates* with interest, to see if the Tenth Circuit is now prepared to adopt a more mainstream view of the MCS-90.

*Real Legacy Assurance Co. v. Santori Trucking, Inc.*, 560 F. Supp.2d 143 (D.P.R. 2008). Policy included pollution exclusion and MCS-90 endorsement. Insurer paid \$1,322,134.44 to settle environmental restoration claims against insured, and sought reimbursement. Court held that plain language of MCS-90 supported reimbursement where policy provided no coverage, but limited reimbursement to policy's \$1,000,000 limit. (Not clear from opinion if MCS-90 provided different limit.)

*Szcepanik v. Through Transport Mutual Insurance Association, Ltd.*, 2008 WL 2166193 (D.N.J. May 21, 2008). Plaintiffs settled claims against defendant insureds and took assignment of insureds' rights against excess insurer. Held: plaintiffs were bound, to same extent as named insureds, by provisions requiring arbitration of all coverage disputes in London, England. Result not affected by inclusion of MCS-90 endorsement

in policy, since endorsement merely controlled liability of insurer but not forum for determining that liability.

*Hawthorne v. Lincoln General Insurance Co.*, 2008 WL 4822044 (E.D. Mich. Nov. 4, 2008). Claimant obtained a default judgment against insured motor carrier, and then sought to collect under the MCS-90. Insurer brought coverage action. Claimant argued that discovery into the accident itself, rather than coverage issues, was irrelevant, since default judgment established that motor carrier was negligent. Court, however, held that default judgment only meant that motor carrier itself could not contest negligence. Insurer was free to litigate issue of motor carrier's negligence, since MCS-90 only applied to judgment for damages arising out of negligence.

*Luzzi v. Pro Transport, Inc.*, \_\_\_ F. Supp.2d \_\_\_, 2008 WL 525433 (E.D.N.Y. Feb. 26, 2008). Since neither the insurer nor its agent could produce a Form 3800 certified mail receipt, the court found insufficient evidence to show that notice of cancellation had been sent to the insured 35 days prior to the effective date of cancellation, as required by 49 C.F.R. § 387.3(b)(1). The court was not persuaded by fact that the Federal Motor Carrier Safety Administration website showed the policy as having been canceled prior to the date of loss, or that the FMCSA had accepted the insurer's request to cancel the policy, as this was not conclusive evidence of the date on which notice of cancellation was sent to the insured.

*Canal Insurance Co. v. Lincoln General Insurance Co.*, 2008 WL 3103270 (W.D. Wash. Aug. 4, 2008). Canal issued a policy to the motor carrier/lessee, which did not cover the tractor-trailer involved in the loss but which included an MCS-90 endorsement. The Lincoln General policy issued to the tractor owner/lessor covered the vehicle, but did not include an MCS-90 endorsement. The court adopted the majority view that the MCS-90 has no effect on allocation of priority among insurers, and held that the Lincoln General policy provided primary coverage for the loss.

*Lyons v. Lancer Insurance Co.*, 2008 WL 4525542 (S.D.N.Y. Sept. 30, 2008). The district court held that prior state court litigation over whether the policy provided coverage under its basic terms, did not preclude (under theories of *res judicata* or collateral estoppel) subsequent litigation over whether the claimants were entitled to recover under the policy's MCS-90 endorsement. The court noted that the question of exposure under the MCS-90 was independent from

the question of coverage under the policy, and that the MCS-90 was not triggered until there was a judgment for damages in favor of the claimants.

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## Mandatory Coverage

*OIDA Risk Retention Group, Inc. v. Williams*, \_\_\_ F. Supp.2d \_\_\_, 2008 WL 835430 (N.D. Tex. Mar. 25, 2008). Court held that Texas mandatory coverage law rendered unenforceable exclusion which barred coverage for injury to person occupying covered auto. Having voided exclusion, court found further that insurer was exposed up to its policy limits, rather than statutory minimum.

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## Severability of Interests

*SECURA Supreme Insurance Co. v. M.S.M.*, 755 N.W.2d 320 (Minn. Ct. App. 2008). Exclusion in homeowners for bodily injury resulting from the criminal act of "any insured" barred coverage for claim against parents for negligent supervision of minor who assaulted neighbor. Court found that "severability of interests" clause did not create ambiguity in exclusion.

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## Hired or Non-Owned Auto

*Shelter Mutual Insurance Co. v. Sage*, \_\_\_ S.W.3d \_\_\_, 2008 WL 2649589 (Mo. Ct. App. July 8, 2008). Dustin, Harold and Travis were involved in a joint farming venture. Harold's homeowner's policy provided coverage for "bodily injury or property damage arising out of farming operations that are conducted on the residence premises," but excluded coverage for "bodily injury or property damage arising out of the ownership, maintenance, use or entrustment of ... any land motor vehicle, other than a recreational motor vehicle, owned or operated by or rented or loaned to an insured." Court held that policy unambiguously excluded coverage for accident involving Dustin's truck that was transporting farm equipment from farm to grazing area on Harold's property.

Travis was also insured under an auto policy which provided coverage for damages resulting from an accident "which is caused by the ownership or use of the described auto or a non-owned auto." "Non-owned auto" was defined as "any auto, being used or occupied with permission..." Court held that non-owned auto coverage only applied to use by named insured Travis of vehicle he did not own.

*Phillips v. Enterprise Transportation Service Co.*, \_\_\_ So.2d \_\_\_, 2008 WL 2894497 (Miss. Ct. App. July 29, 2008). NTC hired Enterprise as a independent contractor to provide transportation services using Enterprise's own vehicles and drivers. Court held that NTC's insurers provided no "hired auto" coverage for accident involving Enterprise vehicle.

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## Loading or Unloading

**C**anal Insurance Co. v. Cook, \_\_\_ F. Supp.2d \_\_\_, 2008 WL 2718355 (M.D. Ala. July 14, 2008). Policy provided coverage for loading and unloading of an "owned automobile," defined to include "any mobile home while singularly attached to a scheduled tractor." Mobile home, which had been transported by scheduled tractor but was no longer attached at time of accident, collapsed on plaintiff during setup. Held: Negligence in failing to inspect site where mobile home was to be unloaded constituted negligence in unloading, and was therefore potentially covered under policy.

*Hensley v. National Freight Transportation, Inc.*, \_\_\_ S.E.2d \_\_\_, 2008 WL 4876994 (N.C. Ct. App. Nov. 4, 2008). Divided court found that there was a material question of fact as to whether shipper retained sufficient responsibility for loading cargo as to be held liable when cargo fall off motor carrier's trailer, causing collision with motorcycle. Minority would have held that motor carrier had sole liability, absent evidence of defect in loading which was not obvious to motor carrier's driver.

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## Duty to Defend

**C**arolina Casualty Co. v. Estate of Studer, \_\_\_ F. Supp.2d \_\_\_, 2008 WL 2077994 (S.D. Ind. May 14, 2008). Court held that insurer's duty to defend insured in bodily injury action terminated where (1) insurer brought separate interpleader action, (2) insurer fully surrendered policy limit into interpleader court, (3) insurer conceded that insured's covered liability exceeded policy limits, and (4) insurer continued to defend insured's pending decision of interpleader court.

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## Bad Faith

**F**ortner v. Grange Mutual Casualty Co., \_\_\_ S.E.2d \_\_\_, 2008 WL 4334613 (Ga. Ct. App. Sept. 24, 2008). Court held that insurer was

insulated from bad faith claim by having tendered its \$50,000 policy limit, even though \$750,000 contribution from second insurer was demanded by plaintiff to settle claim. Dissent argued that there was a question as to whether first insurer's conditions of complete release for insured was reasonable under the circumstances.

*Ann Taylor, Inc. v. Heritage Insurance Services, Inc.*, \_\_\_ S.W.3d \_\_\_, 2008 WL 2696735 (Ky. Ct. App. July 11, 2008). Fact that standard certificate of insurance did not describe attended vehicle exclusion contained in the policy did not support certificate holder's negligent misrepresentation claim against insurer; disclaimer language in certificate made it clear that holder's reliance on certificate was not reasonable.

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## UM/UIM

**P**rogressive Northwestern Insurance Co. v. Weed Warrior Services, \_\_\_ F Supp.2d \_\_\_, 2008 WL 5134074 (D.N.M. Dec. 5, 2008). Having conceded in its briefs that plaintiff was an insured for purposes of UM/UIM coverage, insurer was estopped from challenging status as insured. Court found further, however, that selection of UM/UIM coverage at \$100,000, less than policy's liability limit of \$1,000,000, did not require separate written rejection of UM/UIM coverage to be effective. Plaintiff's potential recovery of \$100,000 in UM/UIM benefits was offset by same amount received from tortfeasor.

*Faragon v. American Home Insurance Co.*, \_\_\_ N.Y.S.2d \_\_\_, 2008 WL 2278093 (App. Div. June 5, 2008). Where plaintiff had completely unloaded equipment from insured tractor-trailer, and had spent 10-15 minutes instructing customer on use of equipment, plaintiff was not "occupying" tractor-trailer when struck by hit-and-run driver, within meaning of supplemental uninsured/underinsured motorist policy covering tractor-trailer.

*State Farm Mutual Automobile Insurance Co. v. Dowdy*, \_\_\_ P.3d \_\_\_, 2008 WL 4367538 (Alaska Sept. 26, 2008). Parents who suffered emotional distress when viewing daughter's dead body at hospital following motor vehicle accident were not injured "in the same accident" as daughter, and were not entitled to recover under underinsured motorist ("UIM") policy which provided coverage for daughter's injuries.

*Hebert v. Clarendon American Insurance Co.*, 984 So.2d 952 (La. Ct. App. 2008). Two school busses, both

operated by employees of same school board in scope of their employment, collided. One driver was injured, and sought benefits under UM policy issued to school. UM policy limited coverage to amounts insured was legally entitled to collect from uninsured tortfeasor. Since tortfeasor was fellow employee, injured party was barred under exclusive remedy provisions of workers compensation law from recovering against him. Court held that driver could not collect under UM policy issued to school.

In *Great American Insurance Co. v. Freeman*, \_\_\_ S.E.2d \_\_\_, 2008 WL 4004669 (N.C. Ct. App. Sept. 2, 2008), the applicable law required that UIM coverage be provided under a fleet policy unless rejected in writing by the named insured. The form used in this case had places for the insured to check off whether it was selecting or rejecting various levels of UIM coverage; all spaces were left blank. In the absence of an express written rejection, the court found that UIM coverage would be implied. Moreover, since the insured did not specify on the form which vehicles would be "covered autos" for UIM purposes, the court implied coverage for "any auto," the same policy definition of "covered autos" for liability coverage purposes. Notably, the policy had been issued with a more restrictive definition of "covered autos" for UIM coverage purposes, but the court found the absence of an express written selection by the insured of more limited coverage to be determinative.

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## Care, Custody or Control

**A**merisure Mutual Insurance Co. v. Carey Transportation, Inc., \_\_\_ F. Supp.2d \_\_\_, 2008 WL 4382806 (W.D. Mich. Sept. 26, 2008). The court held that the cargo sealed inside a shipper's trailer was in the "care, custody or control" of the motor carrier and its driver because (1) it was expressly entrusted to the driver and its fate depended directly on his driving; and (2) the cargo was necessary to the motor carrier's work, because the shipper hired the motor carrier specifically to deliver the cargo to destination in a safe and timely fashion. The court rejected the motor carrier's arguments that the exclusion is ambiguous, that the exclusion violated Michigan public policy (finding no persuasive evidence that the Michigan Supreme Court would so hold), and that the exclusion violated federal public policy expressed in the Carmack Amendment (since the motor carrier remained liable for damage to the cargo, regardless of whether it was insured against such liability).

The federal District Court's initial ruling in *Barry Concrete, Inc. v. Martin Marietta Materials, Inc.*, 531 F.Supp. 2d 766 ( M.D. La), was greeted with head scratching and alarm in the industry because the court held that the "care, custody and control" exclusion of a truckers liability policy did not apply since the cargo was not owned by the motor carrier . The case involved the contamination of a shipment of concrete by the remnants of a consignment of sugar that had previously been delivered in the trailer and which were not properly cleaned out in between loads. Before the problem was noticed the concrete was poured; since it failed to harden properly the concrete company was required to remove and replace the concrete slab and foundation. Western World issued both a cargo policy and a truckers policy to the motor carrier Wilson Trucking. The court concluded that the cargo policy did not apply because it specifically excluded contamination. Western World argued that it had no coverage under truckers policy in light of the care, custody and control exclusion. Relying on several Louisiana decisions on care, custody and control in the context of a general liability policy, the court initially ruled that exclusion applied only in two circumstances: 1. where the insured is a contractor, subcontractor or repair center doing work on personal or real property; or 2. where the insured has a proprietary interest in the property. Since Wilson had no interest in the cargo but only the right to collect a fee for its services, the court concluded that the care, custody or control exclusion did not apply.

On reconsideration, the court recognized that the language and intent of the care, custody and control exclusion is different in a commercial auto policy than it is in a general liability policy. A trucking company hauling property indeed has care, custody and control over the cargo and accordingly its insurer may deny coverage for loss of or damage to the cargo on that basis. Larry Rabinovich and Phil Bramson of our firm assisted Western World in the reconsideration motion.

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## Arising Out of Use of a Motor Vehicle

**T**here are numerous cases across the country addressing whether injuries from an accidental discharge of a firearm which is inside a motor vehicle are covered under an auto liability policy. The Supreme Court of South Dakota, in a 3-2 decision, adopted an expansive view of coverage in *North Star Mutual Insurance Co. v. Peterson*, \_\_\_ N.W.2d \_\_\_,

2008 WL 2009844 (S.D. May 7, 2008). In that case, a rifle had been stowed in a pickup truck after a deer hunting expedition. The next morning, the hunters drove out to the hunting ground in the same pickup truck. Returning from the morning's hunt, they threw their wet clothes into the truck, landing on the rifle. That afternoon, as they boarded the truck and prepared to go out hunting once again, one of the hunters noticed that the rifle was pointing at another passenger's leg. As he attempted to reposition it, the gun discharged, the bullet striking the passenger's ankle.

In finding coverage under the auto policy covering the pickup, the court found that transporting hunters and guns is a foreseeable and inherent use of a pickup truck. Accordingly, when a pickup is being used in a hunting expedition where guns are being transported, the accidental discharge of the firearm is causally connected to the vehicle's use. The dissent argued that there was no "auto accident," as required by the policy language, where the passengers were merely sitting in a parked truck and the vehicle was not actually being used on a hunting expedition at the time the rifle discharged.

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## Statutory Priority of Coverage

A number of states have statutes which establish priority of coverage among various auto liability policies which all provide coverage for the same vehicle in the same loss, regardless of the "other insurance" language in the policies themselves. (E.g., California Insurance Code § 11580.9; Arizona Revised Statutes section 20-1123.01(B)). Indiana Code § 27-8-9-9 provides that, under certain circumstances, the terms of a vehicle lease, placing the primary burden of liability insurance on either the lessee or the lessor, may control over the "other insurance" clauses in their respective policies.

In *Old Republic Insurance Co. v. RLI Insurance Co.*, 887 N.E.2d 1003 (Ind. Ct. App. 2008), RLI issued a policy to a motor carrier, Quickway Express, which provided primary coverage for vehicles leased to the motor carrier and used in its business. RLI, as well as ISOP and First Specialty, also issued excess/umbrella policies to Quickway. Old Republic issued a policy to Kroger, the owner of a trailer transported by Quickway at the time of the loss. The "other insurance" clause of the Old Republic policy provided that coverage was excess for a trailer connected to a power unit not owned by Kroger.

The parties agreed that RLI's primary policy provided coverage ahead of Old Republic's policy. Old Republic, however, argued that, pursuant to Indiana Code § 27-8-9-9, its coverage should be excess over the excess/umbrella policies issued by RLI, ISOP and First Specialty. The court, however, held that the statute only affects priority between primary policies with competing "other insurance" clauses, and does not apply to true umbrella policies. (In so holding, the Indiana appellate court cited to its own earlier decision in *Monroe Guaranty Insurance Co. v. Langreck*, 816 N.E.2d 485 (Ind. Ct. App. 2004), construing an analogous statute.) (Ira Lipsius and Peter Andrews of our firm worked with Mary K. Reeder, Esq. of Riley Bennett & Egloff on behalf of RLI, and are continuing to do so now that the matter has been accepted for review by the Supreme Court of Indiana.)

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## Miscellaneous

*Chan v. Coggins*, 2008 WL 4441941 (5<sup>th</sup> Cir. Oct. 2, 2008). Accident reconstruction expert's testimony that accident was caused by tractor-trailer driver's failure to account for "off-tracking" was properly excluded, since evidence showed that plaintiff was struck by tractor wheels and not by "off-tracking" trailer.

*Estate of Beavers v. Knapp*, \_\_\_ N.E.2d \_\_\_, 2008 WL 1886307 (Ohio Ct. App. Apr. 29, 2008). Appellate court upheld jury award of punitive damages based on fact that truck driver, seeing plaintiff motorcyclist fall and slide towards truck, did not attempt to stop but accelerated and fled accident scene, running over plaintiff in the process. (Upon continuing to make his delivery, driver also asked shipper to record earlier arrival time, in order to create alibi.) Court found that evidence of property damage of approximately \$5,000, as well as evidence of scrapes and abrasions, was sufficient to support a survivor's action for personal injury, which is a necessary predicate for punitive damages claim (punitive damages not awardable in connection with wrongful death claim). Trucking company, however, was not vicariously liable for punitive damages awarded against driver, absent evidence that company authorized, participated in, or ratified driver's actions.

*Owner-Operator Independent Drivers Association, Inc. v. Landstar System Inc.*, \_\_\_ F.3d \_\_\_, 2008 WL 4058042 (11<sup>th</sup> Cir. Sept. 3, 2008). Court held that federal truth in lending laws required motor carrier to

disclose banking fee charges and to document charge back items in leases with owner-operators. Required disclosures included confidential pricing information on communication services provided by vendor under contract with motor carrier.

*Father & Sons & A Daughter Too v. Transportation Services Authority of Nevada*, \_\_\_ P.3d \_\_\_, 2008 WL 1912430 (Nev. May 1, 2008). Company which provided referral services to public to facilitate intrastate transportation of household goods qualified as fully regulated common motor carrier under Nevada law, even though company itself did not physically transport goods. Company referred customers to individual loaders/packers only after customers rented moving vehicle from entity under common ownership with referral company.

*Karney v. Leonard Transportation Corp.*, 561 F. Supp.2d 260 (D. Conn. 2008). Court held, under Connecticut law, that a trucker had a duty to plaintiff motorist to install a rear bumper its truck, with which it was safe for the plaintiff to collide.

*Schlegel v. Song*, \_\_\_ F. Supp.2d \_\_\_, 2008 WL 1799761 (N.D. Ohio Apr. 22, 2008). Song, the driver involved in the subject loss, worked for motor carrier Top One Trucking. Top One was the latest in a series of trucking companies owned by the same individuals, which had over time amassed thousands of violations of USDOT safety regulations, including hiring drivers who could not speak English, maintaining a high accident rate, failing to keep accurate log books, and hiring drivers without proper background checks or driver applications. The court held that evidence of the prior violations by Top One and the earlier entities was admissible to show that the driver and/or the motor carrier had acted with reckless disregard in the present case, and that an award of punitive damages was therefore appropriate.

See also *Montemayor v. Heartland Transportation*, 2008 WL 4777004 (S.D. Tex.). The court held that a claim for gross negligence and exemplary damages could proceed where there was evidence that the motor carrier had made a decision to terminate a driver because of his many accidents and violations and then dispatched him for one last trip, which of course resulted in the accident. The court also left open plaintiff's claims for spoliation where the motor carrier destroyed driver and equipment records, in the normal course of operations, after the accident occurred.

While the primary duty to load cargo rests with the carrier, a shipper will not always be able to avoid its own liability for contributing to improper loading. In *Hensley v. National Freight Transportation, Inc.*, 2008 WL 4876994 (N.C. Ct. App.), the court held that this issue of whether the shipper was a contributing factor to the improper loading was a question of fact to be resolved by a jury, even where there was ample evidence of the driver's control over the loading.

*American Home Assurance Co. v. First Specialty Ins. Corp.*, 2008 WL 4602060 (Mass. Ct. App.) held that a commercial auto policy and not a general liability policy applied to an injury sustained during the loading of a truck. The auto insurer argued that the loss arose from the fact that the terminal operator allowed the use of faulty equipment during the loading process. The court held that there was a sufficient causal connection with the vehicle to trigger coverage under the auto policy.

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## Limitation of Liability

There were at least eight reported decisions in 2008 in federal courts (most of them in the Southern District of New York) dealing with the application of the terms of the Carriage of Goods By Sea Act (COGSA) to inland transportation as part of through ocean shipments from portal to portal. The usual issue is whether the liability of the inland trucker is limited by the \$500 per package limitation of liability provision contained in the through ocean bill of lading. The 2004 decision of the United States Supreme Court in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, held that COGSA terms would apply to inland transportation performed as part of the ocean carriage where the through ocean bill of lading extended the protection to agents of the ocean carrier in a so-called "Himalaya Clause." The trouble began with the 2006 decision of the United States Court of Appeals for the Second Circuit in *Sompo Japan Insurance Co. v. Union Pacific Railroad Co.*, 456 F.3d 54, which held that the federal statute governing the liability of carriers in interstate commerce, the Carmack Amendment, applied to the inland carriage. Accordingly, the Court held that the inland carrier's liability would not be limited unless it complied with the standards applied under the Carmack Amendment, specifically, that the inland carrier gave the shipper specific notice of the limitation and offered the shipper an opportunity to choose a rate for a higher amount of liability. In many cases this is impossible because the inland carrier does not issue a bill of lading

when it receives an ocean container at a port and has no contact with the shipper. The cases decided in 2008 create a free for all which has resulted with conflicting decisions. In other words, it is now very complicated to determine if the inland carrier's liability is limited or not.

For a flavor of the depth of the controversy, one might contrast the Southern District decisions in *Royal & Sun Alliance Insurance PLC v. Ocean World Lines*, 2008 WL 3854556, with *Sompo Japan Insurance Company of America v. Yang Ming Marine Transport Corp.* 2008 WL 4330058. In the *Ocean World* case, the Court held that the Second Circuit *Sompo* decision was contradictory to the Supreme Court *Kirby* decision, so it followed an Eleventh Circuit decision holding that Carmack principles did not apply. On the other hand, in the *Yang Ming* case, the Court specifically disagreed with the *Ocean World* decision and held that the Second Circuit case governed to require Carmack compliance.

In *Great American Insurance Co. v. TA Operating Corp.*, 2008 WL 5335317 (SDNY, 2008), a contract between the shipper and the carrier limited the carrier's liability. In order to avoid the contractual limitation, the shipper also sued the operator of the truck stop from which the loaded vehicle was stolen. The truck stop operator cross claimed against the motor carrier for contribution as a joint-tortfeasor. Denying summary judgment motions, the court held that a jury could find that the truck stop breached a duty to protect the cargo on trucks in its facility and that, although the shipper could not sue the carrier in tort, the carrier could be found liable for contribution as a joint tortfeasor. This suggests that a contractual limitation of liability may be avoided if the loss was caused by the negligence of the carrier and another party. The shipper also sought to avoid the contractual limitation of liability by application of the "material deviation doctrine." The court held that the material deviation doctrine would apply to void the limitation of liability if the jury determined that the trucker made a "separate risk-related promise" to take specific steps to protect the cargo.

In *AIM Controls v. USF Reddaway*, 2008 WL 4925028, a federal court in Texas held that a sticker placed by the trucker on the shipper's bill of lading form, which stated that the trucker's rules tariff applied to all shipments, would satisfy the trucker's obligation to notify the shipper of the limitation of liability contained in the tariff.

Finally, in *Byrnes v. Billion BMW, Inc.*, 2008 WL 4131509, the carrier needlessly stipulated that its contractual limitation of liability would be voided by a jury finding that the loss was caused by the carrier's gross negligence. We are not aware of any case where a contractual limitation was voided for gross negligence.

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## Goods in Transit

Two cases decided in 2008 dealt with the issues of when transportation begins and when it ends.

In *Sompo Japan Insurance Company of America, Inc. v. VIP Transport, Inc.*, a federal court in California denied the shipper's motion to remand the action to the state court on the grounds that the goods were in the course of interstate commerce at the time of the loss. The property was damaged in the course of being loaded on to the carrier's vehicle. The shipper contended that the carrier started to move the cargo prior to receiving a release from the shipper. The court found that the bill of lading indicated otherwise, and that the carrier did not require any further instruction to load the property and transport it. Under these circumstances, the court found transportation had begun.

In *Advantage Freight Network v. Sanchez*, 2008 WL 4183987, the carrier tendered delivery of the goods at the location specified in the bill of lading. The consignee, unable to accept the goods, instructed the carrier to make delivery at a later date. The goods were stolen while being held by the motor carrier. A federal court in California held that the carrier did not qualify as a motor carrier under the Carmack Amendment from the time that the consignee refused delivery and would be liable only as a bailee if the theft was caused by carrier negligence.

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## Prima Facie Case

It is generally thought that a carrier's bill of lading acknowledging receipt of the shipper's goods in "apparent good order" satisfies the shipper's obligation to establish the condition of the goods at origin. In *Fraser-Nash v. Atlas Van Lines*, 2008 WL 346381, a Texas federal court held that the usual bill of lading acknowledgment does not establish the good condition of the goods where the goods were pre-packed and unavailable for carrier inspection. The court held that a shipper of household goods failed to state a *prima facie* case because it presented no independent evidence of the condition of the goods packed by the shipper.

The same principles were applied to establish the contents of goods shipped in a sealed container in [Limited Brands v. Flying Cargo](#), 2008 WL 859013. In that case, the goods consisted of apparel shipped by the manufacturer, so condition did not appear to be an issue. The court held that the plaintiff failed to establish by “direct” evidence what was actually packed into the container.

The shipper in [Center v. Roadway Express, Inc.](#), 2008 WL 3824782, had to show the good condition of goods which had been stored in a warehouse for eight years prior to shipment. A federal court in Massachusetts held that testimony by the owner that the goods were in good condition when put into storage, and testimony by the warehouse operator that the goods were in good condition when delivered to the trucker were sufficient to present issues for a jury to decide.

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## Warehouse

There were a few interesting warehouse cases last year. In [Sasol Wax Americas, Inc. v. Hayes/Dockside, Inc.](#), 2008 WL 2067007, a Louisiana federal court held that a sophisticated storage customer was bound by the warehouse receipt conditions to make claims within 60 days and sue within 9 months of the loss. The warehouse was flooded and its roof damaged by Hurricane Katrina. The decision does not discuss why the warehouseman would be liable at all for such a loss.

In [Continental v. TKT, Inc.](#) 2008 WL 2766078) paint products were destroyed in a warehouse fire. The cause and origin of the fire could not be determined. An Illinois federal court held that the warehouseman was liable for the loss because it could not overcome the presumption of negligence created by the customer’s showing that the bailed goods were damaged in the warehouse. The burden was on the warehouseman to show that it was free from fault.

In [Williams v. Smith Avenue Moving Co.](#), 2008 WL 4642990, the owner of the warehouse building locked out the warehouse operator and removed plaintiffs’ stored property, allegedly in error. The warehouseman rebutted the presumption of negligence by explaining how the loss occurred. However, the federal court in Massachusetts held that the warehouse operator was negligent in failing to prevent the building owner from accessing and removing plaintiffs’ property.

To be sure, the operator asserted a cross claim against the landlord.

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## Transportation Seminar

Schindel, Farman, Lipsius, Gardner & Rabinovich and CAB will hold their twenty-second Annual Transportation Seminar in the New York City area on April 27 & 28. 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.