



Our firm is pleased to present our annual summary of legal decisions that we feel are of interest to our clients and friends. Since our discussion is constrained by space considerations, we invite you to visit our regularly updated website at *sfl-legal.com*, where the legal issues are discussed at greater length and where the full texts of the decisions are available.

**RECENT DEVELOPMENTS IN  
TRANSPORTATION AND  
INSURANCE LAW**

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**LIMITATIONS OF LIABILITY**

The application of inadvertence tariffs to losses which occurred after the effective date of the Interstate Commerce Commission Termination Act was the subject of conflicting decisions in 1999. The uncertainty in this is illustrated by two unreported decisions of the United States District Court for the

Northern District of Illinois. In June, the court held that a carrier's liability was limited in accordance with its unfiled tariff even though the shipper had no actual knowledge of the tariff provisions. *Neiman Marcus Group, Inc., v. Quast Transfer, Inc.* 1999 U.S. Dist LEXIS 956V. The court held that the shipper agreed to the limitation of liability by signing a bill of lading that incorporated the terms of the carrier's tariff. It followed the First Circuit decision in *Hollingsworth & Vose Co. v. A-P-A Transportation Corp.*, 158 F.3d 617 which held that a shipper which was "a substantial commercial enterprise capable of understanding the agreements it signed" was charged with knowledge of the applicable tariff so long as the tariff was available to the shipper upon request to the carrier.

However, in July, another judge in the same court reached the opposite conclusion in *Tempel Steel Corporation v. Landstar Inway, Inc.* 1999 U.S. Dist LEXIS 11018. The court followed Sixth Circuit precedent and held that the limitation was unenforceable because the carrier did not advise the shipper of the limitation prior to the shipment. No mention was made of the *Neiman Marcus* or *Hollingsworth & Vose* decisions, and no reference was made to the level of sophistication of the shipper. Nor did the court make any reference to a decision of yet another judge in the same court in December, 1998, holding that the "neglectful" failure of the shipper to declare a value on the bill of lading did not result in the application of the limitation of liability because the shipper would not be presumed to have knowledge of an unfiled tariff. *Dean Foods Co. v. Consolidated Freightways*, 29 F.Supp. 2d 495 (N.D. Ill.). Although the court did not do so, it is possible to distinguish these cases factually because the court in *Neiman Marcus* relied heavily on the fact that the shipper selected the bill of lading form (it was imprinted with the Neiman Marcus name) and that the bill of lading form stated that the shipper certified that it was familiar with the carrier's tariffs.

A shipper's presumed knowledge of the contents of an unfiled tariff was at issue in *Norpin Manufacturing Co., Inc. v. CTS Con-Way Transportation Services, Inc.*, 68 F.Supp. 2d 19 (D. Mass). In that case, the carrier declined liability for a cargo loss on the grounds that a claim was not presented within nine months. The court held that the shipper was not presumed to have knowledge that a claim needed to be filed within nine months because the bill of lading did not incorporate the terms of the Uniform Straight Bill of Lading and the carrier's tariff. Presumably, the shipper may have been deemed to have knowledge of the unfiled tariff if it had been incorporated by reference into the bill of lading. The court held that the nine-month provision did not apply in the absence of actual knowledge by the shipper. We would observe that the shipment in this case appears to have been exempt from regulation under the Interstate Commerce Act.

**BODILY INJURY LIABILITY**

In a decision with implications for both motor carrier liability and insurance coverage, the Seventh Circuit, in *Teamsters Local Unions No. 75 and 200 v. Barry Trucking, Inc.*, 176 F.3d 1004, considered the question of whether a shipper/producer was engaged in a joint enterprise with its contract carrier. Barry, a carrier that employed union members, had carried steel produced by Ryerson, Inc. for over thirty years pursuant to an oral contract. In an effort to cut costs, Ryerson terminated its relationship with Barry and hired a non-union carrier. The union filed suit on the basis that Ryerson was a joint-employer of the drivers that hauled its steel and, as such, was subject to compliance with the Teamsters' collective bargaining agreement. The court rejected the union's argument, noting that Barry, not Ryerson, had sole supervisory control over the driver's day to day activities, and only Barry had the right to hire and fire drivers. In *dicta*, the court indicated that where there is evidence of dual control the shipper may be considered the co-employer. As such, presumably, it would be exposed to the same types of liability faced by carriers.

Among other interesting cases were *Lopez v. Nutrimix Feed Co., Inc.*, 27 F.Supp 2d 292 (D.P.R.) (shipper not liable for negligence of independent contractors or for selecting contractor); *Goff v. Jones*, 47 F.Supp. 2d 692 (E.D. Va) (summary judgment granted for defendant on claim of negligent entrustment because no basis for establishing proximate cause) and *Lee v. Cass*, 39 F.Supp. 2d 170 (D. Conn) (failure to place warning triangles was proximate cause of loss).

We have, in previous years, discussed cases involving the New York motor vehicle ownership liability statute, Vehicle & Traffic Code §388. In *Argentina v. Emery World Wide Delivery Corp.*, 188 F.3d 86 (2d Cir.) the court considered the scope of Section 388. The plaintiff was injured when a steel plate fell on him as he was attempting to unload cargo from a truck owned and operated by Emery. Emery had hired Ever Sharpe Delivery to load the cargo onto the Emery vehicle. Plaintiff alleged that Ever Sharpe negligently loaded the cargo in an unsafe manner and that the improper loading was the proximate cause of the injury. In addition, plaintiff alleged that Emery was liable, pursuant to Section 388, for the negligent use of its vehicle by Ever Sharpe. The federal district court rejected this argument but, in response to a certified question from the Second Circuit, New York's Court of Appeals concluded that, for purpose of Section 388, loading and unloading constituted use of a vehicle. In addition, it held that the use of the vehicle need not be the proximate cause of the injury. Since Ever Sharpe was a negligent permissive user of the vehicle, Emery was liable.

In *Deal Real v. US Fire Insurance*, 64 F. Supp. 2d 958 (E.D. Cal.) the court concluded that an insurer whose exposure is based solely upon the MCS 90 is not obligated to pay a judgment entered against the driver. The driver may indeed qualify as an omnibus insured under the terms of the policy; however, the terms of the policy are not read into the MCS 90. Where the policy does not apply, the insurer must pay under the filing only in the event that the named insured is liable.

The Texas Court of Appeals, in *National Casualty Company v. Lane Express, Inc.*, 1999 Tex. App. LEXIS 2847, answered a question that we are often asked. National contributed \$500,000 toward settlement of an action against its named insured. The National policy did not cover the accident vehicle, but National paid under its Texas Form F endorsement (the state equivalent, in essence, of the MCS 90). Accordingly, once the matter was resolved, National sought reimbursement from its insured, as is provided for in the endorsement. The insured, however, denied that it was required to reimburse the insurer since no final judgment had been entered; the case had been settled before trial! Fortunately, the court rejected the argument; unfortunately, the decision is not included in the official reports.

Our firm was involved in several other litigations involving filings. *Northland Insurance Company v. New Hampshire Ins. Co.*, 63 F. Supp.2d 128 (D.N.H.) presented the court with an opportunity to consider the single state registration system for state filings, and the automatic cancellation by replacement applicable to federal filings. Thus, when Northland filed proof of insurance with the USDOT, New Hampshire's federal filing was no longer in effect. New Hampshire, however, had failed to cancel its New Jersey filing for the named insured, which was either not subject to cancellation by replacement or was simply not replaced. Since the loss occurred in Massachusetts, and the trucker was not located in New Jersey (although it did business there), the court denied that the New Jersey Form E was applicable.

We were also involved in an important decision on the question of the availability of contribution as between two insurers with applicable MCS 90 endorsements. In *Redland Ins. Co. v. Shelter Mutual Ins. Co.*, 193 F. 3d 1021 (8th Cir.), Redland insured the lessee/motor carrier under a policy which included an MCS 90, and Shelter issued a policy and an MCS 90 to the lessor. Neither policy applied, but Redland paid a judgment entered against both the lessor and lessee (as well as the driver). Shelter had refused to pay the judgment. The court concluded that under Arkansas law, Redland was entitled to seek contribution from Shelter as a joint tortfeasor.

Finally, the court in *National Liab. and Fire Ins. Co. v. Intl. Bus. and Mercantile Reinsurance Co.*, 1999 U.S. Dist LEXIS 7008 (N.D. Ill), accepted our argument that the state Form F, like the MCS 90, does not convert the issuing insurer into the primary carrier. Rather, priority of coverages is determined by comparing the provisions of the competing policies.

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NON-TRUCKING USE

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In *Greenwell v. Boatwright*, 184 F.3d 490 (6th Cir.), the court had little trouble concluding that a driver en route to a motel after leaving a loaded trailer at the consignee's

place of business was still in the business of the motor carrier. The insurer had issued a standard ISO non-trucking policy to the owner of the tractor which excluded coverage when the vehicle was being used in the business of a lessee. Due to congestion at the loading dock the driver was prevented from unloading upon his arrival. The driver dropped the trailer and headed for the motel, intending to return in the morning to complete the delivery. En route to the motel the tractor collided with a passenger car causing death and injury. The court reasoned that under existing precedent, a driver remains in the business of the motor carrier after completing delivery during the course of an unladen return trip; certainly here, where delivery was not yet complete, he remained in the business of the motor carrier. Accordingly, the non-trucking policy did not apply.

The potential conflict between a bobtail endorsement and a state financial security law was raised in *Moore v. Nayer*, 321 N.J. Super 419, which involved two registered carriers and their insurers. In addition, the owner of the tractor had purchased a non-trucking policy from Zurich Insurance. At the time of the accident the vehicle was clearly being used in the business of one, or perhaps both of the carriers. Nonetheless, the insurers of those motor carriers argued that Zurich should contribute to the indemnification of the driver, as the non-trucking endorsement violated New Jersey mandatory insurance law. Interestingly, the court appeared to agree that "as an abstract issue of law," the bobtail provision should not be enforced. However, since there was more than adequate insurance available from the other policies, the court found it unnecessary to reach the issue. Thus, in the view of the New Jersey Appellate Division, the public policy issue of whether the non-trucking endorsement is valid or void should be considered only where there is inadequate coverage from other sources.

In *Continental National Indem. Co. v. Hastings*, 1999 Ohio App. LEXIS 2122, the court struggled, and perhaps stumbled, over the perceived difference between a permanent lease and a series of temporary leases. Continental National issued a non-trucking policy to Hastings. On the date of the loss Hastings entered into a lease agreement with Ace Transportation, a motor carrier. The lease agreement attempted to leave exclusive possession of the vehicle with Hastings except for those periods in which the leased vehicle was actually hauling a shipment for the carrier. Hastings delivered a shipment at Maumee, Ohio, one evening, and then began an empty return trip to his home in Michigan. Ace argued that his work for Ace ended immediately upon the delivery of the shipment. As such, Ace suggested, the Continental National policy applied, since he was no longer in the business of the carrier. The court concluded, though, that Hastings remained in Ace's business on his empty return, even though the arrangement consisted of a series of trip leases rather than a permanent lease.

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UNINSURED MOTORISTS COVERAGE

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Thanks to the state supreme court, UM practice in Ohio is never dull. In *Scott - Pontzer v. Liberty Mut. Fire Ins. Co.*, 850 Ohio 3d 660, Liberty issued a business auto policy to a dairy company. One of its employees was injured while driving his wife's vehicle on personal business; the vehicle, of course, was not covered by the Liberty policy. There is a well-established distinction

between class-one insureds (the named insured and, if the named insured is a individual, family members) and class two insureds (e.g., those who are occupying a covered auto). A class one insured is entitled to UM even if he is in a non-covered auto or even if he is not in a vehicle at all. The court, though, felt that the distinction between class 1 and 2 insureds was not clearly set out in the standard policy form and it accordingly awarded UM benefits to the off-duty employee. We note that the definition of insured that the court found to be ambiguous is identical to the definition contained in the ISO UM forms used throughout the country and, therefore, the potential implications of this decision are truly staggering. In any event, ISO, and its members, may wish to consider a modification to its UM coverage form language.

The Third Circuit considered the question of intentional torts in a UM setting in *Abraham v. Raso*, 183 F.3d 279. A UM claim was filed by a mall security guard who shot and killed a man who had stolen clothing from a department store and was attempting to escape from the mall's parking lot in his vehicle. The guard claimed that the thief had tried to run her down. The thief was uninsured, and the guard sought coverage under her own UM coverage (a class one insured need not be in a vehicle to qualify for coverage). The insurer denied coverage on the basis that the uninsured motorist (the thief) had acted intentionally and, therefore, any injury the guard suffered did not arise out of an accident. The Third Circuit held that while the policy required an accident, the incident qualified as an accident from the point of view of the guard, i.e., the claimant.

In *Bishop v. Empire Fire & Marine Ins. Co.*, 47 F. Supp. 2d 1300 (D.Kan.), a truck driver under dispatch to his employer/carrier was injured after he swerved to avoid a phantom vehicle. The driver was given worker's compensation benefits, but also sought UM coverage under the employer's policy. The employer had rejected UM coverage in those states which permitted rejection, and indicated a wish to purchase only the minimum amount required by statute in those states, such as Kansas, which restricts rejection. However, plaintiff argued that it was entitled to \$1 million in UM, not the \$25,000 required limits, since the insured did not opt for lower limits. The court, however, relying upon communications among the insurer, the agent and the insured, found that the insured had successfully limited its UM coverage to \$25,000, and that was the most the driver could recover.

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**WARSAW CONVENTION**

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A third party claim filed by an international freight forwarder against an air carrier more than two years after the arrival of a damaged shipment was time barred. The treaty's statute of limitations is not modified by state law. *Motorola, Inc. v. MSAS Cargo Int'l*, 42 F. Supp. 2d 952(N.D. Cal. 1998).

Where an air waybill did not reference any agreed stopping place, and the carrier received the right to route the shipment as it saw fit, the carrier was entitled to rely upon the Warsaw Convention's limitation of liability for a loss that occurred at a stop chosen by the carrier (contrast this decision with the view of the Second Circuit described in last year's summary). *INA v. Federal Express Corp.*, 189 F.3d 914 (9th Cir. 1999).

In *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 U.S. Dist. LEXIS 1684 (N.D. Ill.), the plaintiff, Custom Cartage, sought a declaration that it had acted as a broker, and not as a carrier or freight forwarder. If it acted as a carrier it would be liable for cargo loss and damage under the Carmack Amendment; if it was only a broker Carmack would not apply to it. In rejecting Custom's argument that the Carmack Amendment preempted common law claims against it as a broker, the court held that state common law claims for negligence and breach of contract could be maintained against a freight broker with regard to federally regulated transportation

In a subsequent opinion, *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 U.S. Dist. LEXIS 16462 (N.D. Ill.), the court denied Custom's motion for summary judgment on the grounds that there were questions of material fact as to whether it was a broker or a carrier. The court stated that under the United States Code definitions of "broker" and "carrier," and the Code of Federal Regulations provisions regarding brokers, "Custom would be precluded from being a broker if it had been authorized to transport the goods and accepted and legally bound itself to transport them." Custom relied on evidence that Motorola was aware that all goods were carried on vehicles which were operated by third parties. Motorola introduced evidence that it understood that Custom would be ultimately responsible for the safe transportation of its goods and that Custom had control as to the manner in which the goods would be transported. The court stated that "what one labels oneself does not determine one's status" and that "[t]he crux of the inquiry into Custom's status revolves around the nature of the relationship between Custom and Motorola."

The argument that the Carmack Amendment prohibits claims for cargo loss and damage against brokers was also made and rejected in *Commercial Union Insurance Co. v. Forward Air, Inc.*, 50 F. Supp.2d 255 (S.D.N.Y. 1999). In that case, Forward Air, which acted as a broker for a land shipment, issued an "airfreight waybill" to the shipper which contained a limitation of liability. The shipper argued that the limitation was not enforceable because the Carmack Amendment, which provided the sole remedy to shippers for cargo loss and damage, permitted only carriers, and not brokers such as Forward Air, to limit their liability. The court held that the limitation would be enforceable under both state and federal common law.

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their Thirteenth Annual Transportation Seminar in the New York City area on April 17 and 18. Registration is limited and we have been over-subscribed each year in the past. We suggest that you submit your application by March 1. For applications or additional information please call Pauline Hylton at (212) 563-1710, Ext. 217. Information and an application form is also available on our web site.