

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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1111 (9th Cir.).

In addition to notice, a carrier must give a shipper a choice of rates and an opportunity to declare a value. In *Kemper Insurance Companies v. Federal Express Corporation*, 115 F.Supp. 2d 116 (D. Mass.), the court held that a carrier may limit its liability without offering a full value rate, so long as a choice of more than one level of liability was available. The First Circuit Court of Appeals, which

does not require a carrier to give specific notice to a shipper of a limitation of liability contained in an unfiled tariff, has refused to apply the limitation where the carrier did not issue a bill of lading which contained a declared value blank permitting the shipper to declare a value (*Camar Corp. v. Preston Trucking Co., Inc.*, 221 F.3d 271 (1st Cir.)).

WHAT CONSTITUTES A CLAIM

Two cases decided in 2000 confirm that there is disagreement as to what constitutes a cargo claim against a regulated motor carrier. In *Wrigley v. Stanley Transportation, Inc.*, 2000 U.S. Dist. 121 F.Supp 2d 670 (N.D. Ill.), the court reaffirmed the Seventh Circuit rule that the shipper's obligation to present a claim is satisfied if the carrier has actual notice of the loss. In *Tesmer v. Allied Van Lines, Inc.*, 82 F.Supp. 2d 1216 (D. Kansas), the court, which is in the Tenth Circuit, observed that the First, Second and Fifth Circuits require strict compliance with the DOT claim regulations, and that the Sixth and Ninth Circuits require only substantial compliance. The court, which failed to account for the minimal compliance rule of the Seventh Circuit, held that it did not need to select a standard because the shipper had provided information which would satisfy the strictest rule.

MCS-90 ENDORSEMENT

The MCS-90 endorsement requires the issuing insurer to pay any judgment entered against the named insured motor carrier, even if the loss were otherwise not covered by the base policy. Most courts have held that a judgment entered against some party other than the named insured - the driver for instance - does not trigger any obligation under the MCS-90. In *John Deere Ins. Co. v. Nueva*, 229 F.3d 853, though, the Ninth Circuit, citing only a decision from the Tenth Circuit, imposed liability upon an insurer which had issued an MCS-90 even though no action had ever been filed against the named insured. John Deere insured a motor carrier which had a surplus trailer which it was in the process of selling. It was not scheduled on the Deere policy. The trailer was attached to the tractor of an owner-operator who was involved in an accident. Judgment was entered against the owner-operator. Plaintiff then attempted to collect the judgment from John Deere. The Ninth Circuit agreed that Deere was liable to pay under its MCS-90 endorsement.

LIMITING THE CARRIER'S LIABILITY

Limitation of motor carriers' liability for cargo loss and damage was a hot topic of litigation in 2000. In *Schweitzer Aircraft Corp. v. Landstar Ranger*, 114 F.Supp.2d 199 (W.D.N.Y.), our firm successfully argued that a limitation of liability contained in a carrier's unfiled tariff was binding on a sophisticated shipper who did not have actual knowledge of the limitation. Thus, a court in the Second Circuit has followed the rule of the First Circuit in the *Hollingsworth & Vose* case and has rejected the contrary rule of the Sixth Circuit in the *Toledo Ticket* case. Adding to the mix, the Seventh Circuit Court of Appeals has suggested that a limitation of liability contained in a carrier's unfiled tariff would not be binding on a shipper who had no actual knowledge of it (*Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029 (7th Cir.)). It appears likely, therefore, that other courts will split on this issue when they consider it.

DUTY OF PRIMARY INSURER TO EXCESS INSURER

In an instructive decision concerning a primary insurer's duty to an excess insurer, the court in *Phico Ins. Co. v. Aetna Cas. & Sur. Co. of America*, 93 F. Supp. 2d 982 (S.D. Ind.) predicted that Indiana would follow the majority view that there is no direct duty of care running from a primary insurer to an excess insurer; rather what duty does exist is derivative from that which the primary insurer owes to the insured. The excess insurer, though, may assert a claim for equitable subrogation against the primary carrier for bad faith or negligent defense of a claim against the insured. The court denied that the cause of action for equitable subrogation is restricted to those instances in which the primary carrier failed to settle a claim within its policy limits. Aetna, the primary carrier, defended the insured; the focus of the defense was that the injured parties were employees and thus unable to collect in tort. Aetna had warned Phico, however, which had \$10 million in excess coverage, that if the defense were rejected, plaintiff's recovery would likely exceed Aetna's \$1 million limit. Aetna also noted that plaintiffs had hired an

Although the courts may disagree as to whether a carrier must advise a shipper of a limitation contained in an unfiled tariff which applies to regulated common carriage, they agree that a carrier may give notice of a limitation of liability by a course of dealing in the course of unregulated transportation, such as intrastate, commercial zone and air-related shipments. In *Allison-Erwin Company v. Saturn Freight Systems, Inc.*, 106 F. Supp.2d 1328 (N.D. Ga.), the court held that the shipper had knowledge of the limitation on the basis of prior transactions, even though the person who released the shipment to the carrier testified that he had no actual knowledge of the limitation. Similarly, the Ninth Circuit Court of Appeals held that a shipper's receipt of invoices in prior transactions gave proper notice of the limitation to the shipper in *Insurance Company of North America v. NNR Aircargo Service*, 201 F.3d

expert on economic damages and that Aetna would not be doing so. Phico, however, did not promptly respond to Aetna's decision not to hire another economic expert. The time to select experts had long since passed by the time Phico recommended hiring a separate expert. Aetna had no incentive to do so since any likely jury award for damages would exceed its limits even without consideration of long-term economic consequences. In short order, the court decided that the claimants were not employees, Aetna tendered its \$1 million limits and a mediator assessed the claims of one of the plaintiffs at over \$5 million. Under pressure with trial approaching and no economic expert, Phico settled the various claims for some \$6 million. It sought indemnity from Aetna for mismanaging the defense. The court concluded, however, that Aetna had not acted negligently or in bad faith. It had reasonably kept Phico aware of developments and deadlines. Phico had the opportunity to hire an expert and failed to do so; accordingly, it had no legal recourse against Aetna.

FRONTING POLICY/LIABILITY OF STAFFING COMPANIES

In *Air Liquide America Corp. v. Continental Cas. Co.*, 217 F.3d 1272, the Tenth Circuit considered two issues of interest to our readers: whether a fronting policy is considered "other insurance" and how to assess the liability of staffing companies that provide drivers to motor carriers.

Samuel Canada had been a truck driver for Air Liquide, a manufacturer and distributor of industrial gases. After Canada's retirement, Air Liquide asked him to return to work on a temporary basis; doing so, however, would have made him ineligible for some of the retirement benefits he was receiving. Instead, Canada went to work for Staffing Resources an agency which then arranged to assign Canada to Air Liquide. This arrangement continued for several years. Canada was involved in a multi-vehicle accident while driving an Air Liquide truck and plaintiffs sued Air Liquide, Canada and Staffing.

Air Liquide's auto policy with CIGNA had liability limits of \$1 million, but also contained a \$1 million deductible and a provision that CIGNA had no duty to defend. Staffing was insured by Continental. Air Liquide filed a declaratory judgment action seeking a clarification of what coverage was provided.

The Continental policy insured, "any employee while using a covered auto you [Staffing] don't own, hire or borrow, in your business or your personal affairs." This provision is an endorsement to the standard commercial who is an insured clause; it is sometimes used by underwriters when the insured wishes to provide coverage for employees not furnished with company vehicles. Continental denied that Canada was an insured, arguing that Canada was actually Air Liquide's employee, not an employee of Staffing. The court disagreed noting that Staffing held out Canada as its employee for federal and state purposes, and also pointing to provisions of certain internal documents which suggested that individuals like Canada, who are assigned to work for client companies, may create vicarious liability for Staffing. These factors, in the court's view, overrode the fact that Air Liquide had actual day to day supervision and control over Canada telling him when to work and where to go. The court also had no trouble concluding that when he drove for Air Liquide, Canada was also operating in the business of Staffing. Accordingly, he qualified as an insured under the Continental policy. Canada

was also an insured under the CIGNA policy.

At what point did Continental's exposure begin? The court noted that the CIGNA policy, by its express terms, provided primary coverage for losses involving vehicles owned by Air Liquide (as the accident vehicle was) while the Continental policy provided that with respect to vehicles not owned by Staffing, it would pay only after the exhaustion of "other collectible insurance." The difficulty, of course, was that the CIGNA policy was a fronting policy; it would be Air Liquide, not CIGNA, that would have to make any such primary payment. Air Liquide argued that it should be excused from such payment and that Continental should drop down to the primary level. In other words, it argued that a fronting policy was not "collectible insurance." The court, however, applying Oklahoma law, held that a fronting policy is "other collectible insurance," and that Continental's duty to pay arose only after Air Liquide or CIGNA paid the first \$1 million. However, Continental did have a duty to defend Canada and Staffing, since the CIGNA policy had no duty to defend, and there is no basis for requiring an insured under a fronting policy to defend other parties.

HIRING OR BORROWING OF VEHICLE

The court in *USF&G v. Heritage Mutual Ins. Co.*, 230 F.3d 331 (7th Cir.) reviewed the case law on the question of whether a shipper which has an ongoing relationship with a motor carrier "hires or borrows" the vehicles provided by the carrier. If such vehicles are deemed to be hired or borrowed, the vehicles could qualify as covered autos under the shipper's auto liability coverage and the driver would potentially be covered as the permissive user and, accordingly, an additional insured. The court found that since the trucking company, rather than the shipper, had its decal on the doors, maintained and fueled the vehicles, paid the drivers and withheld taxes and social security payments, the vehicle was not under the control of the shipper even though much of the day to day dispatching was done by the shipper's employees.

PRIMARY COVERAGE FOR NEGLIGENT LOADING

In *Griffin v. Public Service Mutual Ins. Co.*, 744 A2d 204, the New Jersey appellate court considered the relative primacy of two insurance policies, one issued by PSM to the motor carrier which owned the tractor, the other issued by Reliance National to Sea-Land Service, the shipping line, which owned the container and chassis. The truck driver was injured when he opened the trailer doors at destination to begin the unloading process. The evidence suggested that the container had been negligently loaded by the shipper and its agents in China.

The driver filed an action for declaratory judgment against Reliance, successfully arguing that the individuals who had negligently loaded the container were permissive users of the "trailer" even though, at the time of the loading, the container and chassis were not attached. Once the container was attached to the chassis at the U.S. port, the two components became a trailer and the Reliance policy attached and covered the loss which occurred thereafter.

Reliance then sought judgment that PSM also insured the

shipper and its agents since, at the time of the accident, the container and chassis were also connected to the tractor insured by PSM. The court agreed that the shipper was a permissive user of the tractor even though, at the time of the loading, the tractor was separated from the container by the ocean. The court then reviewed the other insurance provisions of the two policies and concluded that PSM provided primary coverage and Reliance excess coverage.

The court rejected PSM's argument that the MCS-90 endorsement which was alleged to form part of the Reliance coverage would have converted Reliance's coverage into a primary policy. Citing extensive Third Circuit precedent, the court concluded that the MCS-90 plays no role in deciding which policy provides primary coverage.

TOW TRUCKS AND PREEMPTION

Local regulation of the tow truck industry was challenged in several cases on the basis that Congress has preempted the field and precludes state or municipal regulation of tow operations, since interstate commerce is impacted. The regulations instituted by Pasadena, TX were voided by the federal district court in *Northway Towing v. City of Pasadena*, 94 F. Supp. 2d 801. New York City's regulations fared somewhat better in *Ace Auto Body and Towing v. City*, 171 F.3d 765 (2d Cir. 1999). The court noted that a local government, including a city, could ensure that towing operations complied with safety regulations.

On that basis the city could require tow operators to be licensed, and follow regulations including those which prohibit "chasing" by tow operators rushing to arrive at the scene of an accident before their competitors. The court also agreed that New York could prescribe maximum towing and storage rates for towing companies summoned to the scene of an accident as part of the rotation system in force in the city. Only in those cases in which the driver himself called the tow company was the rate "consensual," and thus preempted from local regulation.

INTERNATIONAL FREIGHT FORWARDER

What liability exposure does an international freight forwarder have toward shippers or third parties? That was the issue confronting the court in *Prima U.S. Inc. v. Panalpina*, 223 F.3d 126 (2d Cir.). Westinghouse Electric contracted with Panalpina, a freight forwarder, for the transportation of an electric transformer from the manufacturer's facility in Italy to the consignee in Iowa. Panalpina's obligation, under its standard written contract, was to oversee all aspects of the transportation, on land and by sea. In line with what the court called industry custom, Panalpina did not issue a bill of lading.

Panalpina hired the official Genoa port stevedore to load the transformer onto a container and secure it for the ocean portion of the trip. There was no dispute that the stevedore was reputable. Nonetheless, the lashing of the cargo was performed in a negligent manner so that the transformer broke loose in heavy seas crushing a laser machine owned by Prima which had been stowed nearby. Extensive clean-up costs resulting from the break-up of the laser machine were borne by the steamship company.

The trial court held that Westinghouse was liable to Prima for

the loss of the laser and to the steamship company for the clean-up costs. Then, relying on the forwarder's contractual commitment to provide, "close care and supervision" for the entire transportation, the trial court held that Panalpina was obligated to indemnify Westinghouse. The Second Circuit, however, held that the forwarder was not liable to indemnify Westinghouse. The court noted that there is a fundamental difference between international freight forwarders and carriers. Carriers, including non-vessel operating carriers such as stevedores, are directly involved in transporting cargo; freight forwarders do not issue bills of lading and are not, therefore, liable to shippers. Since Panalpina hired a reputable stevedore, and otherwise acted responsibly in arranging for the transportation, it bore no responsibility for the stevedore's negligence.

This decision is potentially problematic since, as the court itself noted, some freight forwarders do issue bills of lading. The more active role played by some freight forwarders, including the issuance of a bill of lading, is often said to distinguish a freight forwarder from a transportation broker, at least in the context of domestic transportation.

UNDERINSURED MOTORISTS COVERAGE

The requirement to offer UIM coverage to the insured under an umbrella policy delivered in Ohio was the focus of the court's attention in *Booth v. Guaranty National*, 114 F. Supp. 2d 644. An owner-operator under lease to a motor carrier was seriously injured in a collision with an underinsured vehicle. The motor carrier had rejected UIM coverage, or had selected lower limits, on two underlying policies. The court, however, found that the umbrella insurer, which has a separate duty under Ohio law to offer UIM/UM coverages, had failed to do so on its \$4 million umbrella policy, since the UIM/UM acceptance/rejection form was sent to the insured with the rejection option already marked. Accordingly, \$4 million was available to the claimants, in spite of the facts that no UIM/UM premium was paid, and the named insured believed that it had rejected UIM/UM coverage.

USE OF AN AUTO

The line dividing auto liability coverage from GL coverage was considered by the court in *Progressive Cas. Ins. Co. v. Yodice*, 714 N.Y.S. 2d 715. The loss arose out of a carnival ride which was attached to a flatbed of a parked truck. The ride was controlled by a clutch in the rear of the truck, although the vehicle engine needed to be running in order for the ride to be operated. The court concluded that the loss did not arise out of the use of an auto. Our firm represented Progressive, the automobile insurer.

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their Fourteenth Annual Transportation Seminar in the New York City area this spring. Registration is limited and we have been over-subscribed each year in the past. Call Pauline Hylton at (212) 563-1710, Ext. 217, or check our web site after February 1 for further details. An application form will be available on our web site at that time.

