



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](http://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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whether the vehicle was being used in furtherance of the lessee's business interest. We assume that all parties acknowledged that the vehicle was not being so used; accordingly, both policies applied and the only coverage issue was the relative primacy of the coverages. Indiana Code §27-8-9-9 provides that in the context of a motor vehicle lease, the lessee's insurer is primary unless the lease agreement explicitly provides otherwise.

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**NON-TRUCKING USE**

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One of the recurring problems in analyzing the scope of non-trucking coverages is how to assess a scenario in which a truck driver has completed delivery and, at the time of the loss, is returning to his own home, or some location other than the lessee's terminal. In principle, a trucking company that has sent a driver out in the stream of commerce is responsible for bringing the driver back home: at what point, though, does the non-trucking coverage kick in?

In AXA Global Risks v. Empire Fire & Marine Ins. Co., 554 S.E.2d 755 (Ga. App.), Banzhoff was a driver/employee who completed a delivery for the lessee JME and returned an empty trailer to a JME location in Winder, Florida on a Friday evening. He was told by the JME dispatcher that his next assignment was to pick up a load at Winder in time for Tuesday delivery. Banzhoff spent Friday night in Winder, then headed toward home in Georgia where he intended to spend the weekend before returning to Winder. The loss occurred as he was en route home. The trial court accepted the non-trucking insurer's argument that since the vehicle was under lease to a registered motor carrier the vehicle was, by definition, being used in JME's business. In the trial court's view, so long as the employer has knowledge of the driver's intended use of the vehicle and places no restriction on that use, the employer is liable under the federal leasing regulations. In our view, the trial court understated the scope of liability imposed by the regulations, and made the common error of confusing liability and coverage issues. In fact, under the majority view of the leasing regulations, the lessee (and its insurer) will be exposed in nearly ever loss. However, the question of whether the non-trucking coverage applies must be analyzed separately.

The Georgia appellate court, in reversing the decision, correctly noted that a driver may bobtail under circumstances that further the interests of the lessee. Here, though, the driver was using the tractor, albeit with the lessee's permission, for wholly personal reasons. He drove the tractor home after completing one job and before beginning another route. Since the essential nature of the trip was personal, the exclusion in the non-trucking policy did not apply. Thus the non-trucking policy provided primary coverage; the truckers liability policy covered the loss, but only on an excess basis.

In most circumstances, when the non-trucking policy applies, its coverage will be primary vis-a-vis the truckers policy. However, in Continental Western Ins. Co. v. Reliance National Ind. Co., 141 F. Supp.2d 968 (N.D. Ind.), the court concluded that an Indiana statute which sets out the priority of coverages, mandated that the coverage provided by the non-trucking carrier was excess. The driver was deadheading at the time of the loss, but the court made no finding as to

Although we can not fault the court's reasoning, we suggest that the result conflicts with the underwriting intent. Short of convincing the Indiana legislature to modify the statute so as to exclude non-trucking coverages, the only way for the underwriters of a trucking policy to assure the primary obligation of the non-trucking policy is to examine the insured's leases and make certain that they require the lessor to provide primary non-trucking coverage.

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**MCS-90 ENDORSEMENT**

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This past April, after conferencing the appeal of the decision in John Deere Ins. Co. v. Nueva, 229 F.3d 853 (9th Cir. 2000), the United States Supreme Court took the rather unusual step of asking for the view of the Solicitor General of the United States as to whether the case presented an issue of sufficient importance to justify review by the Court. Our firm represents John Deere Insurance. As we discussed in last year's summary, the key issue is whether judgment against a party other than the named insured motor carrier triggers an obligation on the part of the insurer which issued the MCS-90. In our discussions with officials at the Department of Justice, Department of Transportation and Solicitor General's office over the past few months, we have stressed the open-ended nature of the potential exposure to the issuing insurer. A copy of the Solicitor General's report, which the USDOT appears to have signed onto, is available on our website. Our firm is currently presenting a related issue before the New York Court of Appeals in Pierre v. Providence Washington.

The Fifth Circuit reviewed several issues relating to MCS-90 exposure in T.H.E. Ins. Co. v. Larsen Intermodal Services, (242 F.3d 667). The insurer denied coverage to its insured on the basis that the vehicle involved in the loss was not scheduled in the policy. Nonetheless, the insurer defended the resulting lawsuit, and reached a settlement with the claimants before trial. The insurer then sought reimbursement for the settlement payments and defense costs from the named insured.

The insured argued that the insurer, by failing to obtain a non-waiver agreement to reserve its defense of non-coverage, had waived its right to reimbursement and the trial court agreed. The appellate court, though, concluded that the insurer had not waived its rights under Louisiana law, since it provided notice to the insured of its coverage position and its intent to seek reimbursement of any amounts paid in resolving the claims. The Fifth Circuit rejected the insured's argument that the insurer had no right to settle the claim on its own, and held that the right to reimbursement was available where a case was settled before an actual verdict. The court also agreed that, in principle, it would be possible for an insurer to seek

reimbursement for defense costs as well as for amounts paid to claimants, but held that in this case, there had been a duty to defend under the policy and that, accordingly, reimbursement for those costs was unavailable.

Two decisions by judges on the same court decided two days apart demonstrate how much uncertainty there is in MCS-90 litigation. These two cases, with remarkably similar facts, were resolved in different ways. In American Alternative Ins. Co. v. Sentry Select Ins. Co., F. Supp. 2d (E.D. Virginia, Dec. 18, 2001), an owner-operator carried his wife and three children in his cab as he hauled a load in interstate commerce under the authority of Sparkle Transport. The family members were injured and sued both the owner-operator and Sparkle. The vehicle was described on the owner-operator's policy issued by AAIC; the Sentry policy did not schedule the vehicle, but did contain the MCS-90 endorsement. After reviewing case law from around the country, the court concluded that under these circumstances, the AAIC policy provided primary coverage. Since there was other available coverage, the MCS-90 did not operate to amend the policy and cause it to provide primary coverage.

However, in Canal Ins. Co. v. Distribution Services, F. Supp. 2d (E.D. Va. Dec. 20, 2001), the MCS-90 endorsement was treated as an essential part of the policy. Canal issued a policy to DSI which scheduled certain vehicles and contained an MCS-90. Bryan Lee was driving a tractor leased to DSI by AIM which was not listed on the Canal policy. AIM was insured by Pacific Employers under a policy that provided contingent coverage. Canal sought a declaration that it provided no coverage for the loss or, in the alternative, that it would be entitled to reimbursement from Pacific or the various insureds for any payment that it made.

The court insisted that Canal pay any judgment or settle the case, at which time it would have a right to seek reimbursement from DSI. However, the court denied that Canal would have any right to demand reimbursement from AIM or Pacific. The court concluded that Pacific's contingent coverage was not activated since the MCS-90 constituted "collectible insurance." This, of course, is a debatable point, and it is not clear if the judge who decided the American v. Sentry case would have agreed.

The issue of whether the MCS-90 constitutes "other collectible insurance" is also raised in Fireman's Fund Ins. Co. v. Empire Fire & Marine Ins. Co., 152 F. Supp.2d 687 (E.D. Pa.).

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**UNINSURED MOTORISTS COVERAGE**

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The most recent shot in the battle between the Ohio Supreme Court and the state legislature on the scope of UM coverage has been fired by the latter. In reaction - perhaps overreaction - to a series of decisions, among them the Linko decision discussed below, the newly effective statutory changes to the Ohio UM statute (Ohio Revised Code §3937.18) were intended to make the offer of uninsured motorists coverage optional. The language of the bill explicitly refers to and overrules a series of court decisions including the Scott-Pontzer decision which was discussed in this space two years ago. Unfortunately, the language of the statute is not as clear as that of the legislative history, and it remains to be seen how the Ohio courts will rule in a scenario in which no offer of UM- or an offer which the court deems to have been insufficient - was made.

The immediate trigger for the legislative action was the decision in Linko v. Indemnity Ins. Co. of North America, 90 Ohio St.3d 445, which held that a proper offer of UM coverage must include a brief statement of the coverage, an express statement of the UM/UM limits and specific details about the premium. The Linko court was careful to point out that it reached its decision under the statute as it existed in 1996. The statute was previously changed in 1997 and some recent federal cases have held that those earlier changes were sufficient to undo the results of Linko and Scott-Pontzer. Roberts v. Universal Underwriters, 170 F. Supp. 2d 768 (N.D. Ohio).

The issue of an insufficient offer of UM coverage was also the fulcrum of Norris v. National Union Fire Ins. Co., N.E.2d (Appellate Court of Illinois, Nov. 16, 2001). Jones Truck Lines purchased a truckers policy but retained a \$500,000 deductible. Jones's executives met with the insurance broker and employees of the insurer and made it clear that they wished to reject UM coverage in all states where rejection was possible. As the dissenting judge points out, there can be no doubt that the insured was fully aware of the right to purchase UM. Illinois law does not permit complete rejection of UM: a minimum of \$20,000/40,000 must be purchased. The majority concluded that the rejection form presented to the insured did not comply with the Illinois statutory mandate that the insurer must specify the limits of optional coverage and advise the insured that the optional coverage is available for a modest premium increase. The form actually used (typical of the forms used in the industry for interstate truckers) asks the insured to accept or reject coverage and purported to inform the insured of the mandatory limits, if any, in the fifty states and the District of Columbia. The form incorrectly asserted that the Illinois minimum UM requirement was \$30,000. As a result of the insurer's failure to strictly comply with the terms of the statute, the court concluded that the estate of the driver/employee was not limited to the states minimum limits. Since the insurer had failed to make a proper UM offer to the motor carrier, the estate was entitled to collect \$2 million, the amount of the bodily injury limits. The court also rejected the insurer's argument that it was entitled to a set-off for any worker's compensation payments.

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**LIMITATION OF LIABILITY**

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The United States Court of Appeals for the Eleventh Circuit enforced a limitation of liability of which the shipper claimed to have no knowledge of in Siren, Inc. v. Estes Express Lines, 249 F.3d 1263. As is frequently the case, the shipper prepared the bill of lading. Perhaps intending to guard against the unknown, the shipper used a form which did not incorporate the carrier's "tariff" (although it noted that general freight carriers no longer publish tariffs, the Court referred to its rates and rules as a "tariff"). However, without understanding the significance of it, the shipper used the term "Class 85" in the bill of lading. Noting that it did not have an obligation "to protect shippers from themselves," the Court held that the shipper would be bound by the bill of lading which it "drafted" so that the motor carrier could rely on the industry understanding that Class 85 provided for a limitation of liability. The Court held that incorporation of the tariff in the bill of lading was not the only way the parties could limit liability under the Carmack Amendment. The insertion of "Class 85" constituted, the Court said, an

agreement by the shipper to a limitation of liability even though it was not aware of the limitation.

Another case in which the court enforced a limitation for which the shipper did not have actual knowledge is EFS National Bank v. Averitt Express, Inc., 164 F.Supp. 2d 994. In this case, the shipper completed a bill of lading form supplied by the motor carrier. It provided that in the absence of a special contract, the carrier's rate classifications and rules would apply to the transportation service. The rules limited the carrier's liability to \$25 per pound. The Tennessee federal court rejected the shipper's claim relying on the Toledo Ticket case, that the limitation would not be effective unless the carrier specifically brought it to the shipper's attention. The Court rejected the Toledo Ticket reasoning on the grounds that the loss there took place prior to the effective date of the ICC Termination Act, and it followed the Siren case and Schweitzer Aircraft Corp. v. Landstar Ranger, Inc., which we reported in this column last year. It appears that there is a clear trend toward requiring shippers to inquire about carrier limitations of liability.

On the other hand, a federal court in Maryland, in Aida Dayton Technologies Corp. v. I.T.O. Corporation of Baltimore, 137 F.Supp.2d 637 (D. Md. 2001), refused to uphold a carrier's rule which required suit to be brought within two years of the declination of a claim because the carrier did not issue a bill of lading for the shipment. The court said that the suit rule would not apply unless the shipper agreed to it in a bill of lading.

In Bogen Communications, Inc. v. J. Fanok Services, Inc., [2001 Fed. Carr. Cas P84, 200], in which we represented the motor carrier, a New Jersey state court enforced a limitation of liability in a commercial zone shipment to which the Uniform Commercial Code, rather than the Carmack Amendment, applied. As is usual when a container is received by a carrier at a pier, no bill of lading was issued. The agreement to limit liability was inferred from the "course of dealing" of the parties. The Court held that the shipper had notice of the limitation from prior transactions in which the carrier's freight bills stated that the carrier's liability for cargo loss and damage would be limited to \$50 per shipment unless the shipper declared a higher value and paid a higher freight rate.

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**DUTY TO DEFEND**

In The Ohio Casualty Ins. Co. v. Carman Cartage Company, 262 Neb. 930, the insurer paid the claimant the policy limit without obtaining a release for the insured and refused to defend the claimant's suit for the balance of the loss. We would regard this as a risky procedure, but the insurer got away with it. The court held that the policy provision which authorized the insurer to settle with the claimant did not create an obligation to defend. Since there was no obligation to defend, the insurer was free, the court said, to satisfy its obligations under the policy, leaving the insured to defend itself.

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**SETOFF**

The fact pattern presented by Transit Homes of America 173 F. Supp. 2d 1192 is becoming familiar. The shipper refused to pay accumulated freight bills because it had cargo claims which were not resolved to its satisfaction. Because the amount of the freight bills was

greater than the amount of the cargo claims, the motor carrier had to bring the suit first. It brought the suit in the federal court, presumably because it felt that the Carmack issues would be better decided there. Feeling otherwise, the shipper successfully moved to dismiss the action on the grounds that the federal court did not have jurisdiction to resolve the fee dispute. The court said that it was bound by the complaint, which did not state a federal cause of action, and that it could not consider the fact that the real issues in the case would be raised by the counterclaim for cargo loss and damage under the Carmack Amendment. A lot of attorneys' fees were spent just to get back to square one.

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**OTHER CASES OF INTEREST**

**P**rogressive Casualty Ins. Co. v. Hoover, 768 A.2d 1157 (Pa. Super). Transportation of grain by carrier solely within state of Pennsylvania was part of interstate shipment in light of essential character of shipment and intent of shipper at time of original movement of the goods, even though initial shipper and second shipper were different parties. The appeal of this decision is scheduled to be argued by our firm next month before the Supreme Court of Pennsylvania.

National Union Fire Ins. Co. v. Transportation Ins. Co., 765 A.2d 240 (N.J. Super). Although New Jersey courts have generally refused to enforce policy language excluding liability coverage for those engaged in loading and unloading, we successfully argued that the statutory and case precedent were not controlling. A motor carrier was pumping hot asphalt from its tanker into the consignee's rented tanker-trailer. An explosion occurred which resulted in injury to the insured's employee. The court upheld the loading and unloading exclusion in the consignee's policy because the motor carrier did not maintain sufficient control over the tanker to qualify as a borrower.

Professional Communications, Inc. v. Contract Freighters, 71 F. Supp.2d 546 (D. Maryland). This case sets out the parameters of a freight broker's liability for damage to cargo in the hands of a carrier. The court found no evidence that the carrier was an agent of the broker: it was simply hired by the broker to transport the shipper's goods. Accordingly, the broker was not vicariously liable for the acts of the carrier. Nor had plaintiffs established that the broker had breached any direct duty to shipper. The broker's duty is to select a reputable carrier, which had been done in this case. The court queried, though, whether plaintiff could establish a proximate connection to the loss even if it did establish that the broker had not taken due care in selecting a carrier.

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their Thirteenth Annual Transportation Seminar in the New York City area on April 15 and 16. 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.

