

January 15, 2003

We faced a new world order in 2002. The year began amid fears of terrorism and ever growing concern over the state of the economy. Americans have begun to adapt to the new order and to the struggle to find peace and prosperity. The vulnerability which we felt following 9/11 has been replaced by a sense of caution and watchfulness. This new vigilance has been seen in the transportation industry and is exemplified by the creation of the American Transportation Army, an organization of truckers under the auspices of the American Trucking Associations. Its Anti-Terrorism Action Plan is an effort to calm fears over the use of the nation's trucks as terrorist weapons.

With over 6 million ocean containers arriving every year, and over 2 million tractor trailers operating on a daily basis, the eyes of the public and the government focused on ways to secure the transportation industry from terrorist attack. Many of the new procedures implemented by motor carriers over the last year to tighten security are expected to have the additional effect of reducing cargo theft. With cargo theft reported to range from \$3.5 to \$12 billion a year, any reduction will be welcomed.

The economic impact of the Enron and WorldCom bankruptcies and the reevaluation of accounting procedures for all companies sent the stock market into a rapid downward spiral. The transportation industry, already reeling from increasing insurance costs and higher diesel fuel prices, faced reductions in tonnage, greater operating expenses and loss of investment opportunities. The insurance industry, which previously relied heavily on investment returns in order to maintain profitability, has been forced to offset substantial losses in the stock market with increased premium rates and more selective underwriting, making the market for insurance even more costly for trucking companies.

As we close out the year, the threat of war with Iraq looms and there is no general consensus on whether the economic recovery, which may be bumpy, will be sufficient to allow the transportation or insurance industry to avoid further major trauma. Although rates for both freight and insurance premiums continue to rise, both insurers and motor carriers continue to struggle to maintain profitability.

In last year's resumé we were pleased to report that the Federal Motor Carrier Safety Administration had its first permanent head. However, Joseph Clapp, who

RESUMÉ

2002

MOTOR CARRIER

INDUSTRY

took the reins just last year, has already tendered his resignation to the U.S. Department of Transportation. At year's end Roger Nober was named chairman of the Surface Transportation Board, replacing Linda Morgan.

Government Activity

During 2002, government agencies focused on increasing security for all aspects of the transportation industry. While there was much political maneuvering to implement the Department of Homeland Security and the Port Security Act, many federal agencies looked for ways to increase security through existing regulations. For example, the FMCSA began enforcing requirements that placards and placard holders be used only to identify hazardous materials. The Food and Drug Administration released safety guidelines for food transporters. The Transportation Security Administration advised that early this year it will file a proposed rule-making requiring trailers to be locked at all times.

Although the North American Free Trade Agreement required that Mexican-U.S. borders be opened by January 1, 2000, they remain closed to this day. Target dates were repeatedly set and then extended. In early May, a coalition of environmental, public advocate, trucking and labor groups sought to enjoin the opening of the border on the basis that an environmental impact study had not yet been completed. The court refused to issue an injunction, although the case continues. In accordance with the directives of DOT Secretary Mineta, various draft rules were finally presented to the Office of Management and Budget setting forth the protocol for the certification of Mexican carriers. In early November, Mr. Mineta certified the borders for opening. On November 27, 2002 President Bush authorized the DOT to proceed with the necessary final actions to end the moratorium on Mexican truck access. On December 2, 2002, the coalition applied for an emergency court order to stop the opening. The court rejected the request.

At the other border of the country, the U.S. and Canada began the implementation of various programs contained in the Smart Border Program signed in December of 2001. The program seeks to create express lanes at border crossings and clear up delays through pre-certification of shippers and motor carriers. A similar agreement was signed with Mexico in April of last year.

The modification of the 1939 Hours of Service rules continues to remain unresolved. Mr. Clapp has advised that he anticipates that new hours of service rules will go to the White House for review before he departs the FMCSA. Despite the fact that the proposed rules have not yet been released for review by the public, various trade organizations are already positioning themselves for the anticipated fight over the new rules. This is expected to be a contentious issue in the coming year.

While security was a primary focus, other significant regulations were put into place. In 2002, the STB's household goods valuation ruling of 2001 was extended to all carriers of household goods. By mid-year, all household goods carriers were required to modify their transportation documents to reflect the changes. As an easy loss prevention tool, underwriters should request confirmation that their carriers have made the necessary changes.

The DOT also issued its final rulemaking on the standards to be employed in the protection of cargo. The new standards are based upon the American Cargo Securement Standard Model Regulations. While the rule was effective in December 2001, carriers will have until January 2004 to implement all the new requirements .

In September 2002, FMCSA began enforcement of an interim rule which allows the FMCSA to put a carrier out of service if the motor carrier is operating outside the scope of its operating authority. In addition, the FMCSA released new rules covering CDL drivers which, among other things, will allow for revocation of a CDL if a driver loses his non-commercial license as a result of DWI or DUI offenses. The FMCSA anticipates that over 26,000 truck drivers could be disqualified each year.

At midyear, FMCSA determined that it would exclude intrastate motor vehicle violations and accidents when determining safety ratings. As is often the case, however, the new policy has created more questions than answers as carriers struggle to determine exactly which violations or accidents can be disregarded in reports to the FMCSA.

In November 2002, the Truckload Carriers Association filed a petition with the DOT seeking to exempt all motor carriers of property from mandatory financial reporting requirements. The TCA had been unsuccessful in past attempts to rescind these reporting requirements, in part due to the efforts of the insurance industry and other concerned organizations. We will continue to monitor this issue and will take all steps necessary to prevent the rescinding of this requirement so that you can continue to have adequate information to properly assess each risk presented to you.

The motor carrier industry has suffered, as we all have, from the economic downturn and the increased expense of doing business. The cost of additional security procedures, along with increased insurance premiums and fuel costs, have further reduced profitability. Despite the dismal returns for some motor carriers, trucking continues to be a big business in this country. The Bureau of Labor Statistics reports that there are more than 3 million heavy-truck drivers nationwide, and over 600,000 companies involved in the industry. The ATA reports that 81.6 percent of all trucking operations operate 20 or fewer trucks. The industry employs 9.9 million Americans, paying more than \$317 billion in wages, and generating revenues of \$606 billion. The DOT released a study indicating that domestic inland truckers will increase freight capacity in coming years.

The strike at the West Coast ports in October was another setback to economic recovery for the transportation and marketing industries. With over \$300 billion in freight moving through the port in any given year, the relatively short shutdown crippled the local transportation industry and reduced merchandise at the start of the high volume holiday season.

This year the industry saw the bankruptcy of Consolidated Freightways, one of the largest LTL carriers, and the disappearance of APA Transport, another large carrier. While these companies were front page news, and many other smaller truckers terminated operations during the year, overall bankruptcy filings slowed for motor carriers during 2002. In the final months of 2002 many carriers implemented freight rate increases as a way to offset the increased cost of doing business. The ratio of demand for shipping services to capacity is reportedly higher than ever before and shippers appear to be resigned to accepting these increased charges in order to ensure that their freight will move. Security surcharges were also being implemented by carriers by the end of the year. The cost of diesel fuel continues on a roller coaster, with more highs than lows. Although late fall saw a short drop in fuel costs, overall the price of diesel fuel rose substantially last year.

On the upside, motor carriers have made inroads on reducing safety violations. The Commercial Vehicle Safety Alliance reported that 77.9% of the trucks and buses which they inspected met safety standards. Recent drug testing statistics have also reported a reduction in the number of drivers testing positive. Random testing showed a 5% reduction in drivers found with a blood alcohol content of .02 or higher.

In the coming year we anticipate substantial movement in the effort to generate a uniform model for transportation contracts. In past years, motor carriers often routinely signed any contract given to them by the shipper. In this tight market they are beginning to evaluate the cost of accepting all responsibility for

cargo, personal injury and property damage without guarantees of traffic volume. As the implementation of any uniform contract could have a profound impact on the underwriting process we will follow this issue closely.

The ATA has begun wooing back the various groups which had previously splintered from the organization. The Truckload Carriers Association has rejoined the ATA and more are expected to follow. Once the proposed new hours of service rules are released to the public, the ATA will likely lead the fight to resolve the concerns arising from them. Although the ATA was active in seeking a delay in the implementation of the new diesel emission regulations, it was unsuccessful. The rules became effective October 1, 2002.

The National Master Freight Agreement between the Teamsters and many of the large carriers expires on March 31, 2003. The existing contract covers more than 85,000 LTL employees at more than 60 companies. The parties have already begun active negotiations.

Insurance Underwriting

In the year following one of the largest catastrophes ever to hit the insurance industry, insurance carriers were faced with a struggle to find profitability in a market which had already been volatile before the attack. 2002 did not prove to be a year for dramatic recovery as insurance carriers faced losses in investments and equity income, high jury verdicts, loss of capital and risks of terrorism. Increasingly during the last year the focus has changed to harder underwriting as a way to offset the losses from investment income.

Despite increased premium dollars and greater emphasis on underwriting, many rating organizations have continued to maintain negative outlooks for commercial and reinsurance markets. In the post-Enron environment the issues of reserves and balance sheet integrity are being viewed carefully. Standard and Poor's reports that at year end over 40% of the commercial lines insurance companies hold either a negative outlook or are on Credit Watch Negative. Standard and Poor's reports an overall average combined ratio of 108% for 2002 with a drop to 105% expected in 2003.

Politically, much of the year was spent seeking resolution of the need for terrorism insurance. After much maneuvering between political parties, President Bush finally signed the Terrorism Risk Insurance Act on November 26. This bill allows for \$100 billion in federal funds to be made available to insurance companies in the event of a terrorist attack that caused more than \$5 million in losses. The new statute, which voids terrorism exclusions on current policies, contains a morass of requirements for insurers to complete before terrorism may be excluded. In the final months of 2002 most insurers scrambled to

implement procedures for a smooth transition. Guidelines for implementation of the regulations were released in the final days of December and are designed to help insurers determine how to comply with the Act. Any organization that meets the program's definition of "insurer" must participate in the program, including state-licensed or admitted insurers, eligible alien surplus line carriers, and insurers that are approved by federal agencies in connection with maritime, aviation or energy activities.

On the whole, truck insurers reported that they continued to raise rates over this past year. Rate increases of up to 30% have been requested by some insurers who had not yet begun to increase rates prior to 9/11. As many insurance companies evaluate what markets they intend to focus on in the coming year, we continue to see a decline in the number of insurance carriers seeking to write motor carriers. However, many insurers with sophisticated underwriting processes and a knowledge of the industry report that they are operating profitability. We are pleased that CAB is an integral part of these insurers informed underwriting procedures.

A year has passed since we last reported on the lack of progress in reconciling insurance and trade issues between Mexico and the United States. With much of the industry focused on terrorism insurance last year, the issues related to insuring Mexican carriers in the United States and cargo inside Mexico has fallen by the wayside. As there is a likelihood that the border will open within the next six months we anticipate that these issues will resurface. As resolution of these issues will affect your policy terms, conditions and exposures, we will keep you advised of developments in our monthly "*Bits and Pieces*".

Central Analysis Bureau

This past year was exciting for Central Analysis Bureau. During the year we introduced our internet-based "clearing house", which is available at no additional charge to all our "automatic" subscribers. The reaction of our subscribers has been positive and usage of the website is high. The website contains the CAB rating and financial and operating information on the motor carrier, along with easy links to data from various DOT databases (including insurance filing information, SAFER and SafeStat). Underwriters report that the underwriting process has been streamlined through use of the website which allows them to have all of the relevant information at hand to make an informed decision on a risk. For those of you who are eligible but have not yet signed up, you can start the enrollment process by going to our web site cabfinancial.com (just click on the link for "Subscriber Area" in the upper right corner, then on the link "New User Signup" on the resulting page).

We began to include information from the FMCSA's SafeStat database on our analysis reports during 2002.

SafeStat is an attempt by the FMCSA to take all the safety-related information it receives, quantify it and compare a specific motor carrier to the entire universe of motor carriers. Effective April 1, 2002 every motor carrier is now required to report biannually the size of its fleet, its mileage traveled and the number of drivers used in its operations. This information, which we make available to our subscribers along with the other information we gather on your behalf, provides further assistance in evaluating motor carrier risks.

During the past year CAB has continued to increase the specific and valuable information we provide and to tailor it to the needs of the insurance underwriter in order to reduce your risk and increase your profitability. For example, because we continue to see that many insurance carriers issue liability filings for an amount greater than the required limits, creating unnecessary exposure to the insurer, we have now begun including on our reports, and highlighting on our web “clearing house”, a motor carrier’s required filing limits and the limits of the currently active filing. We urge you to review these required limits and adjust your filing to minimize your exposure.

At a time when there is great focus on the underwriting process we recognize that underwriters need more than just financial information in order to fully evaluate a risk. Understanding the events that affect an individual motor carrier’s operation allows an underwriter to tailor the coverage to protect both parties. For that reason we continue to notify our subscribers whenever the FMCSA issues an “out of service” order for an insured. Underwriters should be concerned whenever a motor carrier runs afoul of governmental regulations and is ordered to cease operations, even for a short period of time. We now provide this notification via e-mail for those subscribers who have provided us with their e-mail address. As an added service, we also continue to monitor releases from the transportation press and governmental regulatory agencies and will notify subscribers of any new information concerning an insured, including potential financial difficulties.

During 2002 we also began to offer to our subscribers the option of receiving analysis reports for insureds via e-mail (in Adobe Acrobat format). If you currently receive your reports via the mail but would prefer to have them sent to you via e-mail please contact Mark Schweber at mschweber@cabfinancial.com or extension 207. Since 1998 we have published a free monthly newsletter, “Bits and Pieces” on our website, which summarizes important events in the transportation and insurance industries. In 2002, we began to e-mail this newsletter to subscribers. If you do not currently receive it and would like to, please furnish your e-mail address to Mark Schweber.

For over 50 years we have been committed to assisting motor carrier insurance underwriters as much as possible. If you ever wish to discuss anything in “Bits and Pieces” in greater detail, or have any questions regarding transportation and insurance, or govern-

ment regulation of these industries, please do not hesitate to contact us.

We work hard to pursue every avenue available to secure current financial information on motor carriers. We are gratified by the cooperation of our subscribers in this important effort, both in helping us to improve the effectiveness of our annual mailings to motor carriers and in obtaining and transmitting to us financial information from motor carrier insureds and prospective insureds. We continue to pledge a 24-hour turnaround to provide a rating based upon financial information faxed or e-mailed to us by our subscribers.

Our affiliate, Transportation Technical Services, Inc., is America’s foremost publisher of transportation directories, both on the web and in print. Its subscription-based web directory, fleetseek.com, has information on almost 88,000 for-hire motor carriers, private fleets and owner-operators in the U.S., Canada and Mexico, and is updated continuously throughout the year. The 17th edition of its flagship *National Motor Carrier Directory*, containing essential information on almost 24,000 for-hire carriers, has just been published. Financial and statistical information on over 2,900 large motor carriers can be found in its “*The Blue Book of Trucking Companies*”. This information is also available on fleetseek.com. To order or get further information phone (888) ONLY TTS or visit their website at tstrucks.com. The senior staff of TTS (and CAB) are recognized transportation experts with many years of experience and are available for litigation, consulting or other purposes.

The law firm of Schindel, Farman & Lipsius LLP specializes in transportation and other coverage matters. It has prepared the following pages concerning recent legal developments and you may wish to share them with your claims department staff.

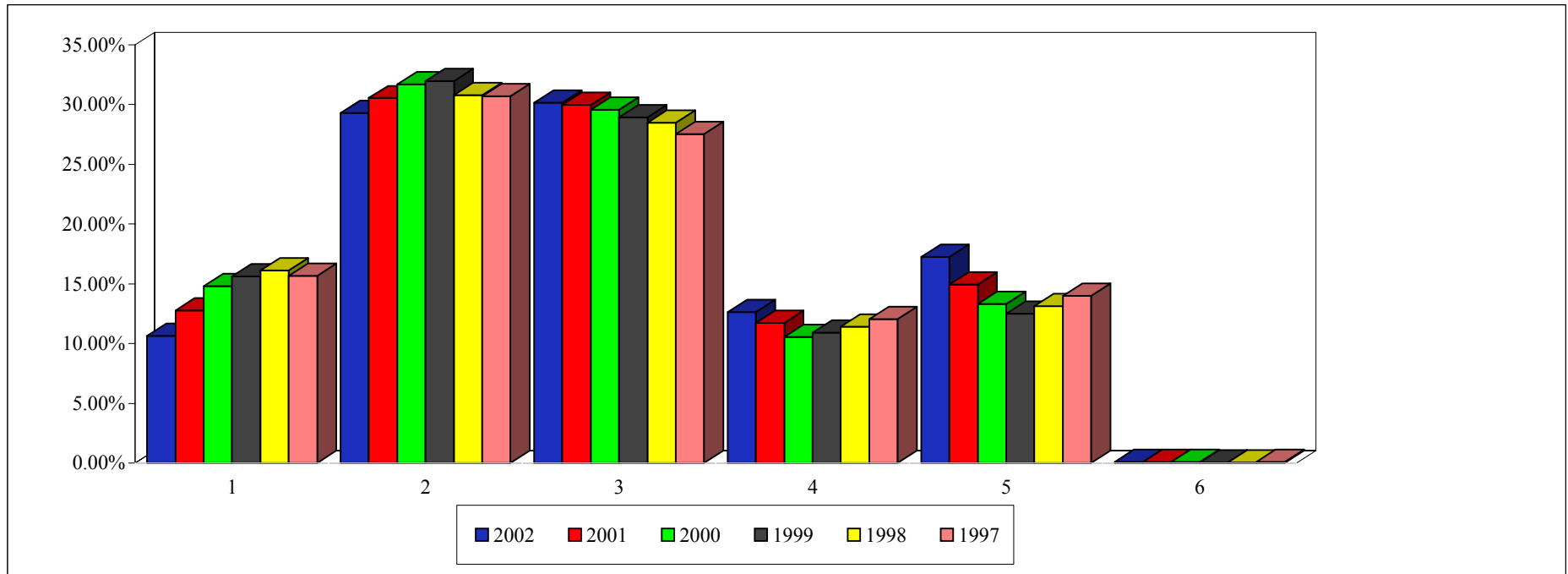
As we noted last year, Andy Schindel cut back on his work load during 2002 and as a result this resumé, written primarily by Jean Gardner, is the first one in over 20 years for which he is not the primary author. Andy has now retired and we all wish him years of enjoyment in the mountains of Vermont. Jean Gardner, Ira Lipsius, Andy Schindel, Steve Schindel, Mark Schweber, Judy Silpe, Gary Bitsko, Alex Bentsen, Matthew Kirschbaum, Daniel Bong and the entire staff of CAB extend our best wishes for the coming year to all our subscribers. We will work hard to provide you with the maximum service possible and we welcome your suggestions and feedback.

We would be pleased to furnish you with additional copies of this resumé upon request. It is also available on our web site.

Ratings

Breakdown of ratings for the year 2002 and prior:

	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993
SATISFACTORY	10.64%	12.77%	14.81%	15.63%	16.11%	15.65%	15.61%	17.43%	17.04%	15.72%
FAIR	29.28%	30.54%	31.70%	31.98%	30.77%	30.70%	31.33%	31.29%	29.14%	27.90%
BARELY FAIR	30.14%	29.96%	29.57%	28.94%	28.49%	27.53%	27.98%	26.68%	25.04%	24.40%
POOR	12.64%	11.71%	10.54%	10.90%	11.42%	12.04%	11.24%	11.16%	12.02%	12.03%
UNSATISFACTORY	17.23%	14.95%	13.30%	12.49%	13.15%	13.97%	13.66%	13.32%	16.60%	19.61%
DANGEROUS	0.07%	0.07%	0.08%	0.06%	0.06%	0.08%	0.15%	0.09%	0.13%	0.32%



Reference to CAB ratings:	SATISFACTORY	Excellent financial condition
	FAIR	Adequate financial condition
	BARELY FAIR	Limited financial condition
	POOR	Weak financial condition
	UNSATISFACTORY	Inadequate financial condition
	DANGEROUS	Distressed financial condition

Our firm is pleased to present our annual summary of legal decisions that we feel are of interest to our clients and friends. During calendar year 2002, the D.O.T. form MCS-90 figured prominently in many important decisions. All of the cases referred to, and several others of interest, are available on the firm website sfl-legal.com.

**RECENT DEVELOPMENTS IN
TRANSPORTATION AND
INSURANCE LAW**

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MCS-90 ENDORSEMENT

The two most disconcerting decisions, from the perspective of motor carrier insurers, relate to the question of whether judgment against a party other than the named insured triggers an insurer's exposure under the MCS-90.

In Pierre v. Providence Washington Insurance Company, 2002 WL 31770499 (N.Y., Dec. 12, 2002), a sharply divided Court of Appeals held that the insurer was obligated by the MCS-90 to pay a default judgment entered against the owner and the driver of a tractor leased to a registered motor carrier. The tractor was garaged and licensed in Pennsylvania, but was being used in the motor carrier's business in Brooklyn, New York where the collision occurred with plaintiff's vehicle. Plaintiff sued only the owner and the driver, both of whom were citizens of Pennsylvania. The police report did not record the name of the motor carrier and plaintiff later explained that he did not know the carrier's identity at the time of the loss.

The driver and the owner defaulted. At a hearing held thereafter, the court awarded about \$250,000. A second lawsuit was filed against the motor carrier but plaintiff dismissed that action and, instead, filed a third action, this time against the motor carrier's insurance company, demanding payment under the policy. Although the defendants had failed to provide notice of the loss of the suit, plaintiff responded that the MCS-90 required payment of the judgment since owner and driver fell within the definition of "insured". The trial court concluded that the MCS-90 was applicable and a split appellate division affirmed.

New York's highest court, the Court of Appeals, held in a 4-3 decision, that the MCS-90 applied under these circumstances. There was no doubt that the driver and owner were insureds pursuant to the policy definition. By not reporting the loss or the lawsuit, defendants had, arguably, waived their rights under the policy. However, the MCS-90 required the insurer to pay any judgment against "the insured" even if the insured had failed to give notice. The majority, noting that the MCS-90 itself did not define the word "insured," held that the policy definition applied. Accordingly, Providence Washington was obligated to pay the default judgment under the MCS-90.

The blistering dissent noted that the word insured did not require a special definition since the federal regulations which promulgated the MCS-90 already defined "insured" for purposes of the MCS-90 as "the motor carrier named in the policy of insurance." In addition, the dissent pointed to the amicus brief that the Solicitor General and the D.O.T. had filed with the Supreme Court in the Nueva case discussed in this space the past two years. Our firm represented Providence Washington in the Appellate Division and the Court of Appeals.

In Lynch v. Yob, 95 Ohio St.3d 441, the Ohio Supreme Court took an even more expansive view of the MCS-90 than did the Pierre court. Yob was a truck driver employed by Bath Transport, a registered motor carrier whose authority was being used when he was involved in a two vehicle collision. Bath was insured by AIG, and there was no dispute that AIG's \$1 million policy provided coverage to Yob and Bath for their liability arising out of the

accident. The controversy revolved around a \$2.5 million policy which AIG had issued to Central Cartage Company, the owner of the trailer that was attached to the Bath tractor at the time of the accident. It was not disputed that the vehicle was not being used in the business of Central or its related companies. Central bore no direct exposure to plaintiffs; the sole issue was whether the AIG/Central policy covered Yob and Bath. The trailer was apparently not a covered vehicle under the AIG/Central policy. Beyond that, AIG successfully argued in the middle level appellate court that Yob and Bath were excluded from coverage under the AIG/Central policy by virtue of the "reciprocity clause". The appellate court had concluded that since they were not insureds under the policy, Yob and Bath were also not insureds under the MCS-90 that AIG had issued to Central.

The Ohio Supreme, in a 4-3 split, reversed and found that the MCS-90 did apply. The court found that the facts largely paralleled those in Nueva: in both cases the policy issued to the owner of a trailer did not provide coverage to the driver and owner of the tractor to which the trailer had been attached. The majority found that the appellate court, and the three dissenters, were reading the MCS-90 and the applicable case law too narrowly. The MCS-90 mandates coverage for permissive users of non-covered autos; it is simply irrelevant whether or not the driver qualifies as an insured under the basic policy.

There were also two unreported federal circuit cases on the MCS-90. In Avalos v. Duron, 2002 WL 1277939, the Tenth Circuit reaffirmed its position on the meaning of insured in the endorsement; its holding is along the same lines as Pierre and not the more expansive Yob. In National Indemnity Co. v. Ozark Mountain Sightseeing, Inc., 2002 WL 31119906, the Eighth Circuit, in accordance, with what we have, in the past, called the majority view, held that attaching an MCS-90 to a policy does not automatically convert that policy into a primary policy.

Not all MCS-90 decisions were decided against the issuing insurer. In Swartz v. McNabb, 830 So.2d 1093 (La. App.), the truck driver punched the manager of a convenience store who had asked him to move his truck. The court reviewing the coverage began by noting that the tort was excluded from coverage under the basic truckers policy; even if the loss arose from the use of the truck in that this was no accident. Plaintiff argued that the MCS-90 should apply; the court, though, noted that the endorsement required that the injury resulted "from negligence in the operation, maintenance or use of motor vehicles", and that the injury be neither expected nor intended. Since the driver had acted intentionally, the MCS-90 was inapplicable. There has been precious little case law on the question of the MCS-90 and intentional tort, but that point has never been in serious doubt. Far more controversial is the question of whether the MCS-90 applies to intrastate

shipments, particularly when the company engages in both intrastate and interstate shipments, and particularly when the vehicle itself is used in both interstate and intrastate commerce. The cases on this point are not consistent. The most recent decision is General Security Ins. Co. v. Barrentine, 829 So.2d 980 (Fla App., 1st Dist.). At the time of the accident the truck at issue was not listed on the declaration page of the policy. The insured attempted to retroactively add the vehicle after the loss. The court voided that attempt. Plaintiff, though, argued that even if the policy itself did not apply, the MCS-90 did. At the time of the loss the driver was en route from Graceville, Florida to Southport, Florida to pick up an empty trailer. He was to bring the trailer back to Graceville; after any necessary repairs were done the trailer was to be hauled out of state to pick up sod. The court held that the MCS-90 applies only when the vehicle is operating in interstate commerce.

The Pennsylvania Supreme Court implied the same understanding of the scope of the MCS-90 in Progressive Cas. Ins. Co. v. Hoover, 809 A.2d 353. The case involved the shipment of distiller's grain. Progressive's insured, Marbec Trucking, whose driver caused the accident, carried the shipment from one Pennsylvania location to another. However, the shipment had originated out of state. The lower court had concluded that there was a continuous movement in interstate commerce and that, accordingly, the MCS-90 applied. The Supreme Court, though, held that the trial and appellate courts had misapplied the test as to whether the shipment was one continuous interstate move, or two separate shipments, the second of which was purely intrastate. The particular circumstances need to be reviewed to determine whether the essential character of the shipment was interstate. Here the shipment had been ordered by Jesse Stewart Co. a month prior to the accident and brought by barge from Illinois and stored in a Pennsylvania warehouse. From there the product was either picked up by the customer directly or, as in this case, shipped to them by a truck hired by Stewart. Stewart was then, arguably, a second shipper (the Illinois manufacturer was the first). There is a fair amount of precedent that under these circumstances the second shipment is separate from the first and deemed to be intrastate in nature. The Supreme Court found that the granting of summary judgment in favor of plaintiff was in error in light of material disputes of fact and gaps in plaintiff's case. Accordingly, this matter was remanded to the trial court. Our firm represented the appellant Progressive in the appeal.

UNINSURED MOTORIST

The flow of uninsured motorist cases continues unabated. Among the most important cases this year were the following:

Seaco Ins. Co. v. Davis-Irish, 300 F.3d 84 (1st Cir.) - the court held that an employee of the named insured engaged in the employer's business while a passenger in a non-covered auto was not entitled to UM coverage. The court blasted the Ohio Supreme Court's decision in the infamous Scott-Pontzer decision ("We consider Scott-Pontzer an anomaly.") A Class II insured (someone other than the named insured) is entitled to UM coverage only while occupying a covered auto.

Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers, 2002 WL 31045356 (Ky. App., Sept. 13, 2002). Punitive damages in the amount of \$1 million were awarded after the court had a look at the insurer's adjuster training manual which encouraged adjusters to plant uncertainty in the minds of claimants and to seize upon fear, anxiety and money needs faced by claimants.

Monday v. Canal Insurance Co. 73 S.W.3d 594. Supreme Court of Arkansas, interpreting the state's UM statute held that there is no need to offer UM in a commercial policy. The statute speaks only of private passenger automobile liability policies. The Maryland Court of Special Appeals took a similar position in Hams of Southern Maryland v. Nationwide Mut. Ins. Co., 2002 WL 31852881.

Mid-Century Ins. Co. of Texas v. Boyte, 80 S.W.3d 546. The Texas Supreme Court held that once a jury or judge enters judgment for a claimant, bad faith is no longer possible. At that point, plaintiff was a judgment creditor - an insurer's duty of good faith arises out of the disparity in the bargaining power of the insurer and the insured. These concerns do not arise in the context of a judgment creditor.

Yocheer v. Farmers Ins. Exchange, 643 N.W. 2d 547. The Wisconsin Supreme Court held that the statute of limitations on a UIM claim begins not at the time of the accident, but on the date of the settlement of the case against the tortfeasor. At that point the claimant knows whether or not there will be a UIM claim.

WAREHOUSEMEN'S LEGAL LIABILITY

A number of interesting opinions were handed down in 2002 which were sympathetic to warehousemen's attempts to limit their liability. In HHH Marine Insurance Services, Inc., v. Gateway Freight Services, 116 Cal. Rptr. 2d 893 (Cal. App., 1st Dist.), a California appellate court applied the Warsaw limitation of liability contained in an China Airlines air waybill to a California cargo handling facility which acted as a bailee of goods. The goods were stolen from its warehouse which was not on the premises of an airport. China Airlines issued its air waybill from Malaysia through to the ultimate consignee in San Francisco. Pursuant to an agreement with China Airlines, Gateway received the cargo of hard disk drives at the airport and transported it to its storage warehouse in South San Francisco for pick-up by the consignee. Acknowledging that the Warsaw Convention generally applies only to transportation in an airplane or in an airport, the court nevertheless extended the air waybill limitation to the warehouseman and to a loss outside the airport. It did so on the basis of a provision on the reverse side of the air waybill which extended the limitation of liability to the carrier's agents who perform services incidental to the air carriage. The court found that under the released value doctrine of federal common law, the shipper was bound by the contractual provisions of the air waybill because it had notice of the limitation and a fair opportunity to obtain greater protection by declaring a higher value and paying a greater freight charge. It found that Gateway was acting as an agent of China Airlines in furtherance of the contract of carriage. The court rejected the analysis of the Second Circuit decision in the Victoria Sales case which held that air transportation ended at the geographical boundaries of the airport, and it rejected the argument that air transportation ended when the goods came to rest at Gateway's warehouse.

A limitation of liability in a warehouseman's invoices was applied where the warehouseman released a loaded container to an impostor in Perfumeria Ultra, S.A DE C.V. v. Miami Customs Service, Inc., 2002 WL 31664695 (S.D. Fla., Nov. 4, 2002). Without making reference to §7-204 of the U.C.C., which permits a warehouseman to limit liability

in a warehouse receipt, a federal court in Florida held that an agreement to limit liability was established by a course of dealing which made the invoices' terms and conditions part of the agreement to store duty-free bonded cargo and load it for transportation. Moreover, the court held that the warehouseman had not waived its right to enforce the limitation by paying two earlier claims "as a gesture of goodwill." Similarly, in Lubell v. Samson Moving & Storage, Inc., 737 N.Y.S. 2d 24 (N.Y.A.D., 1st Dept.) a New York appellate court held that the limitation of liability contained in a household goods storage contract was enforceable even though the depositor did not sign the form in the place designated for agreement to limit liability.

The limitation of liability was not enforced in J.W.S. Delavau, Inc., v. Eastern America Transport & Warehousing, Inc., 810 A. 2d 672 (Pa. Super.), where a limitation contained in warehouse receipts was not applied. In that case the parties had both signed a letter which set forth the price and some other terms under which Eastern would store Delavau's nutritional supplements. Each shipment of goods into the warehouse was evidenced by a warehouse receipt which contained a limitation of liability. A Pennsylvania appellate court held that the trial court could find that the letter agreement constituted the entire agreement. And despite the fact that Delavau had received hundreds of warehouse receipts without taking exception over a period of time, the court found that Eastern had failed to establish that Delavau had consented to the limitation. The court held further that the limitation was not binding because it found that the receipts, which required the signature of an officer of Eastern, contained only the computer-generated initials of the warehouse administrator who was not a corporate officer.

BMC-32 ENDORSEMENT

Because motor carriers continue to file for bankruptcy or simply close up, the BMC-32 Endorsement occupies the attention of cargo insurers. We have advised cargo insurers that claims made under the Endorsement for loss and damage to goods in the course of transportation performed pursuant to contracts could be declined on the grounds that by its terms the Endorsement applies only to common carriage. Shippers are taking the position that despite the wording of the Endorsement, it applies to all carriage because the Interstate Commerce Commission Termination Act of 1995 eliminates the distinction between common and contract carriage. We submitted this issue to a federal court in New York in April 2002, taking the position that the Endorsement applies only to common carriage so long as the mandated form retains its current text and so long as the DOT continues to issue both common carrier certificates and contract carrier permits. The court has not yet rendered its decision.

LIMITATION OF LIABILITY

There continues to be a split of authority as to whether a carrier must give specific notice to a shipper of a limitation of liability contained in its tariff. In Hillenbrand Industries, Inc., v. Con-Way Transportation Services, Inc., 2002 WL 1461687 (S.D. Ind.), the court considered the effect of the Interstate Commerce Commission Termination Act of 1995 on the traditional elements required for limitation of liability set forth in the widely-cited opinion of the Seventh Circuit Court of Appeals in Hughes v. United

Van Lines, 829 F.2d 1407 (7th Cir. 1987). The court affirmed that the ICCTA and cases in other jurisdictions did not change the rule in the Seventh Circuit that a shipper must have actual knowledge (as distinguished from constructive knowledge) of a liability limitation contained in a carrier's tariff in order for the limitation to be enforceable. The court stated that incorporation of a tariff by reference in a bill of lading would not achieve actual notice, even to a sophisticated commercial shipper. It also said that the carrier's receipt, which clearly incorporated its tariffs was "problematic" because it was not signed by the shipper and because it did not have a space for the shipper to declare a value. This opinion, therefore, would appear to require that the bill of lading make a specific reference to the limitation contained in the carrier's tariff, that it provide a space to declare a value and that it be signed by the shipper.

In Nematollahi v. Starving Students, Inc., 2002 WL 31006127 (N.D. Ill., Sept. 5, 2002), the court held that the provision in a household goods carrier's tariff which requires that suits be brought within two years after the written denial of a claim was not binding on the shipper because he did not have actual knowledge of it. In that case, the tariff was properly incorporated by reference into the bill of lading. Curiously, the court based this conclusion on the premise that under the ICCTA, the tariffs are not filed with the DOT. In fact, household goods carriers do file tariffs. Presumably, the result would have been different had the court been advised that the tariff was on file. The carrier's liability was found to be limited in that case on the basis of a specific declared value, not on the basis of the tariff.

Another federal district court in Illinois held that under the federal common law, which applies to interstate transportation which is not subject to the Carmack Amendment (because it is exempt, such as transportation of agricultural commodities or transportation which is prior or subsequent to air carriage), a carrier may limit liability under the "released value doctrine." In Mudd-Lyman Sales and Service Corporation v. United Parcel Service, Inc., 2002 WL 31687683 (N.D. Ill., Nov. 26, 2002), the court held that the UPS package limitation of liability was enforceable under the "released value doctrine" because it gave the shipper reasonable notice of the limitation and a fair opportunity to purchase higher liability. Presumably, this requires that the shipper have actual knowledge of the limitation. It is interesting to note that the court found that the shipper accepted the terms of UPS's limitation of liability by breaking the shrinkwrap seal on computer software provided by UPS and by on-screen acceptance of the software license.

Applying federal common law to a FedEx shipment, a federal district court in Minnesota applied the limitation of liability contained in the FedEx Service Guide to limit the liability of an interstate motor carrier on whose truck the goods were destroyed. U.S. Xpress, Inc. v. Great Northern Insurance Company, 2002 WL 31789380 (D.Minn, Dec. 9, 2002).

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their Thirteenth Annual Transportation Seminar in the New York City area on April 28 and 29. 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 are also available on our web site.