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**Prepared by Ira S. Lipsius and  
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225 West 34th Street  
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**T**he Indiana Supreme Court held that a driver who operated a vehicle in violation of a company rule prohibiting consumption of alcohol prior to use of a company vehicle is not a permissive user of the vehicle and therefore not covered by the automobile insurance policy.

The U.S. Court of Appeals for the Fifth Circuit held that a general liability insurance policy does not cover a loss for which the insured may be liable if the insured's liability does not arise from its negligence. We believe the decision may be applicable to motor carrier insurers' coverage for pollution clean-up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), where an insured is ordered to pay for clean-up in the absence of negligence.

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### **Cargo Loss & Damage**

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**M**any decisions published in 1997 relating to cargo loss and damage discussed the preemption of state law claims in Carmack Amendment cases. Typically, they involve motions by household goods movers to dismiss claims by irate customers for fraudulent misrepresentation and for relief under state deceptive trade practices statutes. As in most areas of litigation, the results vary. The most authoritative of these new cases is an opinion of the U.S. Court of Appeals for the First Circuit which confirmed the proposition that the Carmack Amendment provides the sole remedy for cargo loss and damage in regulated transportation service and that claims under state laws which "enlarge the responsibility of the carrier for loss" beyond the "actual loss or injury to the property" standard of the Carmack Amendment are not permissible. On this basis, the court dismissed state law claims for negligence, misrepresentation and unfair and deceptive trade practices in connection with the settlement of the loss and damage claim. The court found that since the only damage suffered by the claimant was the damage to her goods, the claims related to the settlement abuses were preempted. It should be observed that this court, as well as most, if not all, others, would allow a claim for intentional infliction of emotional distress to proceed on the grounds that the injury alleged in such a claim is not injury to the cargo. Such claims are difficult to sustain,

and further muddy the waters insofar as they would not be covered by cargo insurance. Similar results were obtained in cases decided by the U.S. Court of Appeals for the Seventh Circuit and by the U.S. District Court in Nevada. On the other hand, state courts in Connecticut and Georgia permitted claims for fraudulent misrepresentation and deceptive trade practices both in contract formation and claims resolution on the grounds that such claims were not for damage to property. A state court in Illinois, on the contrary, held that a consumer fraud claim was preempted because it was for damage to the cargo. It appears that the motor carrier will be well advised to remove state court actions to federal courts where state law claims are more likely to be dismissed. It should be pointed out that preemption under the Carmack Amendment is not confined to household goods and that it will apply to contract as well as common carriage inasmuch as the ICC Termination Act made the Carmack Amendment applicable to all regulated transportation.

A preemption argument was rejected by the Supreme Court of Virginia, which permitted a shipper to state a claim of conversion against a motor carrier and its insurer arising out of the salvage sale of the damaged cargo. The court held that the alleged conversion did not arise out of the service performed under the bill of lading and that in any event the Carmack Amendment did not apply to protect the insurer. This decision may place unexpected burdens on an insurer undertaking a salvage sale.

The issue of a carrier's liability for consequential damages was addressed in a recent decision of the U.S. District Court in Arizona in a case in which we represented the carrier. A jet engine which was leased by the shipper hit an overpass while exiting the maintenance facility at an airport on a flatbed. The claim included damages for sums due under the lease for the period during which the engine was being repaired. The court held that the past experience of the carrier in transporting jet engines was not sufficient to place the carrier on notice that leasing expenses would accrue if the engine was damaged in transit, and that actual notice was required in order to impose consequential damages. The court also denied summary judgment to the owner of the engine on the issue of liability even though the height of the load could have been measured by the driver. The court held that the carrier would not be liable for the loss if a jury found that it was reasonable for the driver to rely on the representations of employees of the maintenance facility that he could leave the facility without incident.

When a cargo policy is written to cover only specified vehicles, the theft of cargo from a detached unspecified trailer raises an interesting coverage question. In cases this year in Florida and Louisiana at both the trial and appellate levels we represented insurers who successfully avoided coverage even though the trailers had been brought by scheduled tractors to the storage yards from which they were stolen. The courts held that the

unscheduled trailers had to be attached to the covered tractors at the time of the theft for coverage to apply.

The nine-month notice of claim requirement is the subject of a comprehensive decision rendered recently by a federal court in Texas. The court granted summary judgment to the motor carrier on the grounds that a proper claim had not been filed within nine months of the date of loss. The first notice of claim by the shipper contained a partial list of the items destroyed in a fire and did not demand a specific dollar amount. This did not meet the requirements of the former ICC claims regulations. The carrier tendered a check for an amount calculated on the basis of alleged limitation of liability provisions in the bill of lading and the claimant returned the check without specifying a claim amount. This response also did not qualify as a claim. Finally, an attorney representing the insurer of the claimant wrote to the motor carrier advising that the claimant held the carrier liable for the loss and that "damages associated with this fire are in excess of \$46,000." Even though the claimant contested that it had ever received a bill of lading the court held that the claimant was bound by the nine-month claim provision in the carrier's tariff. The court applied the claims regulations strictly even though the motor carrier in tendering a settlement check clearly recognized that a claim had been presented. The court also held that the tendering of the check as a "full and final offer" did not mislead the claimant into concluding that a more formal claim was not required. Similarly, a federal court in New York held that post-rejection settlement negotiations did not affect the running of the two-year suit provision.

Finally, a federal court in New Jersey which was faced with difficult issues as to whether certain parties were a motor carrier, freight forwarder or broker, resolved the issue by staying the action and requiring the parties to submit the questions to the Secretary of Transportation for determination. Counsel in the case expect that the DOT will refer the matter back to the court.

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The law firm of Schindel, Farman and Lipsius looks forward to advising and representing our clients on all issues of insurance coverage, commercial auto liability and cargo liability in the coming year. Please feel free to call us to assist you or to discuss any questions regarding the issues covered in this resumé, or visit our web site at <http://www.sfl-legal.com>.

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their Eleventh Annual Transportation Seminar in New York City on April 27 and 28. Registration is limited and in the past we have always been over-subscribed. We suggest that you submit your application by March 1. For applications or additional information please call Kim Stanback at (212) 563-1710, Ext. 240. An application form will also be available on our web site beginning February 1.

