

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 <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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and the driver's negligence in operating the vehicle in an unsafe manner, which broke any causal connection.

LIMITATION OF LIABILITY

There are several interesting new cases concerning limitation of liability for cargo loss and damage by

interstate common carriers. In *Toledo Ticket Co. v. Roadway Express, Inc.*, 133 F.3d 439 (6th Cir.), the court held that a limitation of liability contained in a tariff, which at the time of the loss was on file with the ICC, was not enforceable because the carrier did not give the sophisticated shipper actual notice that its liability would be limited unless the shipper exercised its right to declare a higher value. The court said that the published tariff and the usual notices on the face of the bill of lading to the effect that the shipment was subject to the tariff and that shippers are required to declare a value when the rates are dependent on value did not "satisfy the carrier's heavy burden" to provide the shipper with a fair opportunity to choose the amount of the carrier's liability.

In sharp distinction to *Toledo Ticket* is the opinion of the court in *Hollingsworth & Vose Co. v. A-P-A Transportation Corp.*, 158 F.3d 617 (1st Cir.), which specifically rejected the holding of *Toledo Ticket* as a "minority position." The tariff in that case provided that carrier liability would be limited if the shipper did not declare a higher value. The carrier's bill of lading contained essentially the same notices as the Roadway bill of lading. The court held that the tariff and the blank space on the bill of lading for a value declaration was sufficient to provide a "fair opportunity" to choose a liability amount so long as the shipper was "a substantial commercial enterprise capable of understanding the agreements it signed." The court held that the shipper had constructive notice of the carrier's tariff even though the limitation was not found in the tariff of A-P-A, the carrier which the shipper engaged to carry the shipment, but was found in the tariff of another carrier which A-P-A engaged to pick up the cargo.

In *Jackson v. Brook Ledge, Inc.*, 991 F.Supp. 640 (E.D. Ky.), the loss occurred in November, 1995, at which time tariffs were no longer required to be on file with the ICC. The court was thus faced for the first time with the question of whether shippers would be deemed to have knowledge of the provisions of a tariff which was not on file as a public record but which would be available to the shipper only upon request to the carrier. The court enforced the limitation contained in the tariff, holding that the shipper was charged with the knowledge of the contents of the tariff.

LIABILITY COVERAGE ISSUES

Although the court acknowledged that its ruling appears shocking at first glance, it held in *Fratis v. Republic Western Ins. Co.*, 147 F.3d 25 (1st Cir.), that an insurer of a truck rental company which provided only \$25,000 of coverage for lessees and permissive users was held liable to pay, in addition, approximately \$1 million in post-judgment interest charges.

FEDERAL LAW

In a decision defining the outer limits of interstate commerce, the court in *Century Indemnity Co. v. Carlson*, 133 F.3d 591 (8th Cir.), held that when a Minnesota farmer hired a trucker to sell his excess grain on the spot market at a nearby river terminal he was initiating an interstate move, since 99% of the corn received at the terminal was eventually shipped out of state. The subjective intent of the shipper, who was uninterested in the final destination, was irrelevant. The court also noted that the MCS-90 endorsement applied to a loss arising out of the interstate shipment of exempt commodities. Our firm represented Century

In *United States v. Gunther*, 134 F.3d 365 (4th Cir.), the court affirmed the criminal conviction of the president of a trucking company for conspiracy to violate the highway safety regulations. In *Abrams v. Trunzo*, 129 F.3d 1174 (11th Cir.), the court concluded that the question of whether the United States was an insured under a policy issued to an Air Force Colonel who was involved in an accident while within the scope of his government employment, did not involve a question of federal law. The policy provision at issue excluding a vehicle lessee was enforceable under state law and no coverage was afforded to the government.

CARRIER LIABILITY

The issue of what defines a for-hire carrier, as opposed to a private carrier, was analyzed in *Progressive Northwestern Insurance Co. v. Martinez*, 956 P.2d 845 (N.M. App.). Applying the primary business test utilized in both state and federal decisions, the court concluded that the company's main business was mining, and that it was not a carrier for hire. Accordingly, it was not required to satisfy statutory provisions mandating certain minimum insurance coverage for for-hire carriers.

In *United Kingdom v. Northstar Services, Ltd.*, 1 F. Supp.2d 521 (D. Md.), the court concluded that defendant had acted as an international freight forwarder rather than a carrier and, as such, bore only the duties set out in its contract, specifically the obligation to hire a reputable trucking company, which it had done.

In *Cochrane v. Schneider National Carriers, Inc.*, 980 F. Supp. 371 (D. Kan.), the court held that any possible negligence by a trucking company in giving directions to its driver could not be viewed as the proximate cause of an accident that followed in light of the various intervening causes, such as the weather

Judgment had been entered against the lessee for some \$3 million. Although the lessor's insurer never denied owing the \$25,000, it failed to pay those limits for six years. Since the insurer agreed, under its policy terms, to pay "all interest," the court, following the majority line of cases, concluded that it was responsible for interest on the entire \$3 million judgment.

The fellow employee exclusion was found not to violate Vermont's financial security law in *Davis v. Liberty Mutual Ins. Co.*, 19 F.Supp.2d 193 (D. Vt.). In a late 1997 decision, the court in *Sodorff v. United Southern Assur.*, 980 F. Supp. 1004 (W.D. Ark.) held that an employee could not be considered a fellow employee of the owner of the trucking company.

The Michigan Court of Appeals analyzed the rarely litigated "reciprocity clause" of the truckers liability coverage form in the latest reprise of *Engle v. Zurich-American Ins. Co.*, 230 Mich. App. 105. The policy at issue contained the old (pre-1992) ISO version of the reciprocity clause. In a close reading of that provision, the court concluded that the lessee-driver qualified as an insured under the liability policy and was not excluded by the reciprocity clause.

The decision by the well-respected Judge Easterbrook in *Transport Ins. Co. v. Post Express*, 138 F.3d 1189 (7th Cir.), may have been painful for the insurer in that case, which was required to pay in full a \$2.3 million judgment even though its policy had \$1 million limits. Other insurers, though, may benefit from the lesson. The court reaffirmed the "truck driver" rule that provides that it is the trucking company, not the individual driver, that is obligated to report a loss to the insurer. More significantly, the court insisted that the insurer had acted in bad faith when it acknowledged at trial that the insured was liable but urged the jury to award only \$225,000. This constituted an improper gamble by the insurer with the insured's assets.

REGULATORY ENDORSEMENTS

The federal district court in *Hamm v. Canal Insurance Company*, 10 F. Supp. 2d 539 (M.D.N.C.), rejected plaintiff's argument that the MCS-90 endorsement creates potential liability for the insurer in excess of policy limits. Four people were killed and three seriously injured in an accident involving a truck operated by a regulated carrier. The policy, which appears to have covered the accident vehicle, had liability limits of \$1 million, and the same amount was typed onto the MCS-90. The court found nothing in the statutory or regulatory materials or the case law supporting plaintiffs' argument that each individual victim is entitled to recover at least \$750,000 under the endorsement.

This year featured a series of decisions by supreme and appellate courts of the state of Georgia on the issue of the scope of the uniform state motor carrier bodily injury endorsement and filing (known, respectively, as Form F and Form E). In *Ross v. Stephens*, 269 Ga. 266, the supreme court held that where an insurer was exposed solely on the basis of the Form F, its maximum liability was the \$100,000/300,000 state financial security limits, rather than the \$750,000 policy limits.

Exempt carriers do not file proof of insurance with the states. In *Lockhart v. Southern General Insurance Company*, 231 Ga.App. 311, cert. denied, the plaintiffs sued the insurer of a motor carrier, claiming that the insurer was liable pursuant to the Georgia motor carrier statute. The motor carrier was not

registered with the Georgia Public Service Commission. However, the plaintiffs argued that the motor carrier should have registered and that the insurer should have made a Form E filing and attached the Form F endorsement to the policy. The court, however, held that it is the insured's responsibility to register and ensure that a Form E is in place. In the absence of such a filing, there was no basis for a direct action against the insurer by plaintiffs.

Finally, in response to a certified question from the U.S. Court of Appeals for the Eleventh Circuit, the Georgia Supreme Court held in *DeHart v. Liberty Mutual*, _____ Ga. _____, that an insurer which failed to cancel a Georgia Form E filing was liable for damages arising out of an accident that occurred long after the policy expired even though another insurer had, in the meantime, filed a Georgia Form E, and the accident at issue occurred in South Carolina.

NON-TRUCKING (BOBTAIL) COVERAGE

The year featured some important decisions involving the scope and enforceability of the non-trucking endorsement, including these two in which our firm was involved.

Royal Indemnity Company v. Providence Washington Insurance Company, _____ N.Y. _____ (1998). In response to a certified question from the second federal circuit, New York's highest court held that the standard ISO non-trucking endorsement is unenforceable in New York as it conflicts with the state's ownership liability law and related insurance statutes. (We add that under the court's ruling the form developed by ISO in the early 1990's for use in New York would also be unenforceable). Defendant argued that its underwriting guidelines guaranteed that the lessor was under lease to a regulated carrier with the mandated federal insurance limits. The court felt that this was insufficient protection for the public, though, since there is no way that the insurer could be certain that the lease will remain in effect or that the lessee's policy will be available. The court did suggest that a contingent type endorsement would be enforceable.

National Continental Ins. Co. v. Empire Fire & Marine Ins. Co., 157 F.3d 610 (8th Cir. 1998), involved a loss which occurred during a three week layover period following Christmas which is often a quiet period in the trucking industry. The owner-operator in this particular case completed his final pre-holiday run on December 22 and was not dispatched again for about three weeks. One morning, in early January, he decided to take advantage of the opportunity and have his front alignment checked at a nearby service station. En route to the station he was involved in an accident. The court decided the issue according to the laws of the state of Oregon where the vehicle was garaged. In line with earlier precedent, the court applied a variation of the test used in Oregon to determine whether an employee is acting within the scope of his employment at the time of the loss. The court held that since maintaining the vehicle was one of the duties set out in the lease agreement (even though it was the lessor's duty), the lessor was engaged in the lessee's business at the time of the loss.

Among other interesting cases during the year were: *Guaranty National Ins. Co. v. Vanliner Ins. Co.*, 1998 U.S. Dist.

LEXIS 9505 (E.D.Pa. 1998) (driver remained in the business of lessee when he drove to mall and coffee shop while waiting for trailer to be loaded); *MGA Transport Corp. v. Cain*, 128 N.C. App. 428 (driver bobtailing from his home to lessee's terminal was in business of lessee because he was obligated to keep tractor at home and conduct pre-trip inspections at home before setting out on assignment); *Planet Ins Co. v. Anglo American Ins. Co.*, 711 A.2d 899 (N.J. App.) (trip to repair shop was in business of lessee and stop at dry cleaner did not change that).

UNINSURED MOTORISTS COVERAGE

Every year brings dozens of new decisions on uninsured (UM) and underinsured (UIM) motorists coverage. We have selected several of the important ones, particularly those which impact upon commercial or fleet accounts.

Piazza v. Little, 497 S.E.2d 429 (N.C. App.) (now on appeal) (failure to offer UM on umbrella policy leads to award of umbrella policy limits even though insured selected UM in an amount below liability limits in the underlying policy); *Progressive American Insurance Company v. Vasquez*, 502 S.E.2d 10 (N.C. App.) (now on appeal), (\$20 million of UIM available to plaintiff because insurer failed to offer UIM on umbrella policy); *Leisure v. State Farm Fire and Casualty Co.*, 2 F. Supp. 2d 970 (N.D. Ohio) (UM available because insurer failed to completely comply with Ohio requirement of written UM offer with rate quote); *National Union Fire Insurance Co. v. Drex Corp.*, 713 A.2d 1145 (Pa. App.) (even slight deviation from statutory requirements of rejection form leads to UM coverage); *Employers Insurance of Wausau v. Stopher*, 155 F.3d 892 (7th Cir.) (named insured may reject UM and decision is binding upon employees of subsidiary companies); *Frantz v. United States Fleet Leasing, Inc.*, 245 Conn. 727 (rejection by any named insured binding upon all insureds); *Magnifico v. Rutgers Casualty Insurance Co.*, 153 N.J.406 (passenger entitled to collect UIM under policy of driver, but not under her own policy because of New Jersey anti-stacking law).

AGREED STOPPING PLACES

Listing the agreed stopping places on an air waybill is among the various obligations incumbent upon an international air carrier that wishes to limit its liability to \$20.00 per kilogram, approximately \$9.07 per pound, pursuant to the Warsaw Convention.

The current debate focuses on whether the carrier will be able to limit its liability where the information set out on the air waybill is in some way incorrect. For example, in *Federal Ins. Co. v. Yusen Air & Sea Service*, 1998 U.S. Dist. LEXIS 12568 (S.D.N.Y. Aug. 14, 1998) the court upheld the limitation of liability even though the carrier listed an incorrect flight number for the second leg of the flight. Notwithstanding this error, the Court found that Yusen had successfully incorporated Amsterdam as a stopping place because the first leg of the flight was correctly listed and showed Amsterdam as a stopping place. See also *General Electric Co. v. Circle Air Freight Corp.*, 1997 U.S. Dist. LEXIS 3245 (S.D.N.Y.) (the fact that the air waybill listed wrong airport in Paris as a stopping place did not invalidate Warsaw Convention's limitation of liability); *Martin Marietta Corp. v. The Harper Group*, 950 F. Supp 1250 (S.D.N.Y.) (the fact that the air waybill listed wrong date for the shipment's stopping

place did not invalidate Warsaw Convention's limitation of liability).

Not all courts are as forgiving regarding flight information errors on the air waybill and have held that such errors invalidated the Warsaw Convention's limitation of liability. See e.g., *American Home v. Jackey Maeder*, 999 F. Supp. 543 (S.D.N.Y.) (failure of air waybill to list the correct flight number invalidated Warsaw Convention's limitation of liability). Therefore, to ensure that the limitation of liability under the Warsaw Convention will be enforced, if a carrier is not going to specifically list the stopping places for the shipment, the flight information for the shipment, including the air carrier's time tables must be incorporated into the air waybill and should be listed accurately.

FOREIGN FORUM SELECTION CLAUSE

Prior to the United States Supreme Court's 1995 decision in *Sky Reefer* (515 U.S. 528) courts were generally unwilling to enforce a provision in international ocean bills of lading containing a forum selection clause. Although the particular dispute before the Supreme Court in *Sky Reefer* was the enforceability of an arbitration clause, many courts have concluded that under the reasoning of *Sky Reefer*, foreign forum selection clauses are usually enforceable. *Fireman's Fund Ins. Co. v. M/V DSR Atlantic*, 131 F.3d 1336 (9th Cir.) (court enforced a forum selection clause requiring disputes to be adjudicated in Korea), *cert. denied*, 119 S. Ct. 275; *Mitsui & Co. (USA), Inc. v. Mira*, 111 F.3d 33 (5th Cir.) (court enforced a forum selection clause requiring disputes to be adjudicated in London).

Since a foreign forum selection clause in a bill of lading is presumptively enforceable, the burden is on the party seeking to avoid application of the clause to establish that the substantive law to be applied by the foreign tribunal will reduce the carrier's obligations to the cargo owner below what the Carriage of Goods by Sea Act ("COGSA") guarantees. To overcome the presumption of enforceability is a difficult and expensive, although not impossible, task. For example, in *Union Steel America Co. v. M/V Sanko Spruce*, 14 F. Supp. 2d 682 (S.D.N.Y.), *reconsid. denied*, 1998 U.S. Dist. LEXIS 18021 (D.N.J.) the district court held that although a Korean forum selection clause was enforceable as to a bill of lading's contracting parties (the shipper and the time charter), it was not enforceable as to parties who were not signatories to the bill of lading (the vessel owner and vessel manager). On re-consideration, the court also declined to enforce the forum selection clause as to the latter parties, because it was unclear whether they would be recognized as carriers under Korean law, and therefore might escape liability notwithstanding that they would be liable under COGSA.

Transportation Seminar - Schindel, Farman & Lipsius and CAB will hold their Twelfth Annual Transportation Seminar in New York City on April 26 and 27. 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 Kim Stanback at (212) 563-1710, Ext. 240. An application form will also be available on our web site beginning February 1.

