News on industry developments and transportation projects from the Transportation and Logistics Law Group at Dean & Fulkerson

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ROAD REPORT

(INDUSTRY LEGAL NEWS)

■ **Mistaken Identity?** A property broker listed as "Carrier" on the bill of lading avoided Carmack liability for a freight damage claim when the court determined that the freight bill was prepared by a third party and the written contract between the property broker and the actual carrier responsible for the damage clearly spelled out their respective roles.

Delta Stone v Xpertfreight US (USDC Utah 2018)

■ **No Notice, No Law Suit.** The court dismissed a lawsuit brought by one of two parties to a co-brokerage agreement upon determining that the suing party failed to provide a written 15 day "notice to cure" expressly set forth in the agreement ("shall provide") as a condition precedent to commencement of legal proceedings.

ONF Systems v Cargomatic (USDC NJ 2018)

■ **Driver's Physician's "Return to Work Certificate" Insufficient.** Following a heart event, a driver presenting a treater's "return to work" failed to obtain from the doctor additional information addressing specific FMCSA directed assessment standards. The court determined that the driver's ultimate termination for "AWOL" was not due to any discriminatory intent unlawful under the Americans with Disabilities Act.

Dantzler v City and County of San Francisco (9th Cir 2018)

■ **Drivers Deemed Independent Contractors**. A court held that drivers utilized in a FMCSA regulated drive-away service were independent contractors and not employees of the drive-away operator. The carrier's provision of some training and compliance with all FMCSR driver

ON THE DOCK

(CURRENT D&F PROJECTS)

■ **West Michigan Seminar.** D&F, in conjunction with the MTA and the MTA West Michigan Council of Safety Management, presented the First Annual West Michigan Transportation Seminar on May 10. Since nearly 100 guests attended, we hope to repeat this again next year.

■ **D&F Strengthens Roster.** D&F's Transportation & Logistics Group welcomes to the firm Karen Ludden, Sarah Brutman and Eric Wagman, a group having specialized expertise in insurance coverage and accident defense matters, especially as relating to truckers.

D&F Attorney: Karen Ludden

■ **Detention Policy Upgrade.** A carrier facing significant issues with shipper delays in the loading/unloading and release of spotted equipment worked with D&F's transportation specialists in drafting and implementing a custom Detention Policy.

D&F Attorney: Neill Riddell

■ **Multi-Employer Plans.** D&F continues to provide analysis and guidance regarding potential "withdrawal liability" arising from client participation in Teamster Pension Plans.

D&F Attorney: Janet Lanyon

■ **Defending Death Claim.** D&F recently undertook defense of a carrier in connection with claims asserted by the estate of a wrong-way-driver.

D&F Attorney: Eric Wagman

FEATURE:
INSURANCE COVERAGE AND MCS-90
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FEATURE ARTICLE

Putting a vehicle back on the road after the winter? Better make that call and add it back onto your policy right away because MCS-90 won't save you.

By Karen Libertiny Ludden

Spring is the time when commercial vehicles are often rotated into or out of service. Combine that with an uptick in business, and commercial carriers often forgot or postpone calling their agents or insurance carriers to add vehicles back on to their commercial policy immediately. Sometimes the delay is simply caused by the common failure to get around to insurance updates at such a busy time of year. But sometimes the delay is caused by a misunderstanding of how the MCS-90 endorsement applies to interstate haulers. Many trucking companies think that MCS-90 protects them from liability for interstate trucking accidents because they have heard that it applies whether the vehicle is listed on the policy or not. That is true in one respect, but it is only half the story and, if you are not careful, you will end up at the business end of a lawsuit.

MCS-90 is an endorsement required by the Federal Motor Carrier Safety Regulations (FMCSR), and it attaches to commercial auto policies for interstate haulers. Many trucking companies think that it is just another form of insurance, but it is not.

For starters, MCS-90 is a surety, not an insurance policy. Although it attaches to a commercial policy as an endorsement supplied by an insurance carrier, a surety does not operate like traditional insurance, it operates as a guarantee. In this context, it is a guarantee that the public will be protected from damage done by interstate motor carriers, whose national business make it difficult to allocate financial responsibility. Thus, it differs from an insurance policy because the protected party is the public, not the policyholder.

There are other important ways it differs from an insurance policy as well. For example, it does indeed apply to any vehicle that the company named on the policy is operating when it places its placard on the truck or by its interstate licensing, whether it is listed on the policy or not. It also applies regardless of insurance coverage exclusions that would otherwise defeat coverage, like non-cooperation, intentional acts and notice clauses. This is again because it is intended to protect the public, and it does so by obligating an insurer to pay an injured party, regardless of exclusions in the policy.

This sounds really good, but it might lull you into a false sense of security. This is because the surety does not require the insurance carrier to defend the lawsuit, just indemnify you for any judgment (i.e. post-trial verdict or judge-entered judgment). Thus, you technically have the responsibility to defend the lawsuit and incur all the legal expenses (if you do not otherwise have coverage under the policy), and the insurer has the right to sue you to recover that amount. Again, that is because it is the public that MCS-90 intends to protect, not trucking companies. Some carriers choose to pick up the defense anyway, just to control the outcome better, but there is no guarantee that they will.

This is when the question of whether you added that truck you just pulled out from storage back on to your policy becomes important. If a truck involved in an accident is listed on the policy, and no other exclusions apply because you've cooperated, placed your insurance carrier on notice and otherwise complied with the requirements of the policy, you are in a good position. If there is no coverage for that vehicle because you did not add it, you have a problem. MCS-90 will protect the public, but it won't protect you.

ROAD REPORT

(CONTINUED)

rules was not sufficient, according to the court, to establish a level of control over the drivers consistent with an employer-employee relationship.

QD-A v Indiana Dept of Workforce Development (Indiana App 2018)

■ **Wrong But Not Wrong Enough**. Evidence of inaccuracies in a driver's Motor Carrier Management Information System data base is not sufficient to establish legal standing sufficient to permit the driver's action for correction of the data base. According to the court, evidence of injury is required, and no injury is provable absent evidence that the incorrect data in question has been disseminated to prospective employers.

OIDA v US DOT (DC Cir 2018)

ON THE DOCK

(CONTINUED)

■ **HM Certification Snafu.** D&F recently assisted a client with a 300+ unit fleet work through a snafu encountered with the 2018 Hazardous Materials Multi-State Certification process, one that produced an urgent need for the state's expediting of the process.

D&F Attorney: Jim O'Brien

■ **Negligent Broker Claim.** An individual injured when rear-ended by a truck sued the property broker who arranged the transportation, alleging negligence, when it was discovered that the co-defendant carrier failed to maintain required insurance. D&F assisted in resolving the claim.

D&F Attorney: Neill Riddell