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Editor: Colin Bell **Summer 2015**

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Turf Valley, MD

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Maryland
Workers' Compensation
Seminar
Hunt Valley, MD

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MARYLAND INSURANCE LAW UPDATE

UM/UIM INSURERS MAY DISCLAIM COVERAGE FOR INSURED'S FAILURE TO OBTAIN CONSENT PRIOR TO UIM POLICY LIMIT SETTLEMENT

Woznicki v. GEICO General Ins. Co. (consolidated with *Morse v. Erie Ins. Exchange)*

Jessica Woznicki was injured in a motor vehicle accident in Maryland in which the at-fault driver, James Bowman Houston ("Houston"), was covered under a Nationwide Insurance Company ("Nationwide") liability policy with a limit of $20,000. Woznicki was insured under a policy with GEICO providing her with $300,000 in uninsured/underinsured ("UM/UIM") benefits. As a result of the injuries sustained during the accident, Woznicki asserted a claim against Houston for which Nationwide offered $20,000 — the policy limit — to settle. According to both the UM coverage language and Section 19-511 of the Maryland Insurance Article, Woznicki was required to provide written notice to GEICO of any settlement offer which would exhaust the tortfeasor's liability insurance policy limits and obtain GEICO's consent to settle prior to accepting any such settlement with the tortfeasor.[1] Instead, Woznicki executed a Release of all claims against Houston (effectively settling the matter), and at that time sent a letter to GEICO requesting consent to accept the settlement. Approximately five weeks later, GEICO responded denying any and all UIM coverage to Woznicki because she had "failed to obtain [GEICO's] consent, which is required by both [§ 19-511] and Section IV of the policy contract." Woznicki's attorney at that time claimed that he had received oral consent from an unidentified female agent of GEICO on the same day the Release was executed and post settlement written notice was sent. He was a Delaware attorney, where notice of an underlying settlement as a condition precedent to making a UIM claim is not required and he was not even aware of the Maryland statute requiring written notice to the insurer.

Woznicki then filed a Complaint and Demand for Jury Trial against GEICO for breach of the insurance policy seeking damages in excess of the $20,000 she had received from Nationwide. The trial court granted summary judgment in favor of GEICO, which was upheld by the Maryland Court of Special Appeals. Woznicki then appealed to the highest court in Maryland, the Court of Appeals, which granted the petition and accepted the appeal. In considering the appeal, the Court of Appeals charged itself with determining whether (1) GEICO could legally waive the notice requirement and if so did it do so; and (2) if there was no waiver, whether GEICO must show prejudice arising from its insured's failure to give notice of the settlement with the tortfeasor.

In considering the first question, the Court found that an insurer CAN waive the notice requirement in a UM/UIM claim – such a finding allowing waiver being consistent with Maryland's public policy in enacting mandatory UM/UIM to favor compensating innocent victims injured in motor vehicle accidents. However, on the second question, the

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Court of Appeals found as a matter of law that there was no waiver. The evidence from Plaintiff's Delaware counsel of his interaction with the unidentified GEICO adjuster did not constitute a waiver. Even though the attorney claimed the adjuster consented to the settlement (which was already agreed), he conceded there was absolutely no specific discussion of waiving written notice – or even any mention of this, given he was not aware of the law and the requirement. Also, he had corresponded with GEICO following this supposed conversation and waiver and what he wrote was not consistent with having obtained a waiver to notice.

Plaintiff's secondary argument was that pursuant to Maryland law an insurer must show prejudice in declining coverage for lack of notice required by law and/or the policy. This argument was based on another section of the Insurance Article, which specifically provides an insurer can only disclaim coverage for lack of cooperation by an insured or "by not giving the insurer required notice," which "resulted in actual prejudice to the insurer." However, the Court decided that the term "notice" in this provision referred to an insured's duty to promptly notify its automobile insurer of an accident and of any suit filed thereon NOT the written notice required of any settlement for policy limits in the underlying case against the uninsured or underinsured tort-feasor. The Court further found that the term "cooperate" referred to the insured's responsibility to "cooperate . . . during the investigation and subsequent defense or settlement of any claim brought against the insured" and so again nothing to do with cooperation in the context of a UM/UIM claim. Thus, the Court reasoned, Woznicki's untimely notice of and failure to obtain consent to her settlement for policy limits with the underlying tort-feasor and his insurer Nationwide justified GEICO's denial of coverage such that summary judgment in the trial court was correct.

There are perhaps two things to be taken from this case. One is the problems that can arise in not having local counsel who knows the law. Obviously in the context of this case, it was more than helpful to the defense that Plaintiff's original counsel was from Delaware and did not know Maryland's insurance law – but there is still a salutary lesson to be learned for the defense, to retain local counsel who knows the law, the venue, the judges and the likely may have more inherent credibility before a local jury. Over the years Franklin & Prokopik has gathered a vast database of contacts, including attorneys throughout the United States. While clients sometimes have us travel to other jurisdictions to directly handle matters, we offer a complimentary referral service to our clients looking for counsel in another state. This case also serves as a warning to insurers in Maryland that requirements imposed on an insured as a condition precedent to making a claim can be waived by an insurer. Thus, an insurer would be well advised to be very careful in its interaction with an insured (or counsel for an insured) and when discussing claim requirements when a waiver might be implied.

[1] Under both authorities, GEICO was given 60 days to respond with notice of whether consent to proceed with the settlement would be granted or denied and, if denied, GEICO would then have 30 days from providing said notice to tender the policy limit amount to its insured.

FMCSA Update

Commercial Motor Vehicle Driver Restart Study

The Federal Motor Carrier Safety Administration (FMCSA) has been directed by Congress to perform a commercial motor vehicle (CMV) driver study to investigate the impact of one versus at least two nighttime rest periods during the 34-hour restart break. The study was mandated as part of the Consolidated and Further Continuing Appropriations Act of 2015, referred to as the Collins Amendment, which suspends the preexisting restart requirement that each restart period contains at least two 1 a.m. to 5 a.m. overnight breaks, as well as the restriction on use of a restart to once every seven days. The previous unrestricted use of the restart permitted drivers to extend their working hours to approximately 82 hours per week. The suspension is in effect until either the latter of September 30, 2015 or submission of the final report issued by the Secretary of Transportation.

Those opposed to the restart restriction argue that the overnight restriction forces drivers to be on the road during the most heavily traveled times, such as morning rush hour, during which time children are also traveling to school. They also contend that the restriction fails to account for the sleep science specific to those already operating on shift schedules, rather than traditional day/night work schedules. Proponents argue that it assists with alleviating driver fatigue and contributes to overall road safety, as it provides drivers with a guaranteed "weekend" to recover. Proponents also suggest that the restriction does not force drivers to operate during the most congested

traffic hours. It is claimed that those drivers on the road at congested times do so in attempting to extend their operations to the nearly 82-hour weekly maximum available through the regular use of restart breaks (because the restriction places no limitation on the specific time of operation).

The FMCSA study peer review was completed in February 2015, and the United States DOT Office of Inspector General review was completed in March 2015. The study will be completed through the collection of data from volunteer drivers, the recruitment for which concluded in April 2015.

We will no doubt have an update in the future (we were going to provide in the near future, but this is the government we are dealing with!)

Maryland Transportation Law Update

Maximum Potential Speed Limit in Maryland Increased

On May 12, 2015, the Maryland legislature approved Senate Bill 44, a measure serving solely to amend Section 21-801.1(e)(2) of the Transportation Article of the Maryland Code, increasing the maximum allowable speed limit in the State from 65 to 70 miles per hour. The change affects only interstate highways and expressways and will be effective October 1, 2015, although it will not have an immediate effect on the speed limit of any particular road. Rather, this amendment grants local authorities permission to alter the speed limits of affected highways and expressways in the State up to the new maximum.

It should be noted that Section 21-804(c) of the same Transportation Article forbids the driving of certain vehicles on a highway "if the maximum speed capability of the vehicle does not exceed the posted maximum speed limit for the highway by at least 5 miles per hour." Considering motor carriers often govern the top speed of their vehicles and based on the potential increase in the posted limit on some of Maryland's highways, care must be taken to ensure any governed limits are appropriate for the speed limit on a given road.

Transportation Cases

The Courts Once Again Appear to Expand Theories of Liability in the Transportation Industry in Favor of Plaintiffs

Vargas v FMI, Inc. et al.

The U.S. Court of Appeals for the Second District of California recently over-turned a trial court's finding as a matter of law that a defendant motor carrier and the separate defendant owner of a tractor unit were not vicariously liable for the negligent actions of a driver injuring a passenger co-driver.

Motor carrier FMI, Inc. utilized independent contractor ("IC") owner-operators to ship goods from its distribution center. Eves Express, Inc. ("Eves") owned tractor units which it would lease to FMI and also provided drivers. FMI leased a tractor unit owned by Eves, and Eves in turn hired Plaintiff and a co-driver, Villalobos, as a two man driving team to operate that tractor and haul a trailer owned by FMI from California to New Jersey. About four (4) hours out from pick-up Plaintiff was asleep in the sleeper berth with co-driver Villalobos driving, when Villalobos lost control, struck a center divider, the truck rolled over and Plaintiff was injured. Plaintiff sued all of Villalobos, FMI, Eves and Suchite. Plaintiff admitted during the litigation that he and his co-driver were independent contract drivers. Generally a hirer is not liable for the torts of an independent contractor and can also delegate to an independent contractor the duty to ensure workplace safety. The trial court granted summary judgment to FMI and Eves, finding that because Plaintiff and Villalobos were admitted independent contractors, FMI and Eves owed no tort duty to Plaintiff and also could not be vicariously liable for the negligence of Villalobos. The trial court also found that Eves was entitled to summary judgment pursuant to the Graves Amendment (federal law preempting negligence claims that a vehicle owner is vicariously liable for the negligent driving of a permissive user, where the vehicle owner has rented the vehicle and is in the customary business of renting vehicles).

Plaintiff appealed, arguing that there are two exceptions to the general doctrine that a hirer is not liable to an independent contractor or vicariously liable for the actions

of an independent contractor, and that both exceptions were applicable in this case. Under the "peculiar risk" exception a person who hires an IC to perform work that is "inherently dangerous" can be held liable for damages caused to others by the IC's negligent work. The second exception argued by Plaintiff was that a duty either imposed by statute or regulation, or imposed under a franchise granted by a public authority that involves an unreasonable risk of harm to others, cannot be delegated – even by the hirer of an independent contractor. Plaintiff specifically argued that Villalobos' operation of the commercial motor vehicle was "inherently dangerous" work for which his hirers could be vicariously liable. Plaintiff further specifically argued that the Motor Carrier Act imposed non-delegable duties on Defendants to safely operate commercial motor vehicles, which duties arose from the "franchise" of the Federal Motor Carrier Safety Administration and Department of Transportation granting carrier authority.

The Appeal Court held that the trial court erred in finding that a hirer (in this instance the motor carrier and tractor owner) can never be vicariously liable to an IC, finding that the duty to provide a safe work environment is not necessarily implicitly and presumptively delegated in all cases involving independent contractors. Specifically, the duty to provide a safe work place of FMI and Eves arose from their being granted public license ("franchise") to operate commercial motor vehicles. This in turn rendered them subject to the safety provisions of the Federal Motor Carrier Safety Regulations and the Motor Carrier Act and so was non-delegable. Thus, both a duty was potentially owed to Plaintiff and Defendants could potentially be vicariously liable for the negligent driving of independent contract co-driver Villalobos. There being potential material facts in dispute, summary judgment was not warranted.

The written opinion is an extremely confused and garbled mess, failing to clearly delineate - and even co-mingling - the reasoning. For example, after opening with the reversal of summary judgment – including that Eves was not entitled to judgment based on the Graves Amendment, there is absolutely no further reference in the opinion to the Graves Amendment issue, but judgment is still reversed as to Eves. This was clearly a "results oriented" decision and goes back to the old adage that bad facts make bad law – with courts across the land 'bending over backwards' to give sympathetic and badly injured plaintiffs their respective "day in court" and irrespective of the law. This is just another prime example of the expanding theories of tort liability being countenanced – and even encouraged or created by the courts.

Broker Liability -- Yes Again! (And Once Again Out of Illinois!!!)

Hayward v. C.H. Robinson Co.

In the apparently constant series of cases and our continuing series of reports on expanding theories of liability against brokers and shippers – the vast majority coming out of Illinois – here is yet another one.

Plaintiff/Appellant, Richard Hayward, filed suit against a trucking company, Pella Carrier Services, Inc. ("Pella"), its driver, Vlado Petrovski ("Petrovski"), and C.H. Robinson Worldwide, Inc. ("C.H. Robinson"), the broker who contracted with Pella for transportation services. Pella employee Petrovski was attempting to make an illegal U-turn when a vehicle driven by Plaintiff's wife, Crystal Hayward, struck the Pella tractor-trailer. Crystal Hayward later died as a result of her injuries.

The trial court entered summary judgment in favor of C.H. Robinson on the basis that Pella was operating as an independent contractor and that C.H. Robinson had no control over Pella's operation. The trial court also found that C.H. Robinson did not negligently hire or supervise Pella or Petrovski.

The appellate court, in affirming the decision of the lower court, noted several important factors, in essence providing a "checklist" that brokers should be aware of when contracting with carriers in order to minimize the risk that the bad acts of the carriers and their drivers could be related back to the broker. Specifically, the Court noted:

- Driver, Petrovski had a valid CDL for seven (7) years and no traffic tickets or moving violations on his driving record.
- The subject vehicle was in good condition with no safety violations when the accident occurred.
- C.H. Robinson did not own, operate, or lease any of its own vehicles and equipment or hire any of the operators of the tractor-trailers who worked on the Pella-C.H. Robinson Agreement for Motor Carrier Contract Services.
- C.H. Robinson obtained proof of Pella's federal operating authority and liability insurance prior to contracting with Pella.
- C.H. Robinson also checked Pella's safety record using the DOT website and confirmed that Pella had an acceptable safety rating.

- Pella maintained a "satisfactory" safety rating with the FMCSA.
- C.H. Robinson annually rechecked the safety rating of all of its independent contractors.
- Pella transported approximately 770 loads for C.H. Robinson over an approximate four year period without incident.

The above items should be borne in mind by any broker when hiring motor carriers and managing transportation contracts with independent contractors. It is unfortunate that a broker is often placed between the proverbial rock and a hard place. If a broker does the somewhat bare minimum of checking a motor carrier's operating authority, FMCSA rating and that the carrier has at least minimum liability insurance limits, courts have increasingly found these to be potentially insufficient as a matter of law in negligent hiring bodily injury claims against the broker. However, if a broker does more (e.g. such as an independent investigation or audit of a carrier's safety history), this could constitute voluntarily taking on a duty that does not necessarily otherwise exist or is not otherwise imposed by law. In turn, this could leave open the potential for claims that this acknowledges more stringent oversight is warranted, but that what was done was not sufficient (and no matter what is done, there is always going to be an argument from the plaintiffs' bar that more could have and should have been done); or something was negligently missed; or the self-imposed standard and duty was not followed. As a bare minimum, any broker should avoid actions that could be construed later in court as having too much control over the operations of the carrier and/or the driver and thus lessens any independent contractor defense – where the most important factor is usually one of "control."

Virginia Transportation Update

Owner-Operators Not Employees For Purposes of Virginia Workers' Compensation

Many states, through court decisions and/or legislation, appear to be attempting to do away with independent contractor owner-operators in the transportation industry business model. Recent cases out of Oregon and California have found that those operating commercial vehicles previously traditionally considered independent contractor owner-operators were 'mis-classified,' and were legally employees (so entitled to certain benefits, such as health insurance, workers' compensation and over-time pay etc.). These employee mis-classifcation suits appear to be generated in large part from the possibility of enhanced damages to the plaintiffs and attorneys' fees are often recoverable from the defendant. Massachusetts passed legislation providing that one could only be an independent contractor if, among other things, the nature of the business/work was other than that of the person hiring the contractor. It does not appear this was specifically directed towards motor carriers and their owner-operators, but for practical purposes this completely eviscerated the owner-operator business model in Massachusetts – the contractor is obviously involved in the same business as the hirer in transporting and delivering goods! (This Massachusetts statute was finally found by a federal appeal court to be pre-empted by federal law and thus invalid – that it impacted the "rates, routes and services" of motor carriers, which is violative of the Federal Aviation Administration Authorization Act of 1994, as amended.)

It appears that the mid-Atlantic may be far more pragmatic as to independent contractor status – to some extent at least. In Virginia, if a trucking company hired owner-operators, and one of those operators became injured on the job, it was likely that the owner-operator would file for workers' compensation benefits naming the trucking company as his direct employer. This was especially true if the owner-operator hired an attorney unfamiliar with the trucking industry. Once the claim was filed, it became incumbent upon the trucking company to prove that the owner-operator was an independent contractor. Given the general workers' compensation presumptions in favor of the injured party, proving an independent contractor relationship often became an uphill battle for the trucking company.

On July 1, 2015, a new Virginia Statute took effect changing the definition of employee to specifically exclude owner-operators, if certain conditions are met. Virginia Code §65.2-101 (Workers Compensation Definitions) now reads:

Employee shall not mean....

o. An owner-operator of a motor vehicle that is leased with or to a common or contract carrier in the trucking industry if (i) the owner-operator performs services for the carrier pursuant to a contract that provides that

the owner-operator is an independent contractor and shall not be treated as an employee for purposes of the Federal Insurance Contributions Act, 26 U.S.C. § 3101 et seq., Social Security Act of 1935, P.L. 74–271, federal unemployment tax laws, and federal income tax laws and (ii) each of the following factors is present:

(1) The owner-operator is responsible for the maintenance of the vehicle;

(2) The owner-operator bears the principal burden of the vehicle's operating costs;

(3) The owner-operator is the driver;

(4) The owner-operator's compensation is based on factors related to the work performed and not on the basis of hours or time expended; and

(5) The owner-operator determines the method and means of performing the service.

At least for the purposes of workers' compensation in Virginia, owner-operators are specifically excluded from the definition of "employee." Whether such independent contractors might 'jump on the bandwagon' as to other bases of employee mis-classification claims remains to be seen – although hopefully this specific legislation may be some indication – and perhaps even give some argument – that owner-operators are truly independent contractors and not employees.

If you have any questions regarding the new statute or its implication on your business, please do not hesitate to contact Becki Dannenberg 703-793-1800 or rdannenberg@fandpnet.com.

ON THE ROAD AGAIN . . .

Colin Bell and **Andrew Stephenson** will attend the Trucking Boot Camp for the Claims Professional in Essington, PA September 24, 2015.

Andrew Stephenson will attend the DRI Annual Meeting in Washington, DC October 7-11, 2015.

Andrew Stephenson will attend the ATA Management Conference & Exhibition in Philadelphia, PA October 17-20, 2015.

Tamara Goorevitz and **Andrew Stephenson** will attend the TIDA Industry Seminar in San Antonio, TX October 26-28, 2015.

Maryland's Non-Economic Damages Cap Table

Date of Accident			Cap
October 1, 2011	to	September 30, 2012	$755,000
October 1, 2012	to	September 30, 2013	$770,000
October 1, 2013	to	September 30, 2014	$785,000
October 1, 2014	to	September 30, 2015	$800,000
October 1, 2015	to	September 30, 2016	$815,000

FRANKLIN & PROKOPIK 24-HOUR EMERGENCY RESPONSE

Because accidents don't always happen during business hours, Franklin & Prokopik has a 24-hour emergency response system in place for those situations where immediate action is needed to protect your interests. If you would like copies of our emergency response cards, please contact Joan Hartman, our Director of Events and Communications at 410-230-3631 or email her at jhartman@fandpnet.com and we will be happy to provide them to you.

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