Welcome to Fall. Now that we are finished with the heat of the summer it is back to business. This month we report:

CARGO THEFT - Freightwatch has released its latest quarterly report and Florida and Texas have taken the lead as the target cargo theft areas, beating out California. The report states that there were 185 reported incidents of cargo theft during the quarter. The average loss-value per load increased roughly 5.6 percent, to $17,415. Florida had 45 of the 185; Texas had the second-most theft incidents with 29, with California following closely behind with 28. The top five included Georgia and Illinois with 15 each. Unsecured parking once again topped the list of locations where theft was most likely to occur, accounting for 113 reported incidents, primarily at truck stops. Thefts of trailers and containers accounted for 75 percent of all reported incidents. The product type most often stolen was food/drinks with 19% of all incidents. Electronics regained its position at the second place spot with 32 thefts, or 18% of the total, while the personal care category recorded triple the amount of thefts year-over-year, with 15 thefts or 8% of the total. The building/industrial sector experienced the third most thefts with 19 or 11% of total thefts. The category of pharmaceuticals had by far the highest of any category when it came to the average value of each heist at $2.8 million, while the electronics category was ranked second at nearly $305,000.

VEHICLE MILES TRAVELED - The Federal Highway Administration says that we are all on the road. The FHA reports that miles traveled from July 2013 to June 2014 were at their highest point since 2008 with travel of 2.97 trillion miles. In the first half of this year, 1.466 trillion miles have been driven, the largest number since 2010 and the fourth-highest in the report's 78-year-history. FHWA's report "Traffic Volume Trends" reveals that 261.7 billion vehicle-miles traveled were driven in June 2014. June has not hit such numbers since 2010, and June 2014 marks the largest single-month gain this year.

DELAYED RULEMAKING ON INSURANCE LIMITS - The DOT is not yet ready to announce its proposed rules on raising the minimum insurance requirement for interstate motor carriers and whether to require speed limiters on new heavy trucks. The proposal to raise the insurance minimum, originally scheduled for publication later this month, has been delayed until Oct. 22 and the proposed speed-limiter rule has been delayed until Jan 12. The minimum financial responsibility rule has been fast-tracked by the Federal Motor Carrier Safety Administration since the agency released a study in April indicating the required minimum insurance for most carriers is not adequate to cover many fatal and serious-injury crashes.

ATRI STUDY - The American Transportation Research Institute (ATRI) reported that the average marginal cost-per-mile last year has increased to $1.68, up from $1.63 in 2012. The findings came in a 2014 update to "An Analysis of the Operational Costs of Trucking." The increase in average operating costs in 2013 is attributed by the ATRI to the ongoing driver shortage and the resulting wage increases by motor carriers to ensure retention of experienced, qualified drivers. The news also reports that the annual cost for large truck crashes is estimated to be more than $99 billion.

DRIVER TRAINING - Suit has been filed against the DOT by the Advocates for Highway and Auto Safety, Citizens for Reliable and Safe Highways (CRASH), and the International Brotherhood of Teamsters which seeks to compel the DOT to implement new rules for entry level driver training. MAP-21) mandated that the FMCSA issue a new entry-level training rule by October 1, 2013, to include behind-the-wheel training. The rules are still not out.

CSA NEWS - Congressman Lou Barletta has, introduced the "Safer Trucks and Buses Act" (H.R. 5532). The legislation would prohibit the Federal Motor Carrier Safety Administration (FMCSA) from publishing motor safety scores on its website until the agency revamps its Compliance Safety Accountability (CSA) scoring system. Under the proposed bill, FMCSA must submit to Congress an improvement plan and implement that improvement plan. We will be following to see where this goes.

STATE TRANSPORTATION STATISTICS - The Bureau of Transportation Statistics (BTS) released the "2014 State Transportation Statistics (STS)" — a web-only reference guide to transportation data for the 50 states and the District of Columbia. The report consists of 115 tables of state data on infrastructure, safety, freight transportation, passenger travel, registered vehicles and vehicle-miles traveled, economy and finance, and energy and environment, plus a U.S. Fast Facts page. It can be viewed here for those of you who love the data.

OUT OF SERVICE ORDER – Florida based Trucking company Ken's Trucking , LLC, DOT # 1050616, was declared an imminent hazard and ordered out of service for "numerous widespread violations of critical safety regulations".

CASES

AUTO

Is there a possible change in direction in the case law which disallowed other causes of action against trucking companies which had acknowledged vicarious liability? The Middle District of Georgia concluded that with an apportionment statute on liability in place in Georgia a plaintiff could pursue the trucking company for separate torts, such as negligent hiring. The Court also held that there was no cause of action for punitive damages based upon the trucker's cell phone policy, which permitted cell phone use as long as it was hands free. (Little v. McClure , 2014 WL 4276118)

The Western District of Texas held that a truck insurer had an obligation to defend various parties involved in a truck accident where the complaint specifically alleged that the vehicle being operated was being done so with the permission of the named insured, even though that was disputed by the named insured. The Court also held that the Occupant Hazard Endorsement was void as against public policy in Texas. (Canal Insurance Company v. XMEX Transport, LLC , 2014 WL 4385941)

The Appellate Division in New York held that while a rear end collision generally resulted in liability to the striking vehicle, as this trucker demonstrated that he struck the rear of the plaintiff's vehicle while it was stopped in the right lane there was a triable issue of fact as to whether they had a nonnegligent explanation for the collision. (D'Agostino v. YRC, Inc. , 2014 WL 4627762)

A parked flatbed, not in operation, does not lose its identity as an auto under a general liability policy. The Supreme Court of Ohio held that the general liability carrier would have no obligation to defend or indemnify the flatbed owner for a fatal accident which occurred when the injured party struck the flatbed. (Sauer v. Crews , 2014 WL 4358384)

The Court in the Northern District of Mississippi was hesitant to dismiss a suit which was arguably brought past the applicable statute of limitations when the first action plaintiff filed in another Court was timely. In the prior action, which was dismissed for lack of jurisdiction over the trucker, defense counsel had argued that the plaintiff had a remedy in another jurisdiction, which apparently may not have been correct. The Court remanded the case for further proceedings to address whether the plaintiff should be entitled to pursue its action on an equitable basis. (Douglas v. Norwood , 2014 WL 4215846)

When a trucking company specifically prohibits its employee from using a company vehicle after hours that driver will not be a permissive user of the vehicle when he has an accident. The District Court on West Virginia held that the insurer has no obligation to defend and indemnify the driver and that the MCS-90 had no application when the motor carrier was not a party. (Canal Insurance Co. v. Dupont , 2014 U.S. Dist. Lexis 127178)

The 8th Circuit, applying Minnesota law, confirmed that a plaintiff was not judicially estopped from pursuing coverage under a bobtail policy when it had already gotten money from the trucker's auto policy through a settlement. The Court concluded that the bob-tail policy did apply as the driver was not hauling cargo at the time and the carrier was not paying for the driver for the transport at issue. (Occidental Fire & Casualty Co v. Soczynski , 2014 WL 4290379)

In the Appellate Court in Illinois the court held that a bob-tail policy would not apply when the driver was hauling cargo for another carrier. The Court concluded that the policy, which excluded liability for losses which occurred when the vehicle was used in the business of one to whom the vehicle was rented was not ambiguous and applied when the vehicle was being operated in the business of a carrier to whom the vehicle was leased. (Argonaut Midwest Insurance Co. v. Morales , 2014 WL 4364859)

We continue to report when we find case law addressing the qualifications of experts in the trucking industry. The Northern District of West Virginia held that John Barnes would be an acceptable expert to address the cause and origin of a truck fire. (KBS Preowned Vehicles v. United Financial Casualty , 2014 WL 4388294) In Tennessee John Bethea was held to be an acceptable expert to determine the relative speed of a truck and the plaintiff's vehicle. The Western District of Tennessee held that he had ample support for his conclusions regarding the relative speed and enough experience to rise to the level of an expert. (Covic v. Ber , 201l U.S. Dist. LEXIS 127919)

CARGO

Claims between brokers and carriers continue. The Southern District in Ohio held that the Carmack Amendment did not preempt a claim by the broker under its separate contract with the motor carrier. The Court concluded that the broker was entitled to recover the full value of a lost shipment which it paid for, even where there was a limitation of liability on the bill of lading. The Court also held that the insurance required under the contract for cargo loss was not a limitation of liability. (Exel v. Southern Refrigerated Transport)

The same Court also held that a broker was entitled to recover attorney's fees under its contractual agreement with the motor carrier when the motor carrier was liable for the cargo loss under the Carmack Amendment. The Court held the contract was an acceptable contract under 49. U.S.C. 14101 and changed the customary rule that attorney's fees were not recoverable under Carmack. (Total Quality Logistics, LLC v. Mactoon , 2014 WL 4426184)

Even when the defendant alleges in the answer that it was acting as a broker and not a motor carrier, the plaintiff's state law claims were preempted. The Northern District in Indiana held that the cause of action for breach of bailment was identical to the Carmack cause of action, dismissing the action. (Mitsui Sumitomo Ins. Co. v. Basic Enterprises , 2013 WL 4407645)

Plaintiff was unable to withstand a motion to dismiss in the Southern District in Illinois when it sought recovery from a carrier under a negligence theory. The fact that plaintiff alleged that the carrier might be a broker was insufficient to defeat the preemptive effect of Carmack. (Mason & Dixon Lines v. Walters Metal Fabrication
, 2014 U.S. Dist. Lexis 129285)

The Southern District of Florida continued the rule that the Carmack Amendment does not apply when there is a through bill of lading for an international shipment with a final resting place in the U.S. when there is no requirement that there be a separate bill of lading. (Sodikart USA v. Geodis Wilson ,
2014 WL 4373609)

Happy Pumpkin Picking. See you next month.