

## **WINTER 2012 NEWSLETTER**

### **COMMERCIAL TRUCKING LITIGATION UPDATE**

**By Dean Foster**

#### **1. *Amerisure Ins. Co. v. Navigators Ins. Co.*, No. 11-20117, 2011 USF Lexis 20041 (5<sup>th</sup> Cir.), September 30, 2011.**

On October 9, 2003, William Sylvester drove two employees of Texas Crew Boats, Inc. from Freeport, Texas to Morgan City, Louisiana where they were to board and crew the Florida Lily, one of Texas Crew Boats' vessels. While en route, Sylvester fell asleep at the wheel, causing the vehicle to veer off the road and flip over. The two passenger employees of Texas Crew Boats suffered significant injuries as a result. They sued Texas Crew Boats and Sylvester in Louisiana state court, claiming negligence and recklessness against Sylvester and bringing similar claims under the JONES ACT against Texas Crew Boats.

The claims were settled at mediation, but the three insurance carriers involved could not agree on who should fund the settlement. Ultimately, Amerisure and Navigators paid the full sum of the settlement, but Amerisure reserved its right to seek reimbursement from Navigators through subrogation, and eventually filed a subrogation action in U.S. District Court for the Southern District of Texas.

The District Court granted summary judgment to Navigators, and that order was appealed to the Fifth Circuit. The first panel of the Fifth Circuit reversed the District Court, holding that Amerisure could subrogate against Navigators. The panel then remanded the case to the District Court to determine whether Sylvester was an employee of Texas Crew Boats or an independent contractor. The District Court held a bench trial on the issue of Sylvester's employment status, finding that he was an independent contractor and not an employee of Texas Crew Boats. As a result, the District Court found in favor of Navigators.

Amerisure then filed a second appeal on this issue. Affirming the District Court's judgment in favor of Navigators, the Fifth Circuit noted that Navigators had shown that Sylvester maintained discretion over route selection, which indicated a lack of control over the details of the work. Navigators also proved that even though Sylvester worked about 20 hours per week for three years, he chose when to work and did not have to accept any particular job from Texas Crew Boats. It was also shown that Sylvester did not take any part in Texas Crew Boats' benefits programs (retirement, health insurance) and was paid by the job. Finally, Navigators showed that Sylvester was allowed to work other jobs during his time driving for Texas Crew Boats. Amerisure did show that Sylvester's truck was owned and maintained by Texas Crew Boats at all relevant times. However, the Fifth Circuit held that there was enough conflicting evidence marshaled by Navigators to render the District Court's finding that Texas Crew Boats did not have the right to control Sylvester not to be a clearly erroneous decision.

**2. *TMC Auto Transport v. Flowers*, No. 02-10-00226-CV, 2011 Tex. App. Lexis 7829 (Tex. App. – Fort Worth) September 29, 2011.**

Flowers purchased a 2000 Lincoln Town Car at an auction for the purpose of reselling it at his business, a used car lot in New Mexico. He hired TMC Auto Transport, Inc. to transport the vehicle from Texas to New Mexico. While TMC’s trailer was stopped at a red light, a car struck the rear of the trailer, moved up onto the trailer, and hit the Lincoln Town Car. The driver of the other vehicle was arrested for DWI.

Flowers’ car was damaged in the accident. Upon instruction by the adjuster for TMC’s insurance carrier, TMC dropped off the vehicle in the parking lot of the auto auction, where the carrier had it picked up by wrecker. The carrier and Flowers engaged in negotiations over compensation. Flowers rejected the carrier’s offers and at some point the carrier sold the car at a salvage auction for \$1,575.

Flowers filed suit against TMC for breach of contract, breach of bailment, conversion, negligence, and breach of duty of good faith and fair dealing. The trial court rendered judgment for Flowers on his breach of bailment contract claim against TMC and awarded him \$10,000 in actual damages and \$11,910 in attorney’s fees. The court rendered a judgment in favor of TMC on Flowers’ remaining claims.

TMC argued it was not liable for breach of the bailment contract because the damage to the vehicle was caused by the negligence of the drunk driver. However, the court found that TMC still had an obligation under the bailment contract to return the property to Flowers even in its damaged state. TMC failed to do so. In addition, TMC did not argue that it delivered the vehicle to the insurance company at Flowers’ instruction or that Flowers gave consent to having the vehicle delivered to the insurance company creating a subsequent bailment. As a result, the court found TMC could not escape liability on this basis.

TMC also argued there was no basis for an award of attorney’s fees because Flowers failed to present his demand to TMC as required by §38.002 of the TEXAS CIVIL PRACTICE & REMEDIES CODE, and failed to disclose in response to discovery the amount or method for calculating his attorney’s fees. While Flowers himself could not offer any testimony that the requisite demand had been made, which would entitle him to recovery of attorney’s fees, Flowers’ attorney testified that she had made a demand on TMC’s insurance company and she asserted that same fact in a post-trial brief to the trial court. Section 38.002 allows the presentation of a claim to a “duly authorized agent.” TMC argued that it never authorized an insurance agent to receive demands that TMC pay a claim. Regardless, the court found that the insurance company acted as TMC’s agent as far as compensating Flowers for damage caused by a drunk driver, and no evidence showed that the agency relationship did not extend to covering TMC’s damages that arose from TMC’s breach of the bailment contract. As a result, the trial court’s judgment was affirmed.