In Transit

Transportation Loss Prevention & Security Association

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Transportation Loss Prevention and Security Association

155 Polifly Road
Hackensack, NJ 07601

201-343-5001
201-343-5181 FAX

William Bierman
Executive Director

wbierman@nakblaw.com
www.TLPSA.org

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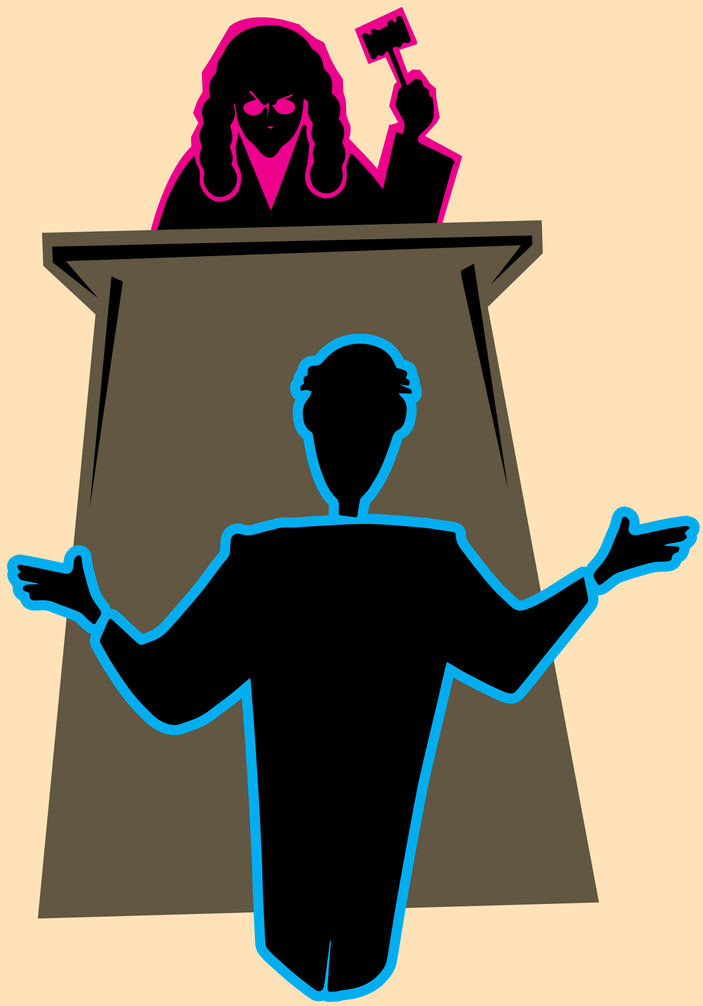

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WHY WON'T THE COURT UPHOLD MY LIMITATION OF LIABILITY?

By: William D. Bierman, Esq., Executive Director, TLP & SA

Just when carriers thought the courts understood Bills of Lading and limits of liability in light of deregulation, several courts and judges have decided to turn the issues on their head. For example, a divided Forth Circuit Court of Appeals reversed the trial court grant of summary judgment upholding a $25,000.00, limit of liability in a rail case and held the rail carrier was subjected to full liability of $550,000.00. ABB, Inc. v. CSX Transportation, Inc., 2013 WL 2451088 (C.A. 4 (NC)) 2013.

The Court in ABB concluded the Carmack Amendment subjected the rail carrier to full liability for the shipment, and that the parties did not modify the carrier's level of liability by written agreement as permitted by statute. Even though the shipper drafted bill of lading did not indicate a level of liability and that same bill of lading incorporated by reference the limitation of liability included in the carrier "Price List", and also indicated the shipper agreed to terms and conditions in "the classification or tariff which governs the transportation of this agreement", the court determined this was not enough to satisfy Carmack requirements.

The Court went out of its way to distinguish "notice" of the incorporated documents by stating:

Under such a theory, the shipper's "knowledge" of the list [Price List] could be proved solely by use of the generic and outdated word "tariff" being employed as standard language in a bill of lading.

Furthermore, the court seemed to require a reference to the particular rate authority or other code indicating the applicable rate and liability level even though the shipper drafted the bill of lading and chose its own language. The court concluded as follows:

Our ruling encourages parties to employ precise bills of lading, which reflect fully and specifically the parties' choice of liability terms in writing as Congress intended by passage of the Carmack Amendment.

In a stinging and well reasoned dissent, Judge Agee of the Fourth Circuit sets forth the practical and real world application of Carmack especially since the sophisticated shipper drafted the bill of lading in question and the Judge observed:

ABB argues that the contract language is unenforceable as written because the term "tariff" refers only to tariffs lawfully filed with the ICC prior to deregulation, rendering that term essentially meaningless in the ensuing 20 years of the deregulation era. Yet even after deregulation, rate schedules and price lists such as Price List 4605, are still commonly, if not uniformly, referred to as tariffs.

The Judge goes on to state more fully in footnote 8:

Price List 4605 also falls within the plain meaning of the term "classification," which is defined as "a publication containing for the purpose of tariff assessment a list of articles, the classes to which they are assigned, and the rules and regulations governing the application of class rates." Webster's at 417. ABB presents no argument that Price List 4605 is not a classification.

In stating he would affirm the District Court's holding that the limitation of liability applies, the Judge in dissent relied on the well reasoned cases of **Siren, Inc. v. Estes Express Lines,** 249 F. 3rd 1268 (11th Cir. 2001; **Werner Enterprises v. Westwind Maritime International, Inc.** 554 F. 3rd 1319 (11th Cir. 2009); **Sassy Creations, Inc. v Watkins Motor Lines, Inc.** 331 F. 3rd 834 (11th Cir. 2003) which cases the majority, however, managed to sidestep or ignore.

In an equally perplexing decision, the Federal District Court for the Southern District of New York in **Great American Insurance Co. v. USF Holland Inc.**, 2013 WL 1313841 (2013) refused to assign the applicable limitation of liability. In the USF Holland case the Court avoided following the various contractual provisions of the contracts involved which contracts and limits of liability are commonly used in the industry. In addition the court would not consider expert testimony which demonstrated the unique nature of transportation documents and the manner in which the industry conducts business. We believe had the court reviewed the expert testimony, the court would have had a better idea as to how the transportation documents functioned and why the lowest limitation of liability pertained.

It would appear these two cases demonstrate some courts are buying into a self-created idea of "equity" and or of "fairness" based on their own views rather than on how the transportation industry works. In the ABB case the majority admits there was a sophisticated shipper; the shipper drafted the bill of lading; the bill of lading incorporated the carrier tariffs and classification; the shipper did not declare a value on the bill of lading; the shipper did not ask for a copy of the governing documents; the appropriate governing documents were on the carrier website; the freight rate was based on the limit of liability and that the shipper could have prevented all the problems since the shipper had control of the bill of lading language. In the face of all these overwhelming facts, the majority ruled the carrier should have specifically advised the shipper of the exact limitation language and the carrier could not rely on the "use of the generic and outdated word "tariff" being employed as standard language in a bill of lading.

Similarly in the USF Holland case, the court found commonly used transportation contracts and language were ambiguous and certain terms were merely contractual offers which were not accepted even though the carrier issued the bill of lading.

These cases destroy the predictability of result so necessary in the transportation industry. Statutes such as Carmack were enacted to provide a uniform way to conduct business throughout the country. Drivers, dock workers, receiving and shipping managers, are not attorneys. Binding contracts cannot be created on the dock or at the terminal. Tens of thousands of transportation documents which are executed each day must have consistency in order for the business to run efficiently and on time. Each contract and bill of lading cannot be negotiated separately. We must continue to educate courts about the unique nature of our business as recognized by the legislation pertaining to transportation through law review articles; educational conferences; industry trade groups; sharing successful court opinions; through oral arguments on specific cases; and by the use of amicus briefs on appeal.

Hopefully, by creating a mass of legal authority we can begin to address the courts who want to rule by emotion rather than by statute and practical considerations. Perhaps in this way we can get the courts to uphold your limitation of liability upon which you set your freight rate.

NOTE: Help is on the way in the form of a recent well written and reasoned opinion by the District Court in the Sixth Circuit in Tokio Marine v. Flash Expedited Services, Inc. 2013 WL 4010312 (S.D. Ohio 2013) wherein the Court upheld the limitation of liability capping a claim of $361,864.32 for the limitation of liability of $1,566.00. The Court rejected a material deviation argument and found the Toledo Ticket Case was questionable.

THE INTERSECTION OF BANKRUPTCY LAW AND MARITIME LAW

By: Rick A. Steinberg, Esq. Nowell Amoroso Klein Bierman, P.A., Hackensack, New Jersey

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By: Rick A. Steinberg, Esq.
Nowell Amoroso Klein Bierman, P.A., Hackensack, New Jersey

This article will provide a short overview of selected topics regarding the intersection of bankruptcy law and maritime law. Specifically, it will cover the basics of the bankruptcy process as it relates to the interests of ocean cargo carriers and other maritime entities as creditors or other parties in interest in a bankruptcy case filed in the United States.

The United States Bankruptcy Code is a federal body of law that governs the rights of debtors and creditors when an entity files a bankruptcy petition in this country. The entity in bankruptcy is called the "debtor." Parties that are owed money by the debtor are called "creditors." Creditors may be either secured creditors, meaning that they hold collateral for the debts owed them, or unsecured creditors, who do not have any collateral or security for their claims.

Some other important possible parties in interest to a bankruptcy case are a creditors' committee and a trustee. The entire bankruptcy process is administered by a bankruptcy court judge, with the input and oversight of the Office of the U.S. Trustee, which is a branch of the U.S. Department of Justice.

The two main types of corporate bankruptcy, as opposed to personal or individual bankruptcy, are Chapter 11, reorganization, and Chapter 7, liquidation. In addition, Chapter 15 governs the proceedings in the United States when a foreign entity with assets in the United States files a bankruptcy proceeding in a foreign country and an "ancillary" or cross-border bankruptcy case in the U.S. to protect its U.S. assets. Lately, there has been a rash of Chapter 15 filings in the U.S. by foreign ship owners and other maritime entities, due to the general downturn in the economy as well as other factors specific to the shipping industry.

Under Chapter 11 of the Bankruptcy Code, a debtor-in-possession or a trustee attempts to reorganize a debtor company's business. The reorganization is generally consummated through confirmation of a plan of reorganization or a sale of substantially all the debtor's assets out of the ordinary course of business. Under Chapter 7, a trustee is appointed who sells or otherwise liquidates the debtor's assets, with the assets or proceeds of sale distributed to creditors according to the priorities of distribution established in the Bankruptcy Code.

In addition, a creditor or a group of creditors may file an involuntary bankruptcy petition against a debtor, which forces the "alleged debtor" entity into bankruptcy. Generally, an involuntary bankruptcy petition can be filed by a group of eligible creditors when the debtor is not paying its debts as they become due.
The filing of a voluntary or involuntary bankruptcy petition under Chapter 7 or 11 creates what is called a bankruptcy "estate." There is no bankruptcy estate as such when an entity files a Chapter 15 bankruptcy case in the U.S. Further, the filing of a voluntary or involuntary bankruptcy petition under Chapter 7, 11 or 15 invokes a "stay" against certain creditor actions to collect debts that were incurred prior to the bankruptcy filing, called the "pre-petition" period, as opposed to after the bankruptcy filing, called the "post-petition" period. The automatic stay is one of the fundamental purposes of bankruptcy, because it gives the debtor breathing room to try to solve its financial problems and difficulties.

THE AUTOMATIC BANKRUPTCY STAY

When a company, such as a consignee of goods, files for bankruptcy protection, there is an automatic, legal stay or prohibition against attempting to collect a debt that was incurred before that company filed for bankruptcy. Likewise, there is a stay against acts to sell or otherwise take possession of cargo that is property of the debtor's bankruptcy estate. An ocean cargo carrier should file a motion for relief from the automatic bankruptcy stay in order to allow the carrier to execute its maritime lien on cargo, or to reconsign the cargo per the shipper's instructions.

Section 362(a) of the Bankruptcy Code states in pertinent part that "a petition filed under … this title … operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;
(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
(7) the setoff of any debt owing to the debtor that

arose before the commencement of the case under this title against any claim against the debtor…."

RELIEF FROM THE AUTOMATIC BANKRUPTCY STAY

Section 362(d) of the Bankruptcy Code states in pertinent part that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization…."

As a general rule, ship owners have a lien upon cargo for freight charges. Consequently, ship owners may retain the goods after the arrival of a ship at the port of destination until payment of the freight charges is made. Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the parties, and not from any statutory regulations. Legal effect of such a lien is that the shipowner, as carrier by water, may retain the goods until the freight is paid.

The parties to a maritime contract may also employ words in their contract to affirm the existence of the maritime lien, or even to extend its reach. Further, the intervening insolvency of either party to a maritime contract cannot change the terms of the parties' agreement.

An ocean carrier who has goods in its possession at the time that a shipper or consignee files for bankruptcy should seek relief from the automatic bankruptcy stay to allow it to execute its maritime lien or to reconsign the cargo, either for cause or because the debtor may not own the goods and the cargo is not necessary for an effective reorganization, especially if the debtor is liquidating.

PROPERTY OF THE ESTATE

Section 541(a) of the Bankruptcy Code states in pertinent part that: "[t]he commencement of a case under … this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) … all legal or equitable interests of the debtor in property as of the commencement of the case."

Property of the estate is broadly defined and interpreted. However, the question whether property of the estate extends to assets that are outside the territorial limits of the United States is a disputed issue. Thus, it is usually prudent to assume that such property is property of the debtor's estate and seek stay relief before diverting cargo or executing a maritime lien on the cargo.

STOPPAGE OF GOODS IN TRANSIT

When a shipper, usually the seller of the goods, learns that its buyer, usually the consignee, has filed for bankruptcy, it is not unusual for the shipper to send a notice to the carrier to stop the goods in transit. The shipper does not have to obtain bankruptcy stay relief to do so. However, before the carrier may return the goods to the shipper or reconsign them to a new consignee, it may need to obtain relief from the automatic bankruptcy stay.

Even assuming that cargo was ever property of a debtor's bankruptcy estate, the stoppage of cargo in transit by a shipper takes the cargo out of the debtor's bankruptcy estate. Since cargo that has been stopped in transit was never or is no longer property of a debtor's bankruptcy estate, the automatic stay of Bankruptcy Code Section 362(a) arguably does not apply.

CRITICAL VENDOR STATUS

When a company files for bankruptcy, especially a manufacturer or retailer, it will often file a "first day motion" for authority to pay critical vendors, including its carriers. Without such a critical vendor order, the debtor is not allowed to pay its pre-petition creditors. In order to ensure uninterrupted service from its carriers, a debtor will obtain one or more critical vendor orders. Critical vendor status allows a debtor in bankruptcy to pay a carrier for pre-petition charges immediately after filing, despite the fact that it violates the absolute priority rule, whereby pre-petition claims are usually paid pursuant to a confirmed plan of reorganization.

SERVICE CONTRACT REJECTION DAMAGE CLAIMS

Another issue that often arises is rejection of minimum volume quantity service contracts in bankruptcy by the debtors, who are often the shippers.

Section 365(a) of the Bankruptcy Code states that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." An executory contract is generally defined as one that requires performance by both sides in the future. A service contract, including a minimum quantity commitment contract, is an executory contract.

Under the Bankruptcy Code, a debtor in bankruptcy can reject an executory contract or unexpired lease. The damages flowing from the rejection, which is considered a breach of the contract, are deemed a pre-petition, general, unsecured claim. Although the contract rejection actually occurs after the bankruptcy filing, or post-petition, the breach occasioned by the rejection is deemed to have occurred immediately prior to the filing, or pre-petition.

PREFERENCE PROCEEDINGS

A debtor in bankruptcy or a trustee may seek to avoid or recover payments made by the debtor within 90 days before the debtor filed bankruptcy, if the debtor was insolvent at the time of the transfer, the payment was made on account of an antecedent debt, and the transfer allowed the creditor to receive more than it would receive in a Chapter 7 liquidation.

The manner by which a debtor or a trustee attempts to avoid or recover allegedly preferential payments is through an adversary proceeding, which is a lawsuit filed in the context of the underlying or main bankruptcy case.

Section 547(b) of the Bankruptcy Code states that "the trustee may avoid any transfer of an interest of the debtor in property—
(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made--
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if--
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title."

A carrier may defend a preference proceeding on the basis that the plaintiff, which could be the debtor, a trustee, or unsecured creditors' committee, cannot prove the elements of the preference cause of action.

DEFENSES TO PREFERENCE PROCEEDINGS

One common defense to proof of the elements of the preference cause of action is that there was not an antecedent debt to begin with, because the carrier received payment of its freight charges before it delivered or released the cargo for which it was paid the freight charges. If there is a prepayment or a cash on delivery (COD) payment, then there was arguably not an antecedent debt at all, and the transfer was not a preferential payment in the first instance.

A carrier may also defend a preference proceeding on the basis that the carrier was fully secured at the time of the preferential payment transfers by virtue of the cargo in its possession. Thus, the trustee (or debtor in possession) cannot make out one of the elements of the preference cause of action, that is, that the creditor received more from the preferential transfers than it would receive in a liquidation.

Even if the plaintiff in the preference adversary proceeding can prove the elements of the preference cause of action, there are also several affirmative defenses to a preference proceeding, under Bankruptcy Code Section 547(c). The three most important affirmative defenses are contemporaneous exchange for new value, subsequent new value, and ordinary course of business.

Contemporaneous exchange for new value defense

Contemporaneous exchange for new value means that the debtor and the creditor intended that the payment was in simultaneous exchange for provision of new goods or services, and the payment was substantially contemporaneous.

An ocean carrier has a lien on all cargo in its possession to secure unpaid freight and accessorial charges. The debtor is presumed to understand that it had to pay the carrier in order to receive its cargo. Thus, any preference payment was made in contemporaneous exchange for the carrier releasing its lien on the cargo. Therefore, carriers have a contemporaneous exchange for new value defense to avoidance of preference payments.

Subsequent new value defense

Subsequent new value means that, after the preferential payment, the creditor provided the debtor with new goods or services. The creditor is entitled to a new value credit for the price or value of the new goods or services provided.

A carrier might have a subsequent new value defense to a preference demand if it provided shipping services to the debtor subsequent to receipt of the preferential transfers but before the bankruptcy petition filing date. The services that were provided after the transfers but before the petition date constitute subsequent new value, to which a carrier defendant is entitled to a credit.

Ordinary course of business defense

Ordinary course of business means that the debt was incurred in the ordinary course of business of the debtor and the creditor, according to ordinary business terms between the debtor and the creditor, or according to ordinary business terms in the creditor's industry.

Generally, the debt that was paid by a preferential transfer was incurred in the ordinary course of business of the debtor, as shipper or consignee, and the creditor, as carrier. However, a carrier, defendant in a preference proceeding, may argue that the payment was made in the ordinary course of business between the debtor and the creditor, based on the number of days from invoice or cargo delivery date to freight charge payment date, usual manner of payment by check or wire transfer, lack of extraordinary collection efforts, etc. Also, a carrier may argue that it has an ordinary course of business defense according to the ordinary business terms in the shipping industry, since the terms and manner of payment of freight charges are often similar across the shipping industry.

KNOWLEDGE IS POWER

Whether you are a carrier, a shipper, or a consignee, it is good to know the basics of the bankruptcy process, especially as it relates specifically to the ocean transportation industry. Such knowledge can help you to collect your debts, even from an apparently insolvent debtor, avoid violating the automatic bankruptcy stay, and maybe even help you defend against having to return a preferential payment to the bankruptcy trustee or other party in interest.

Recent Court Cases

as analyzed by the Conference of Freight Counsel

Vic Henry, Esq. , Chairperson and Ken Bryant, Esq., Vice-Chairperson

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1. Great American Insurance Co. v. USF Holland, Inc., 2013 WL 1313841 (S.D.N.Y., Mar. 27, 2013). Novartis entered into three contracts with Holland to ship animal vaccines. The first was a Pricing Agreement which limited the liability of Holland to $25 per pound with a cap of $100,000 per shipment. The Pricing Agreement also contained terms and conditions with a limitation of liability of the lesser of $10 per pound or $100,000 per shipment. The Pricing Agreement referred to a Special Services Schedule (―SSS) for various services including Guaranteed Delivery and ―Protect From Freeze. The SSS limited Holland's liability to cancellation and refundable shipment charges. The bill of lading contained a blank valuation provision. Although the shipments were labeled DO NOT FREEZE, there was no provision on the bill of lading reflecting that the cargo should not be frozen. The product allegedly froze. Great American paid Novartis approximately $135,000 and filed this subrogation claim against Holland under Carmack.

Issue: Can the subrogating insurer recover under the contracts?

Holding: The Court initially granted Great American's motion to exclude the expert witness report finding that his report ―oversteps the basic role of an expert by advancing a legal opinion rather than an expert opinion on transportation industry practices. The court found that Great American made out a prima facie case of liability against Holland, that the undisputed proof reflected that the animal vaccines were delivered to Holland in good condition and that they arrived in a damaged condition. The court disregarded Holland's argument that Novartis decided to ship freeze-prone vaccines in the aftermath of severe snow storms in Illinois and Iowa. Following a convoluted contractual analysis of the three written agreements, the court concludes with a determination that the $25 per pound limitation applied as found in the Pricing Agreement. As a result, Holland was found to be liable for the full $100,000 liability under the Pricing Agreement.

2. Great American Ins. Co. of New York, Inc. v. USF Holland, Inc., 2013 WL 1832185 (S.D.N.Y. 2013) (on reconsideration).

Issue: USF Holland sought reconsideration of the above decision. Holland argued that that a ―guaranteed delivery sticker placed by the shipper merely constituted an offer to purchase guaranteed delivery services. In its first decision, the court found that defendant never agreed to provide these services (as evidenced by defendant's email to Novartis stating that such services were unavailable due to a winter storm and by defendant's failure to provide or charge for the service).
Holding: Without a manifestation of acceptance by Holland, well-established contract principles dictate that no contract to provide the guaranteed delivery service was formed. As a result, the limitation on liability found in the guaranteed delivery portion of the Holland Special Services Schedule (―SSS) did not apply. Holland argued the Court's finding was manifest error because state law ―concepts such as offer and acceptance in the motor carrier liability context are preempted by the Carmack Amendment. The Court found that position to be without merit, holding that while plaintiff could not have brought a state-law breach of contract action against Holland regarding the interstate shipment by motor carrier, that fact does not limit the interpretive tools the Court may use to evaluate the Carmack claim. The operation of the Carmack statutory scheme depends on the use of principles of contract interpretation. Reconsideration denied.

3. Man Ferrostaal, Inc. v. M/V Akili et al., 704 F.3d 77 (2nd Cir. 2012). M/V Akili, its owner - Akela Naviation, and its manager - Almi Marine Management, appealed from a bench trial verdict holding the Akili liable in rem for damage to cargo consisting of 9,960 "thin-walled" steel pipes (but dismissing Akela and Almi). Plaintiff's business consisted of accepting orders of steel from customers in the U.S., finding international suppliers of the steel, and arranging the shipment of the steel to the customer in U.S. The subject pipes, manufactured in China, were purchased by the Plaintiff and then sold to a customer. The Akili was chartered to Seylang Shipping, Ltd., who subchartered it to S.M. China. S.M. China entered into a part-cargo charter with the Plaintiff to ship the pipes from China to Houston, and subsequently to New Orleans; the part-cargo charter contained a clause paramount specifying the application of Hague-Visby rules and specifying liability for cargo damage caused by negligent stowage upon the "owner" of the vessel, defined as S.M. China. When the pipes were delivered in New Orleans they were damaged as a result of being placed under heavier pipes.

Issues: 1. Whether an in rem proceeding rendering the Akili liable for damage to, or loss of cargo is unavailable in this matter because a vessel is not a "carrier" under the COGSA? 2. Whether the free-in-and-out provision of the charter (certifying that the cargo is to be stowed, latched, etc. free of risk and expense to the vessel) between the S.M. China and Plaintiff absolving the Akili from in rem liability is enforceable.

Holdings: The court held the free-in-and out provision unenforceable in so far as it may prevent in rem liability of the vessel. The court declined to decide whether the clause paramount incorporated Hague-Visby rules, prohibiting a carrier from contracting for a waiver of its obligations for damage under COGSA. Defendants argued that COGSA defines a "carrier" as the "owner, manager, charter, agent, or master of vessel." However, the Court focused on the pre-COGSA maritime law doctrine that the once the cargo is onboard a vessel, the vessel is deemed to have impliedly ratified the underlying contract of affreightment and is answerable for non-performance. Hence the Akili/vessel, "by setting sail with the cargo aboard, impliedly ratified the contract of affreightment between S.M. China and Ferrostaal." The court rejected the arguments of the Plaintiff that the ship owner and manager (Akela and Almi) should have been found liable in personam based on COGSA liability or bailment, as Plaintiff did not argue the former and there was no bailment relationship to constitute the latter.

4. Mayflower Transit, LLC et al., v. T.J. Campbell, CA: 4:11-808 (E.D. Mo. 2012). This case involved an adverse claim of ownership regarding the shipment of household goods arranged by T J Campbell. After the shipment was loaded and was being moved, Campbell told Mayflower to deliver the shipment to storage in transit because he did not have the funds to pay for the move. While the goods were in SIT, Rita Case alleged that the goods that had been moved and were being stored belonged to her. In the first order, the U S District Court for the Eastern District of Missouri granted Mayflower's request for summary judgment against T. J. Campbell, but denied Mayflower's summary judgment request with regard to Rita Case. The court decided that because Rita Case was not identified on Mayflower's Bill of Lading, the court was unable to determine ownership of the goods included in the shipment as between T J Campbell and Rita Case.

In the second order, dated November 13, 2012, the court granted Mayflower's second Motion for summary judgment declaring that Rita Case was the owner of the household goods that had been in storage at the warehouse facility of Dodge Moving & Storage.

II. Limitation Period and Notice

5. Crompton Greaves, Ltd. V. Shippers Stevedoring Company, 2013 WL 441453 (S.D. Tex., 2013). The parties disputed responsibility for damage to a large power transformer being manufactured and shipped from India to Arizona for Tuscan Electric Power, an electric utility. The purchaser contracted with the manufacturer to build and ship the transformer to the United States. The transformer was delivered in March 2007 from India to the port of Houston and was discharged. Shipper's Stevedoring provided internal services for the transportation of the transformer from the port to its final destination in Arizona. Upon delivery in Arizona, the manufacturer determined that the transformer was damaged and inoperable. After a seven-day trial, the court provided extensive and detailed findings of fact and determined that the majority of the plaintiff's claims were barred by COGSA's one-year limitations. Furthermore, the court found that the manufacturer had failed to make out a prima facie showing that the stevedoring company was liable as a bailee and that it is not liable to the plaintiff on the theory of negligence. This case represents an extensive analysis of the applicability of COGSA and —delivery for purposes of the running of the one-year statute of limitations.

III. Limitation of Liability

6. Miller v. Air Van Lines, Inc., 2012 WL 6901155 (Conn. Super.). Steven Miller brought suit for damage to household goods transported from Connecticut to Hawaii, of alleged value of $113,711 (including a piano). When damage to certain items was discovered upon delivery, Miller was paid the declared value of the damaged items, totaling $17,854. Miller filed suit against the motor carrier, Sterling Moving and Storage, Inc. and the various intermediaries. A bench trial resulted in a verdict for the defendants. The Court found that it did not credit Miller's testimony as to the value, that Miller admitted that he was aware that he had selected the limitation of liability value, as opposed to full declared value, to save costs, and that the limitations were reasonable. The court dismissed the bailment claims as they were not raised in the complaint or the Joint Trial Management Report. The Court also dismissed the claims under the Connecticut Unfair Trade Practice Act ("CUTPA") as both impliedly preempted under the Carmack Amendment and lacking any factual support.

IV. Preemption

7. Benefield v. Hays City Police Dept and Greyhound, 2013 US Dist Lexis 17732, 2013 WL 501412 (D. Kansas). A passenger was traveling on a Greyhound bus from Denver to St. Louis. The passenger became unruly. The bus driver called the police while the bus was in Hays, Kansas. The passenger was taken to jail. The passenger was found to have marijuana in his possession. The bus drove off with the passenger's luggage still in the bus. The passenger was eventually convicted of various crimes and spent 4 months in jail. Two years and 3 months after the arrest, the passenger (representing himself) sued the Hays City Police Depart and Carrier for false arrest, false imprisonment, and conspiracy, and sued Carrier for theft of his luggage.

Issue: Can the passenger sue the bus company for theft?

Holding: No. Carrier wins. The claim against the bus company is preempted by the Carmack Amendment, which provides the passenger's exclusive remedy. The bus company validly limited its liability. Further, the passenger never filed a claim, and the statute of limitations expired. The other claims for false arrest, false imprisonment and conspiracy were dismissed.

8. California Tow Truck Assn. v. City of San Francisco, 2013 WL 791265 (N.D. Cal.), Fed. Carr. Cas. P 84,751 (N.D. Cal. 2013). Nonprofit corporation representing towing companies filed a state court action alleging that San Francisco's permit system for towing companies and drivers was preempted by the FAAAA. In this, the fourth decision in this ongoing dispute, the parties filed cross-motions for summary judgment. Both parties appealed. The Court of Appeals, 693 F.3d 847, vacated and remanded. On remand, parties again filed cross-motions for summary judgment.

Issue: Whether the FAAAA preempts the city's permit system for tow trucks.

Holdings: The court held that: (1) the city's permit system fell within scope of motor vehicle safety exception to FAAAA's preemption provision; (2) the requirements that permit applicants provide identifying information, description of their business plans, system for handling complaints, evidence of minimum insurance coverage, and record of all of applicant's criminal convictions fell within scope of FAAAA's motor vehicle safety exception; (3) the requirement that applicants pay filing and finger-printing fees fell within scope of FAAAA's motor vehicle safety exception; (4) the requirement that applicants provide evidence of insurance fell within scope of FAAAA's financial responsibility exception; (5) the requirement that tow drivers and firms display their permits at all times was not subject to preemption; (6) the requirement that firms maintain record of each vehicle towed fell within scope of FAAAA's motor vehicle safety exception; and (7) the provision prohibiting firms from imposed towing, storage, or other charges in excess of the maximum rate established by the city was preempted by FAAAA

9. City of Girard v. Youngstown Belt Railway Co., 134 Ohio St.3d 79 (2012). The City filed an appropriation action against Youngstown in state court regarding a 41.5 acre parcel of land of the 55 acre parcel owned by Youngstown after Youngstown had entered into an agreement with Total Waste Logistics for the sale of the land for use as a construction-and-demolition landfill contingent on Total Waste obtaining the appropriate permits. Youngstown filed a motion for summary judgment arguing that the appropriation proceedings were preempted by Interstate Commerce Commission Termination Act of 1995 ("ICCTA") as it was using 13.5 acres of the parcel (a section which was not part of the planned appropriation) for storage space and had plans for the remaining lot to develop it for use for "industrial, transloading, and/or warehousing purposes to be serviced by rail" and the appropriation would result in a burden to or interference with railway transportation. The City argued that the sale of the parcel to a landfill company contradicted that argument and the 13.5 acres unaffected by the parcel needed for City use was admitted as sufficient for Youngstown's storage use. The trial court, exercising its discretionary jurisdiction, held that the appropriation action was preempted. The City appealed. The District Court of Appeals affirmed the trial court's ruling, although on a slightly different reasoning as to ICCTA preemption, focusing on Youngstown's unspecified future plans for the parcel to expand railway operations (despite the sale agreement to the landfill company.) The City appealed. Issues: 1. Did the trial court correctly exercise jurisdiction? 2. Is there ICCTA preemption? Holding: The Court of Appeals found that the trial court properly exercised its concurrent jurisdiction to decide whether ICCTA preemption applies. The Court of Appeals reversed as to preemption, finding that preemption did not apply where the present use of the parcel did not call for preemption of the future operations of the purchaser of the property (as a landfill). The present use did not constitute transportation by a railway carrier, and Youngstown's claims that it intends to use the parcel for future expansion were too hypothetical and contradicted by the sale of the property to Total Waste Logistics.

10. Clean Harbors Recycling Services Center of Chicago, LLC, et al., v. Harold Marcus Ltd., 2013 U.S. Dist. LEXIS 45703, 2013 WL 1329532 (D. Mass. 2013). Harold Marcus Ltd. agreed to provide interstate transportation of waste materials for Clean Harbors pursuant to a Waste Transportation Agreement. The parties also entered into a —Stand By Emergency Response Agreement□ (—SERA) by which Clean Harbors agreed to provide remediation services. When a load of waste materials exploded in Michigan in route from Indiana to Ontario, Canada, Clean Harbors provided clean-up services for the waste material spill and submitted a bill to the carrier for over $688,000. Clean Harbors filed suit in state court to recover for breach of contract as to both the transportation agreement and the SERA. The carrier removed the case to federal court and moved to dismiss based on Carmack preemption.

Issue: Was the SERA preempted by Carmack?

Holding: The trial court determined that the SERA was not preempted by Carmack as Clean Harbors did not seek to recover for any breach of the carrier's duties as a common carrier. However, the court determined that the remaining contract claim for indemnity for failure to provide appropriate insurance coverage and for improperly selecting a tanker for the waste materials it transported were preempted by the Carmack Amendment. The court further held complete preemption of the state law claims and allowed the plaintiff to amend. In addition, the court provided advice to the defendant as to potential defenses under the bill of lading, including the failure to provide written notice of a claim under the provisions of the bill of lading and deadlines within which to file a lawsuit.

11. Dan's City Used Cars, Inc. v. Pelkey, 133 S.Ct. 1769 (U.S. 2013). Vehicle owner brought action against towing company that towed his vehicle and later traded it to a third party without compensating owner, alleging violations of state laws governing enforcement of statutory liens for storage and towing fees, the New Hampshire Consumer Protection Act, and common law negligence. The Superior Court granted summary judgment to towing company on grounds that the Federal Aviation Administration Authorization Act (FAAAA) preempted owner's claims.

Issue: Whether Section 14501(c)(1) preempts state-law claims stemming from the storage and disposal of a towed vehicle.

Holding: The FAAAA did not preempt owner's claims,

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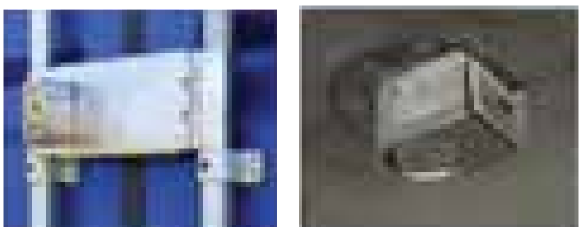

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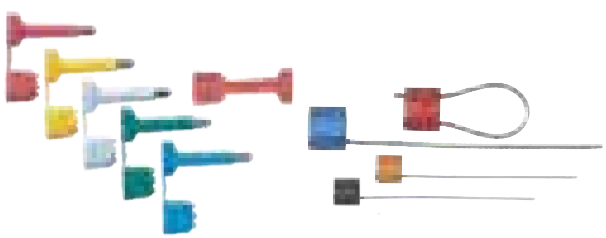

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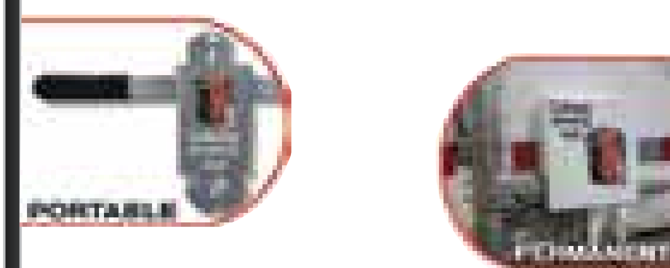

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12. Hamilton v. United Airlines, Inc., 2012 WL 6642489 (N.D. Ill.). Hamilton, a former flight attendant for United Airlines, sued for violation of the Illinois Whistleblower Act and common law retaliatory discharge and sought declaratory relief ordering United to admit that it had no legitimate reason to terminate him. Hamilton claimed that United terminated him for bringing to the Federal Aviation Administration's attention United's departure from internal holding times regulation as to security checks prior to allowing additional passengers board a flight already occupied with commercial passengers, while United argued he was terminated for inflating holding times to increase his pay. United removed and moved to dismiss the claims based on federal preemption of the state law claims pursuant to the Federal Airline Deregulation Act, 49 U.S.C. § 41713(b)(1)("FADA") and the Whistleblower Protection Program ("WPP") amendment to the FADA.

Issues: 1. Are whistleblower and retaliatory discharge claims under Illinois state law preempted by FADA's exclusive regulation of price, route, and services of an airline, or expressly preempted by WPP? 2. Is there federal subject matter jurisdiction?

Holdings: The Court held that Hamilton's claims were too tenuously related to any price, route, or services provided by United and therefore not expressly preempted by FADA; the claims stemmed purely from his employment relationship with United rather than as an airline competitor; and the claims were not related to United's safety obligations as to rates, routes or services. The Court also held that Congress did not intend the WPP to be the exclusive remedy for whistleblower claims. The Court denied the Defendant's motion to dismiss and ordered remand of the action for lack of subject matter jurisdiction

13. Rosen v. Continental Airlines, Inc., 2013 WL 656189 (N.J. Super.). Michael Rosen filed a class action against Continental for violation of the New Jersey Consumer Fraud Act, discrimination, emotional distress, and breach of contract for Continental's refused to allow him to purchase on-flight amenities (headset and a cocktail) using cash on a flight from Hawaii to NJ. Rosen argued that the cash-less cabin policy amounted to discrimination against low-income passengers, preventing him from enjoying in-flight amenities, resulting in severe emotional distress and mental anguish. The lower court denied Plaintiff's claim for class certification as baseless and dismissed all but the breach of contract claim as preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(1)(a) ("ADA"), which Rosen voluntarily dismissed in order to appeal the lower court's ruling. The Appellate Division affirmed, finding the sale of a headset and alcoholic beverages "relat[es] to price, routes, and service[.]" The Court held that the definition of "services" includes matters such as "boarding procedures" (seemingly contrary to the holding in Hamilton-Case 26), baggage handling, and food and drink-matters.

V. Jurisdiction, Venue, and Removal

14. Geyer v. U.S. Van Lines, 2013 WL 65458 (S.D. W.Va., 213). Geyer engaged defendant All Coast Transporters to convey personal and professional effects from Ohio to Georgia. At an Undetermined time, defendant United States Van Lines obtained possession of the cargo. The United States Van Lines truck containing the plaintiff' belongings caught fire while traveling in West Virginia. Plaintiff sued All Coast and United States Van Lines in the same court in West Virginia. All Coast removed. United States Van Lines never appeared. Plaintiff filed two motions to remand, alleging removal procedure defects and failure to obtain consent of all defendants to the removal.

Issue: Should the case be remanded?

Holding: Both motions for remand were denied. The procedural defect of filing to notify the state court of the removal was moot because the removing defendant eventually provided the notice. The failure to obtain consent from the other defendant was waived as a basis for remand because of the plaintiff's failure to raise his procedural objections within the 3-day period established by 28 U.S.C. § 1447©.

15. Mahmoud Shaban & Sons Co. v. Mediterranean Shipping Co., S.A., et al. (S.D.N.Y., Jan. 28, 2013). A forum selection clause was placed in a bill of lading between a broker and a carrier. The shipper did not see the bill of lading. After a shipment of rice was delivered by the ocean carrier to Jordan, the parties determined that the rice was contaminated. The rice was sold as animal feed at a substantial loss. The consignee-purchaser of the rice filed suit against the international freight forwarder and the ocean carrier in the Southern District of New York.

Issue: Whether the forum selection was enforceable.

Holding: Although no party transacted business in the Southern District of New York, the court found that it had jurisdiction over all parties pursuant to the forum selection clause in the bill of lading between the freight forwarder and the ocean carrier. Reviewing the Kirby decision, as well as the decision of the Southern District of New York in A.P. Moller-Maersk, the court concluded that an intermediary serves as the upstream merchant's agent for the purposes of agreeing to litigate in a particular forum.

16. Pyramid Transportation, Inc. v. Greatwide Dallas Mavis, LLC, 2013 WL 840664 (N.D. Tex.).

Pyramid, a freight broker, arranged for Greatwide, a motor carrier, to deliver a Caterpillar dump truck for its customer, Claudio Marcias, from Georgia to Texas. The truck was damaged en route when it was struck by a train. Pyramid paid a third party to transport the damaged truck to Texas, incurred storage costs, and was not paid by Marcias for services in the amount of approximately $80,000. Pyramid refused to pay Greatwide for services rendered on other jobs as a result of the truck damage. Pyramid filed suit, raising claims under Carmack, breach of contract and negligence, for damages to the truck (with power of attorney to act on Marcias' behalf), loss of use, lost business opportunities, and storage costs. Greatwide counterclaimed for breach of contract for the outstanding accounts. Pyramid filed a motion for partial summary judgment for damage to the truck and for attorneys' fees. Greatwide argued that Pyramid lacked standing as it did not own the truck and also moved for summary judgment for lack of liability and limitation of damages.

Issue: Does Pyramid have standing (constitutional and prudential) to sue under Carmack?

Holding: While the Court found that Pyramid had constitutional standing to raise the Carmack claim for damage to the truck, as it held a power of attorney from Marcias and sustained damages itself, the Court dismissed the Carmack claim based on lack of prudential standing. The Court sua sponte raised the issue of prudential standing, finding that without an assignment of rights from Marcias either in the bill of lading or any other contract, a broker on its own does not have the right to sue under Carmack, which only permits suit "under a receipt or a bill of lading" 49 U.S.C. § 14706(a)(1).

17. Samsung Austin Semiconductor v. Integrated Airline Services, 2013 US Dist Lexis 3497, 2013 WL 105380 (N.D. Texas). Shipper hired Carrier #1 to transport an expensive machine and components from Singapore to Austin, Texas. The machine arrived at DFW Airport safe and sound. The plan was for the machine to be picked up by a ground carrier – Carrier #2. At pickup, Carrier #2 issued a delivery ticket indicating that carriage by air had ceased. While the machine was in a warehouse being prepared for ground transport, a forklift operator hired by Carrier #2 dropped the machine, causing irreparable damage. Shipper sued Carrier #2 and the forklift operator under state law for breach of bailment for $2.7 million. Carrier #2 and the forklift operator argued the damage to the machine occurred within airport boundaries, and thus, the lawsuit is governed by the Montreal Convention and should be adjudicated in federal court. In addition, they argued they were agents of Carrier #1, and thus, the Montreal Convention extended to their acts and omissions. The Shipper argued that the carriage by air ended when the machine arrived at DFW Airport and, consequently, the Montreal Convention does not apply.

Issue: Should the lawsuit be adjudicated in federal court or state court?

Holding: The lawsuit should be adjudicated in state court. The Montreal Convention generally extends to the entire move and extends to the agents of the air carrier. However, in this case, the paper trail and the shipping documents establish that the air move ended when the machine arrived in DFW Airport. Plus, Shipper had arranged for Carrier #2 and the forklift operator to handle the last part of the move, and thus, they were not the agents of Carrier #1 under this analysis. The Shipper's motion to remand the lawsuit to state court was granted.

18. Great American Insurance Co. v. Nippon Yusen Kaisha, 2013 US Dist Lexis 67175, 2013 WL 1962308 (N.D. Cal). Shipper hired Carrier to transport 6000 cartons of grapes from California to the Philippines by ocean at a specified temperature. The temperature varied widely during shipping, which caused the grapes to arrive moldy and rotting. Shipper collected $48,000 from its own insurer, and in turn, Shipper's Insurer sued the ocean carrier in a US court in a subrogation suit to collect the $48,000. The bill of lading required lawsuits arising from the shipment to be filed in Japan. The carrier accordingly argued that the US court had no jurisdiction, and any lawsuit should be brought in Japan.

Issue: Is the forum selection clause in the bill of lading valid?

Holding: The court held that the forum selection clause is valid and enforceable, and the court granted the motion to dismiss.

19. Great American Lines, Inc. v. Sanovi-Aventis U.S., LLC, 2013 WL 596421 (W.D.Pa. 2013). Great American Lines (GAL) entered into a Transportation Agreement with Sanofi, a manufacturer of pharmaceuticals, for delivery of Sanofi's product to Amerisource. GAL contracted with Logistics and Distribution Services (LDS) for the transport of Sanofi's product to Amerisource. Upon delivery of the freight, Amerisource reported that the freight was damaged and refused delivery. Sanofi filed a claim with GAL seeking $2.1 million for damage to its freight. GAL declined the claim and filed suit seeking a declaration that GAL was not liable to Sanofi pursuant to the Transportation Agreement. LDS filed a motion to dismiss based on another agreement, the Master Agreement, which contains a forum selection clause indicating that any claims arising from that agreement shall be brought in the State of Michigan and be decided under Michigan law. Alternatively, LDS sought dismissal based on the arbitration clause in a Broker-Carrier Spot Contract between GAL and LDS.

Issues: Should the case be dismissed based on the forum selection clause or the arbitration agreement?

Holding: The court determined that it was unclear which contract governed the dispute between GAL and LDS, namely, that it was impossible to determine the intent of the parties as to which agreement would bind or supersede the other agreement(s). Because of these issues, the court determined that the motions were premature and denied them without prejudice.

VI. Carrier-Broker-Third Party Issues

20. Titan Transportation, Inc. v.O.K. Foods, Inc, 2013 Ark. App. 33, 2013 WL 245253 (Ark.App.). The shipper O.K. Foods hired broker Titan Transportation to handle a shipment of frozen chicken from Arkansas to Colorado. Unbeknownst to O.K. Foods, Titan hired carrier Southwind to handle the actual transportation. At destination, the consignee rejected the shipment because records showed that the shipment was outside of the prescribed temperature range. OK sued Titan and Southwind for $30,000. Southwind ignored the lawsuit. OK asserted that Titan was responsible for the chicken. OK alleged that Titan never told OK that Titan selected Southwind to transport the chicken. The records showed that Southwind's corporate charter was revoked 8 months previously and Southwind was not in good standing. Because Titan selected an insolvent carrier, OK argued that Titan was responsible to OK just as if Titan was the actual carrier. Titan asserted that it was merely the broker and never touched the shipment; thus, OK's only remedy was with Southwind.

Issue: Can shipper sue the broker?

Holding: The appellate court did not characterize the broker Titan as a carrier, but instead concluded that Titan was an agent acting on behalf of an undisclosed principal (carrier Southwind), and accordingly, Titan was liable for the loss The court stated that the following facts supported this conclusion: The documents issued by Titan did not state that Titan was a broker; Titan did not hold itself out as a broker, or at least it was ambiguous about Titan's status; Titan's brochures showed images of carriers, and indicated that Titan itself performed hauling services; Titan advertised that it offered —carrier services"; and Titan never disclosed the name of the motor carrier to OK Foods.

21. United Van Lines, LLC v. Lohr Printing, Inc., 2013 WL 353313 (D.N.J.,2013). Lohr Printing was in the business of making text-book covers. Lohr leased a printer valued at $261,000. Lohr contracted with UVL's agent, McCollister's, to ship the printer from Kentucky to New Jersey. A United driver picked up the printer and presented a United bill of lading. Lohr signed the bill of lading at origin. The printer was allegedly damaged in transit. United and McCollister's filed for a declaratory judgment of limited liability, and Lohr counterclaimed for damages in the full value of the printer. United had non-Carmack claims dismissed in a previous decision. Lohr filed third-party claims against the manufacturer of the printer and individual employees of McCollister's under various theories, including an alleged principal-agency relationship between United/McCollister's and the manufacturer.

Issue: Was the manufacturer of the printer and the motor carrier principal and agent for purposes of liability for the damaged shipment?

Holding: The court dismissed the agency allegations against United, McCollister's and the manufacturer. Neither the shipping contract nor the behavior of the parties suggested the requisite exercise of control between the manufacturer and United/McCollister's.

22. Viasystems v. Landstar, 2012 US Dist Lexis 171133, 2012 WL 6020015 (E.D. Wisconsin). Shipper hired Middleman #1 to arrange the transport of a Finnpower turret punch press from Wisconsin to El Paso, and from there it would be transloaded and placed on a flatbed for the cross-border move, and delivered to Ciudad Juarez, Mexico. Shipper provided Middleman #1 specific instructions for the move, including that the press be transloaded on a flatbed in El Paso for the cross-border move. Middleman #1 contacted Middleman #2, who in turn hired Carrier. The press arrived in El Paso, but there was uncertainty over where it was supposed

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to go. Carrier did not deliver the press to the address on the bill of lading, but instead delivered it to a different address. Carrier claimed that Middleman #2 advised Carrier by phone to do this. Carrier hired Sub-Carrier to handle the cross-border move. Sub-Carrier in turn hired Sub-Sub Carrier. The press was never placed on a flatbed. The press fell off the Sub-Sub's truck and was destroyed. The evidence suggested that the press was not properly rigged. Shipper sued Middleman #1, Middleman #2 and Carrier for $600,000.

Issues: The parties disputed just about everything, including what Shipper had instructed about the flatbed, whether and to whom those instructions were conveyed, what the bill of lading said, whether the bill of lading was modified, whether there were irregularities concerning the bill of lading, whether Middleman #2 told Carrier to deliver the press to a different El Paso address, whether Middleman #2 was a carrier or a broker, and whether Carrier was authorized to use a subcarrier. The parties disputed who was responsible for loading the press in El Paso. The parties disputed whether Carrier knew Sub-Carrier hired Sub-Sub.

Carrier argued it did exactly what Middleman #2 told it to do. Middleman #2 was the agent of Shipper, and by obeying Middleman #2 it is just as if it obeyed Shipper. Middleman #2 told Carrier to deliver the press to an address other than the address on the bill of lading. Carrier safely delivered the press to that alternative El Paso location, and the damage occurred after the press left Carrier's hands. Middleman #2 never told Carrier that Shipper required a flatbed for the cross-border move.

Holding: Carrier was liable under Carmack. Carrier issued a through bill. Carrier was liable for damages caused by intermediate carriers selected by the Carrier. Carrier cannot shield itself from liability by claiming that Middleman #2 was Shipper's agent. Carrier was involved in loading at the alternative address, and the press was not securely loaded, therefore Carrier was responsible (at least in part) for the press falling off the truck. The judge did not rule on the amount of damages. Carrier may be entitled to contribution and indemnity from some of the other defendants. Middleman #1 and Middleman #2 may have some culpability. The case will proceed to determine the amount and the allocation of damages.

VII. Damages & Costs

23. Orient Overseas Container v. Crystal Cove Seafood, 2012 US Dist. Lexis 182821, 2012 WL 6720615 (S.D.N.Y.). Shipper Crystal Cove hired carrier Oriental Overseas to transport 3,400 cartons of frozen tilapia fish from China to Tennessee. The fish had to be maintained at a specified temperature. After the fish was unloaded from the vessel, the fish was loaded onto a rail car. The refrigeration unit in the rail car failed. The carrier learned about the malfunction but did not tell Crystal Cove until two days later. Crystal Cove then told the carrier to break the seal on the containers and transfer the fish into a different container, but for reasons not clear, the carrier refused to do so. When the fish arrived at destination, it was clearly spoiled, and the shipper rejected the shipment. The carrier stored the fish in a different container, with a working refrigerator, while it hired a surveyor and attempted to sort out the dispute. Acting against Crystal Cove's orders, the carrier sold the fish to a salvage company for $30,000. Crystal Cove sued for $60,000 in damages under COGSA. The carrier counterclaimed for demurrage charges and surveying expenses. The parties disputed the salvage value of the fish and whether Crystal Cove had mitigated its damages.
Holding: After a bench trial, the court found that the carrier acted in bad faith and for purposes of delay and vexation and had to pay Crystal Cove damages, plus $50,000 for Shipper's attorney's fees.

Issues: The parties disputed just about everything, including what Shipper had instructed about the flatbed, whether and to whom those instructions were conveyed, what the bill of lading said, whether the bill of lading was modified, whether there were irregularities concerning the bill of lading, whether Middleman #2 told Carrier to deliver the press to a different El Paso address, whether Middleman #2 was a carrier or a broker, and whether Carrier was authorized to use a subcarrier. The parties disputed who was responsible for loading the press in El Paso. The parties disputed whether Carrier knew Sub-Carrier hired Sub-Sub.

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Holding: Carrier was liable under Carmack. Carrier issued a through bill. Carrier was liable for damages caused by intermediate carriers selected by the Carrier. Carrier cannot shield itself from liability by claiming that Middleman #2 was Shipper's agent. Carrier was involved in loading at the alternative address, and the press was not securely loaded, therefore Carrier was responsible (at least in part) for the press falling off the truck. The judge did not rule on the amount of damages. Carrier may be entitled to contribution and indemnity from some of the other defendants. Middleman #1 and Middleman #2 may have some culpability. The case will proceed to determine the amount and the allocation of damages.

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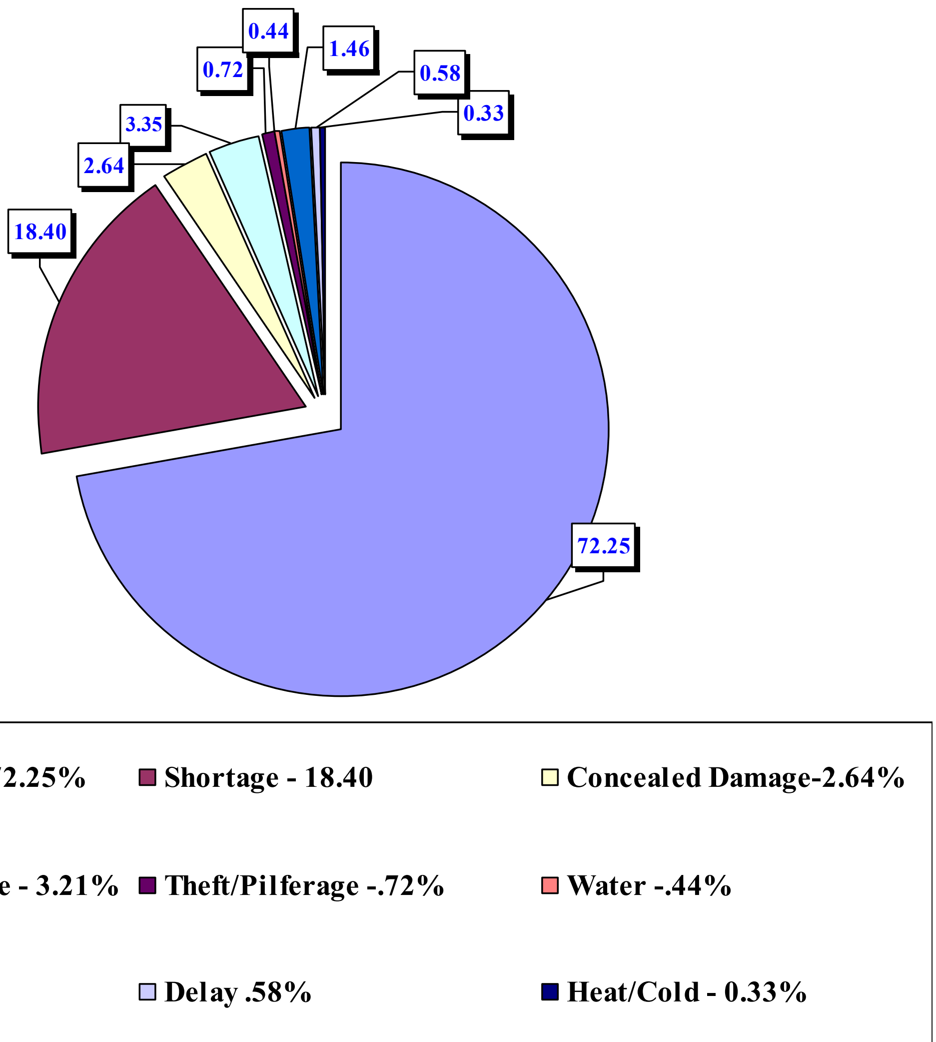

TLP & SA MOTOR CARRIER CLAIMS SURVEY – 2012

CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	18.40 %	9.19 %
Theft / Pilferage	.72 %	.07 %
Visible Damage	72.25 %	62 %
Concealed Damage	2.64 %	2.39 %
Wreck / Catastrophe	3.21 %	.37 %
Delay	.58 %	.05%
Water	.44 %	.09 %
Heat / Cold	.33 %	.08%
Other	1.46 %	.15 %
Totals	100 %	74.39 %

Total numbers of claims paid Vs. number of claims filed.	75.52 %
Total dollars paid Vs. total dollars filed.	32.69 %
Net dollars paid Vs. total dollars filed.	33.53 %
% of claims filed to total number of shipments made.	.62 %
Total company claim ratio.	1. 02 %
Percent of claims resolved in less than 30 days.	.81 %
Percent of claims resolved 31-20 days.	.14 %
Percent of claims resolved more than 120 days.	.05 %


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- **STEVE CROUSE, CCP**
- ABF FREIGHT SYSTEM, FT. SMITH, AR
- **CHRISTINE GRAMSE, CCP**
- LAND O' LAKES, INC. , ST. PAUL, MN
- **MANDIE HIMAN, CCP**
- UPM, WESTMONT, IL
- **CARRIE MERCIE, CCP**
- SCHWAN'S GLOBAL SUPPLY CHAIN,
- MARSHALL, MN
- **VERN O'BRIEN, CCP**
- BRIGHAM YOUNG UNIVERSITY, PROVO, UT
- **CINDY RAFART, CCP**
- CAROTRANS INTERNATIONAL, INC., MIAMI, FL
- **MICHELLE RUPKE, CCP**
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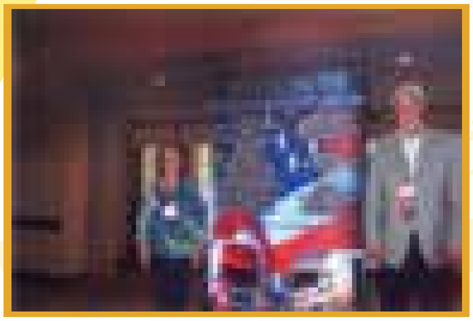
with Milestone AV Technologies has agreed to fill the vacant position of ProClaim Editor-In-Charge. ProClaim was last published in the Spring of 2012 after Editor Marcus Hickey, CCP left the industry to pursue other interests.
We are very pleased to have someone with the expertise and knowledge that Lori has to assume this position.

Lori is looking to Members, Educators, Attorneys and Vendors for news worthy articles and submissions for her first edition to be published in November. Now is your chance to write an article on a topic you deal with every day. So put your notes together and send them off to Lori. CCP's wishing to earn contining education credits to maintain their Certification and those desiring to apply for the exam but have not earned enough points, now is your chance as CCPAC credits are awarded to those who submit articles that are published.
Email Lori at lori.amerikanos@milestone.com

TLP & SA 2013

JOINT CONFERENCE



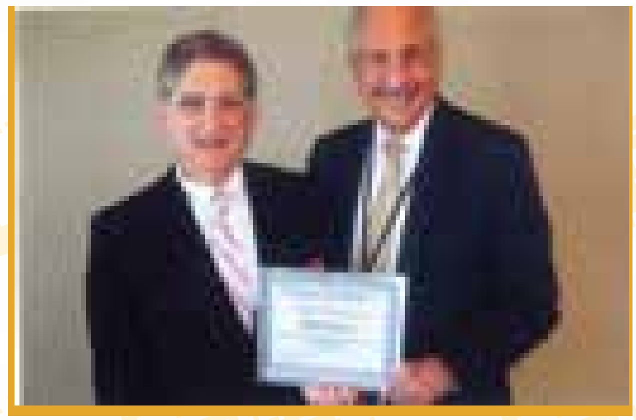
Diane Smid of T&LC and Ron WIlliams & Acssociates Stand along side the billboard of the 39th Annual Joint Conference of TLP&SA and TLC

Ron Popham,Ass't. V.P. Industry & Trade Relations-Port of San Diego receives a Plaque of gratitude from WIlliam D. Bierman, Esq. of TLP&SA for his Keynote Luncheon Speech.

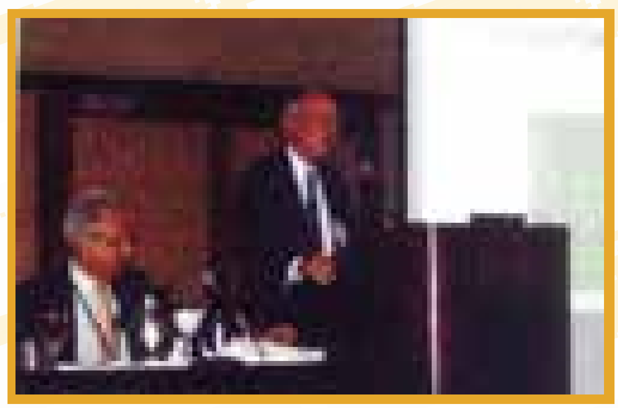
Ed Loughman of TLP&SA with Diane Smid of TLC work behind the scenes.

'Professor' John O'Dell, Executive Director,

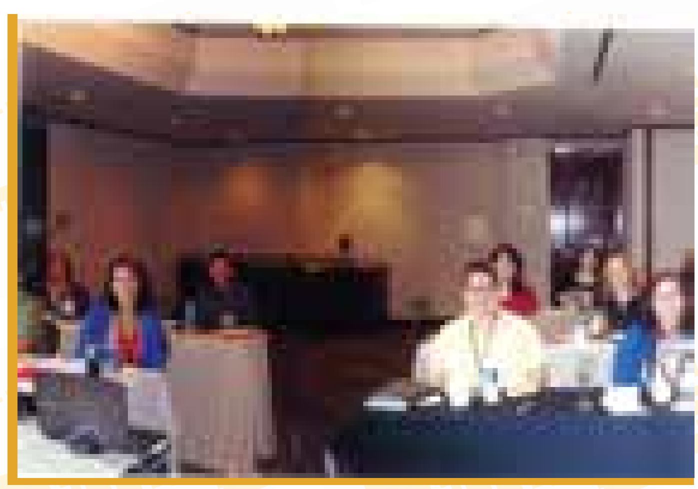
Wes Chused,Esq., Looney & Grossman - Robert Voltmann - Press. & CEO, TIA - Jim Attridge, Esq., Business Trial Lawyer-Clark Van Orman, Sr. Mgr., Sysco Corp. - Ray Selvaggio, Esq., TLC - Jeff Jordan, V.P. Central Freight Lines- Jerry Smith, Esq, TLC - Christopher Brown, Rsq. Total Quality Logistics.



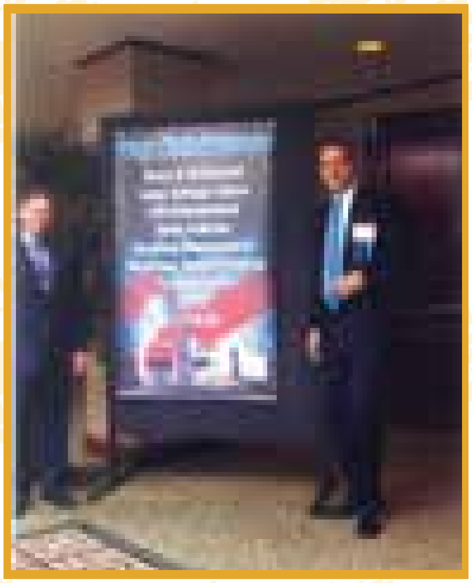
Wes Chused, Esq. receives Certificate of Appreciation from Bill Bierman, Esq for his efforts for the TLP & SA.



Bill Bierman listens to Ron Popham's luncheon speech.



The CCPAC (Certified Claims Professional Accreditation Council) Class of 2013

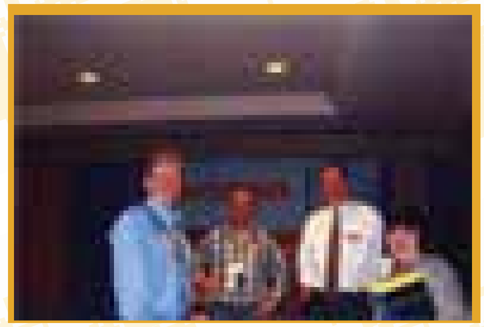


Tom Martin, Esq., Nowell Amoroso Klein Bierman
& Eric Zalud, Esq. - Benesch, Friedlander, Coplan & Aronoff
flank the billboard at the entrance to the Exhibit Room of the
Joint Conference.

Frank Copic, PE, Burns & McDonnell fcopic@burnsmcd
speaks with Tanya Dinh of Daylight Transport.

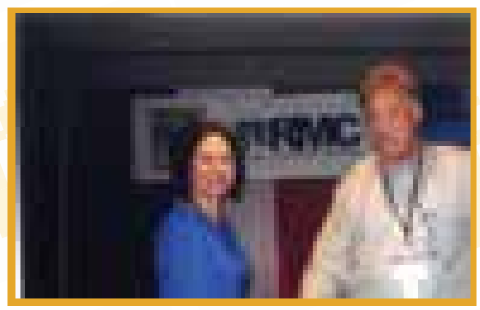
Pat Fenton of Forward Air visits Donna Wyss of
Cargo Salvage Claims Cscalesnet@earthlink.net

John O' Dell, CCP of CCPAC is flanked by Les Vaagen of Midwest Motor Exp.
and Wally Dammann, CCP of Mitsui Sumitomo Marine Management -
jodell@ccpac.com



Roderick Fracassi, Esq. of Con-Way & Sonya Lisenbach of McCormick
& Co. flank John Watson & Rod Burlison of
Clovis & Roche - Jwatson@clovisroche.com

Becky Pennison of SAIA visits Dave Myers of RCM (Recovery
Management Corp a/k/a CargoLargo) - dmyers@cargolargo.com



John Adams of Reiscope Digital Imaging - Adamsj@regiscope.com is
visited by Pamela Vance of Transplace Texas.

Mary Ann Krvia of Transolutions (a/k/a Myeasyclaim)
MartyAnn.Krevia@myezclaim.com or joe.celestina@myexclaim.com
speaks with Bill Gardner, CCP of HUB Group

Cidney Ota of Sunkist Growers visits the booth of the TLP & SA, manned
by Ed Loughman, HCCP - Eloughman@tlpsa.org

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Volume 1, Issue 1

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155 Polifly Road
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Tel (201) 343-5001
Fax (201) 343-5181
wbierman@nakblaw.com

Chairperson
Jeffrey D. Jordan
Central Freight Lines
5601 W. Waco Dr,
Waco, TX 76710-2636
Tel (254) 741-5574
Fax (254) 741-5576
Jjordan@centralfreight.com

Chairman Emeritus
Daniel Saviola
Y R W C
7708 Drayton Cr.
University Park, FL 34201
Tel (678) 517-6799
Fax (941) 517-5587
Daniel.saviola@yrcw.com

Associate Exec. Director
Edward M. Loughman, HCCP
TLP & SA
5 B Yorktowne Pkwy.
Whiting, NJ 08759
Tel (732) 350-3776
Cell (732) 703-0515
Eloughman@tlpsa.org

Directors

Roderick Fracassi, Esq.
Con-Way Inc.
2211 Old Earhart Rd.
Ann Arbor, MI 48105
Tel (734) 757-1633
Fax (734) 757-1150
Fracassi.rod@con-way.com

Daniel Hill
ABF Freight Systems
P.O. Box 10048
Fort Smith, AR 72903-0048
Tel (479) 785-6343
Fax (479) 785-8800
dhill@abf.com

Karen M. McCoury, CCP
Marten Transport
129 Marten St.
Mondovi, WI 54755
Tel (800) 395-3000 Est. 2415
Fax (80) 461-0372
KMS@marten.com

John O'Dell, CCP
CCPAC
P.O. Box 550922
Jacksonville, FL 32255-0922
Tel (904) 322-383
Fax (94) 287-9843
jodell@ccpac.com

Martha Payne, Esq.
Benesch Friedlander Coplan & Aronoff
103 Coronado Shores
Lincoln City, OR 97367
Tel (541) 764-2859
Fax (216) 363-4588
payne@beneschlaw.com

John Tabor
National Retail Systems
2820 16th St.
North Bergen, NJ 747
Tel (201) 330-190 Ext. 3673
Fax (201) 866-8703
John.Tabor@nrsonline.com

William Taylor, Esq.
Hanson Bridgett, LLP
980 9th St.
Sacramento, CA 95814
Tel (916) 442-3333
Fax (916) 442-2348
wtaylor@hansonbridgett.com

Vickie Visser
USF Holland
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