In Transit

Transportation Loss Prevention & Security Association April 2015

TLP&SA CHICAGO CONFERENCE
APRIL 19-21, 2015
BEST CONFERENCE OF THE SEASON

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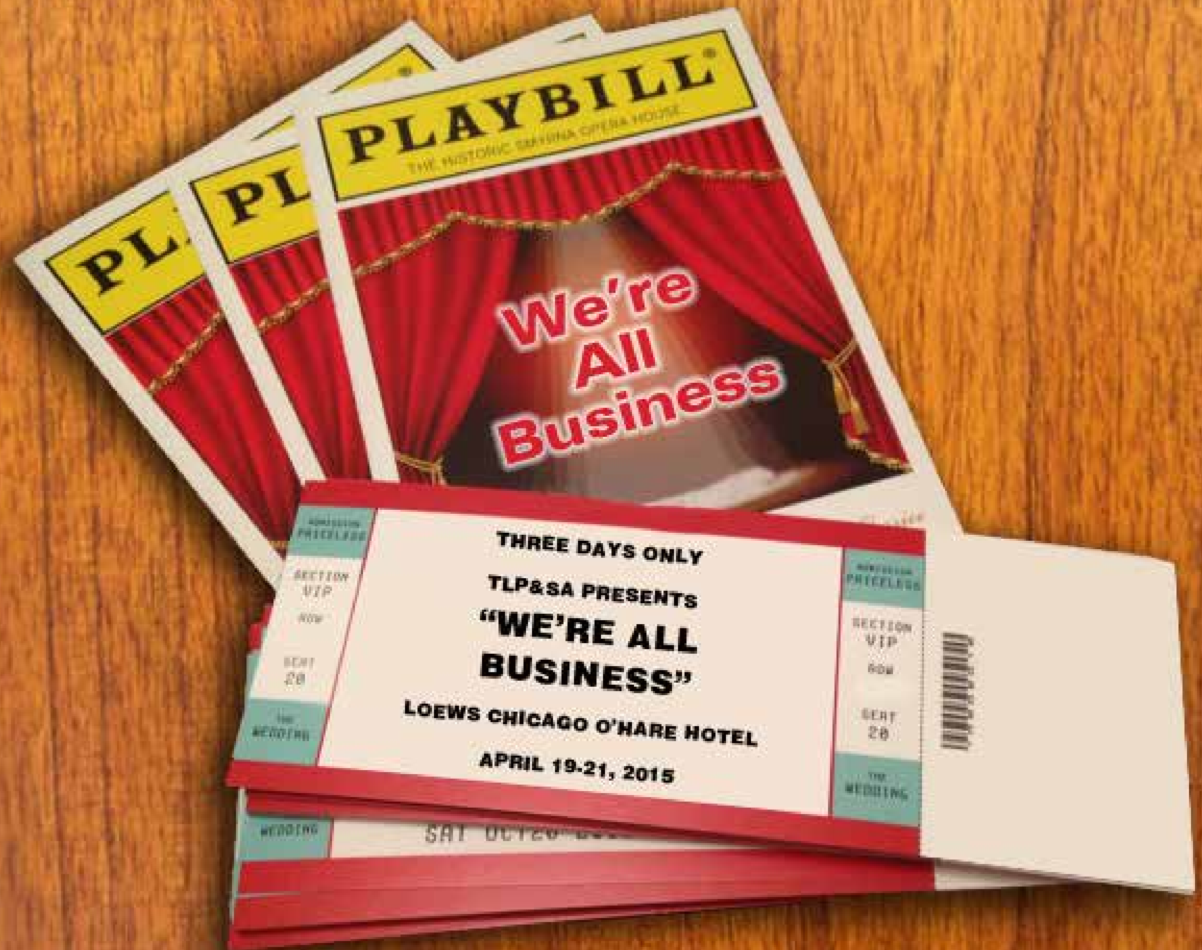

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See attached Conference materials

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“WE’RE ALL BUSINESS”

By: William D. Bierman - Executive Director

We live in an ever changing world moving at the speed of a key stroke. Information drives all industries and transportation is certainly no exception. In fact information is at the heart of the transportation industry. The logistics of the movement of goods spells the outcome of the shipment. Time, distance, nature of the commodity, contracts of carriage, bills of lading, tariffs, rules, regulations, statutes, security all play an essential part in any shipment and all depend on accurate information.

So how does the transportation industry keep up? Clearly it is impossible for any one company on its own to master all the necessary information in house. No company no matter how large employs experts in all the essential areas. This is where an industry Trade Group performs its most important function. The Transportation Loss Prevention & Security Association (TLP&SA) has for years put together the most knowledgeable and recognizable experts in the field to keep its members and friends informed of the latest industry developments. From our periodic Newsletter In Transit which contains articles and a summary of the latest cases to our email ALERTS giving you instant feedback as to what just happened today, TLP&SA works to inform the industry.

Perhaps the most important function of TLP&SA is our Annual Conference which this year will be at the Loews Chicago O’Hare Hotel, April 19-21, 2015. The theme of the Conference is “WE’RE ALL BUSINESS”. This year’s meeting is in response to our industry members who have requested a no frills educational meeting which updates our attendees on the important issues of concern to us all. We have strived to provide a Program that not only presents information but also supplies solutions our attendees can immediately use when they return to work.

In this Newsletter you will find our Conference Agenda & Registration Form as well as a list of our excellent speakers who you will no doubt recognize. We believe the outstanding Program is a must attend for your company. We are offering a one day “CLAIMS ACADEMY” on Sunday for those who wish for an intensive review and to brush up on the basics and for those who have recently entered the field.

On Monday and Tuesday we have our General Sessions which were chosen to deal with the pressing transportation issues of the day. One of the highlights will be a unique “CLAIMS MANAGER’S ROUNDTABLE” where the heads of departments from ABF, Con-Way & Marten Transportation will discuss their philosophies and how they handle their most difficult problems. Other Sessions will address MAP-21 and pending federal legislation and regulations as well as recent FMCSA initiatives.

In addition, one of the most costly and vexing problems confronting the industry today is the new FOOD legislation which may affect every shipment covered by the legislation and its pending regulations. The “IS OR MAY BE CONTAMINATED” language runs counter to Carmack requirements and is an almost impossible bar to overcome. We address the legislation head on with practical ways to deal with the issue providing a level playing field for both carriers and shippers. Hostage taking towing companies, independent contractor issues and security are just some of the additional areas we will cover for you.

While we might not be able to move at the speed of a key stroke, we will give you three days of invaluable information which will allow you and your companies to keep up with and perhaps conquer the information war. Get your tickets now…two on the aisle for “WE”RE ALL BUSINESS”. You will give it a great review!

OUR GOOD FRIEND HANK SEATON HAS PROVIDED TLP&SA WITH HIS REGULATORY UPDATE SO WE CAN ALL WATCH THE GOINGS ON IN WASHINGTON.

Further Delays

1. E-Log. The FMCSA has pushed back the date for a final rule which will require all drivers who currently must prepare RODS to use electronic devices. The new date for a final rule is November 9, but whenever it is issued, the rule will not take effect for 2 years.

2. Speed Limiters. The target date for a proposed rule to require the use of speed limiters for large trucks has been extended to June 8. The FMCSA and NHTSA must first agree on the proposed rule which will be subject to comment and rulemaking before being implemented.

3. CDL Drug and Alcohol Clearinghouse. This final rule has been pushed back until December 14 and will track all drivers holding CDLs who fail or refuse to take a drug or alcohol test. The final rule will not become effective for 18 months after publication, but ultimately will require carriers to keep records and to obtain clearinghouse checks for all new drivers.

4. Prohibition of Driver Coercion. The Agency has published proposed rules to impose fines on carriers and shippers and brokers for coercing truck operators to violate the Federal Motor Carrier Safety Regulations. See Fed Reg. 2014-10722. The Final Rule is scheduled for issuance on September 10 and will be effective when issued. This rule will bring shippers and brokers under FMCSA regulation for violation of safety offenses for the first time and should abate demands for delivery times which exceed the hours of service requirements.

5. Safety Fitness Determination. A long awaited safety fitness determination rulemaking has again been delayed until July 1. Some suggest the rule would merely allow the FMCSA to use ratings from CSA's Safety Management System to target carriers for intervention. Yet, Joe DeLorenzo, the Agency's Director of Enforcement, in February is quoted as saying that, "When the safety fitness determination rule is published the Agency will have the authority to assign monthly safety ratings – satisfactory, conditional or unsatisfactory – to carriers based on algorithms rather than conducting manual compliance reviews.

This prospect is indeed scary as the following commentary suggests.

They Can't Mean That

Joe DeLorenzo, the FMCSA's Director of Enforcement and Compliance, previewed the long awaited safety fitness determination at the Omnitracs convention in Dallas. The Commercial Carrier Journal and a number of attendees reported that when the long awaited safety fitness determination is finally published, the Agency will have the legal authority to assign monthly safety ratings – satisfactory, conditional, and unsatisfactory – to carriers based on algorithms rather than conducting manual compliance reviews.

Rating carriers based upon compliance information has been the Agency's goal for the past 11 years. Yet, certainly Mr. DeLorenzo could not have meant the ultimate safety fitness rule will be published in July or that the Agency, any time soon, will be authorized to replace existing rules with "its algorithm" to rate carriers to make a safety fitness determination on a monthly basis without a compliance review.

Whatever the Agency publishes in July must be the first step in the long delayed rulemaking process. Although the Agency has indicated that its ultimate safety fitness determination will rely on raw scores, not peer group percentiles, peer grouping of carriers is not the only fatal flaw in SMS methodology. The law of large numbers pointed out in the Gimpel Study and confirmed by the GAO, proves the SMS system lacks sufficient data to rank 90% of the carriers. The Agency has professed an ability to determine crash preventability and a 75% error factor which leads to wild fluctuation in small carrier scores is a problem the Agency cannot ignore. The Agency's use of average or medium trend lines to vindicate the alleged nexus between compliance in the BASICs and safety gives no predicate for placing a carrier out of service based upon raw scores alone.

As the misuse of SMS methodology by shippers and plaintiff's bar has shown over the past 4 years, SMS may be useful in profiling carriers for "further monitoring" by the Agency but not as a predicate for making an ultimate safety fitness determination which deprives a small business of its right to operate or its access to business without due process.

Currently if a carrier after audit is issued a proposed fitness standard of conditional or unsatisfactory, it has an appeals process before the Agency's action is final and the safety rating is published. Clearly, any administratively final rule will have to give carriers similar appeal rights in order to comply with due process requirements. Will the result of grading carriers as satisfactory, conditional or unsatisfactory based upon the flawed "algorithm" ultimately just publicly brand thousands of carriers as damaged goods before their rights of due process are exhausted?

Currently using SMS methodology as originally intended, the Agency audits 14,924 carriers annually and ultimately concludes that only 465 are unfit to operate on the nation's roadways. Will publicly branding carriers as conditional or unfit on a monthly basis based upon compliance numbers alone somehow improve this ratio?

Congressman Gibbs and Barletta are already asking the Agency the right questions about SMS methodology. At this point, the Agency's SFD rulemaking should add some more questions to the stack.

A Win for the Owner-Operator Model in New England

The State of Massachusetts, a traditionally unfavorable venue for owner-operators, passed a wage act which applied the so called ABC Test so as to make it impossible for a motor carrier to have owner-operators in the conflicting lower court decisions including a favorable Virginia District Court decision interpreting Massachusetts statute resulted in *Massachusetts Delivery Ass'n v. Coakley*, 671 F. 3d 33 (Court of Appeals, 1st Circuit 2012). Our firm, on behalf of small trade associations, filed an *amicus curiae* in support of petitioners. On appeal of an adverse decision to the 1st Circuit Court of Appeals, a favorable decision has been entered.

As Wes Chused, a Massachusetts based transportation lawyer notes, "Motor carriers' use of independent contractors in Massachusetts [is now] a whole new ball game." Not only did the court reverse adverse lower court decisions, importantly it found that the preemption provisions of the F4A (49 U.S.C. 14501(c)) preempted the second prong of the state law which otherwise would have precluded the use of owner-operators without the risk of consequences of a misclassification claim.

Remember, preemption is the doctrine that under the commerce clause of the Constitution, federal law is supreme and trumps state law. The federal court in *Coakley* found that the Massachusetts statute in effect prevented the use of independent contractors in Massachusetts, making impossible use of a business model federal law is intended to permit. Hopefully this decision will have legs and will be adopted by other Circuits as well.

Now, if only we could get the doctrine of federal preemption affirmed when plaintiff's bar attempts to use state law to penalize the public for using motor carriers the FMCSA has determined are safe to operate.

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Recent Court Cases

as analyzed by the Conference of Freight Counsel

Ken Bryant, Esq. , Chairperson and Kathleen Jeffries, Esq., Vice-Chairperson

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1. Burlington Coat Factory v. Jay Dee Trucking. 2014 WL 2440729 (N.J. Super A.D., June 2, 2014). Driver sued his employer Burlington Coat Factory for personal injury suffered while cargo was being unloaded from the truck owned by defendant Jay Dee Trucking at Burlington's loading dock. Burlington sued the motor carrier and its insurance carrier claiming defense and indemnity under Jay Dee's trucker's policy. The court granted summary judgment to the insurer and Burlington appealed. The underlying plaintiff's accident arose when he slid between the dock and the trailer during unloading. The underlying plaintiff's lawsuit was couched in premises liability. Burlington claimed defense and indemnity because the underlying claim was an accident covered by Jay Dee's auto insurance policy.

HOLDING: The court held that the negligence of the premises owner in failing to maintain its loading dock, resulting in the underlying plaintiff's injury, cannot be viewed as a negligent use of the truck that would trigger insurance coverage under the motor carrier's insurance policy. The attempt to adjust the loading dock and its equipment, although necessary to unload the truck, should not be construed to constitute use of the truck. Accordingly, once it was determined that the fall was caused by the condition of Burlington's premises, coverage was precluded under the truck policy.

2. OshKosh Storage Company v. Kraze Trucking, LLC. Case No. 13-C-1246 (E.D. Wis., July 17, 2014). OshKosh retained Kraze to deliver a truckload of kosher cheddar cheese from Minnesota to Wisconsin under a bill of lading. The shipment was made pursuant to specifications of OshKosh's customer, Dairy Concepts. At the time of delivery, Kraze's driver checked in with OshKosh, had his paperwork stamped, and received a lot number. OshKosh told Kraze's driver to pull up to the north side of the building and OshKosh's man would break the seal. Kraze's driver parked his truck, opened the seal and the trailer doors. OshKosh rejected the load because the seal was broken. OshKosh sued Kraze alleging that a rejection of the load was required by Kraze's breaking the seal prematurely. Kraze asserted that the absence of the seal does not mean the shipment was contaminated or otherwise damaged, and as such, there was no "actual damage" under Carmack.

HOLDING: The court determined that whether the broken seal constituted damage under Carmack often depends on the actions of the end customer. Food products transported with a broken seal may be accepted by a customer, however, food distributors have a duty to ensure that food is safe for the public, requirements that shipments be unsealed only by authorized personnel are intended to provide assurance that the shipment has not been contaminated. Based on this reasoning, the court determined that OshKosh established a prima facie case under Carmack. Further, because the Kraze driver did not refute OshKosh's showing that verifying unbroken seals is industry practice, Kraze was not successful in demonstrating that it was free of negligence. The court granted summary judgment to OshKosh.

3. Open Systems Technologies v. Transguard Insurance Company. 2014 WL 3625737 (W.D. Michigan, S.D., July 22, 2014). Plaintiff arranged for shipment of two computer arrays from Oklahoma to Michigan. One of the arrays was damaged. Specifically, the array was shipped from Oklahoma to the consignee's facility on East Beltline in Grand Rapids. The shipment went to the Beltline location because the intended location on Bradford Street was under construction. Approximately 2-1/2 months after delivery to the Beltline location, a subsequent shipment, by another carrier, moved the array from Beltline to Bradford. Plaintiff sued defendants in state court for damage to the array. Defendants removed arguing that the transportation of the array from Oklahoma to the Bradford location constituted one continuous act of shipping, and thus was an interstate shipment falling within the jurisdiction, and preemption, of the Carmack Amendment. Plaintiff argued that delivery of the array of the Beltline location terminated the interstate shipment, and subsequent shipment was intrastate.

HOLDING: The court determined that the parties separated the shipment of the array into distinct portions with separate contracts. Because plaintiff contracted with one carrier to ship the array from Oklahoma to Beltline, and executed a separate contract with a separate carrier and separate bill of lading to move the array from Beltline to Bradford, this was not a true interstate shipment, and accordingly, the second leg of the shipment was intrastate. The court concluded that Carmack did not apply to the case and remanded.

4. Mahmoud Shaban and Sons Co. v. Mediterranean Shipping Co., S.A, 2014 WL 6480669 (S.D. New York, November 14, 2014). The case involves a series of shipments of 22,000 metric tons of rice from the facility of the Shipper's agent in Williams, California to Aqaba, Jordan. The Plaintiff shipper purchased the rice from a third party seller (American Commodity Company or "ACC"). ACC stored the rice for various periods of time spanning a few days to in some cases two weeks. The rice was loaded into multiple one ton tote bags and then was containerized. ACC contracted with an NVOCC called Globerunners to coordinate the transportation from Williams, California to the Port of Oakland, California and then on to Aqaba, Jordan. Mediterranean Shipping Co., was the ocean carrier.

The subject rice arrived in a damaged condition either with insects, water damage or odors.

Plaintiff moved for summary judgment taking the position it had proved its prima facie case under COGSA and that the $500.00 per package limitation did not apply. The Court denied both motions.

Plaintiff argued it could prove delivery to the carrier in good condition based on a series of Bills of Lading, survey reports, outgoing inspection reports and USDA reports all showing the containers or the tote bags of rice were either "fit for human consumption" or "clean onboard." The Court denied summary judgment because, upon review of the reports, they only related to either the outside of the totes or the outside of the containers but not the condition of the contents. None of the inspectors issuing their reports actually saw, confirmed and verified the condition of the rice itself as it went into the one ton totes. Moreover, there was evidence the infestation could have begun at the seller's warehouse where, at times, the rice sat for days or weeks. Accordingly, the Court found there were questions of fact and that the Plaintiff could not prove its prima facie case under COGSA at least not on summary judgment.

As to the motion for summary judgment against the $500.00 per package limitation, Plaintiff argued the course of the voyage to take the rice past Aqaba, Jordan, and traveling an additional 1,142 nautical miles or 3,886 nautical miles (as the case may be) before circling back to Aqaba, Jordan was an "unreasonable deviation" that included additional risk to the freight. As such, Plaintiff argued the $500.00 per package limitation would not be applicable as per COGSA. The Court denied that motion holding that "unreasonable deviation" can only be determined upon an assessment of all of the surrounding circumstances. There was also evidence the practice of the ocean carrier in traveling past Aqaba, Jordan and then returning was part of the carrier's normal route, that it made transportation more efficient and that the Plaintiff knew about it beforehand all made the question of "unreasonable deviation" an issue of fact for trial.

5. Hongbo Han v. United Continental Holdings, Inc., 2014 U.S. App. LEXIS 15433 (7th Cir. 2014). This case concerns the proper interpretation of an airline's frequent flyer agreement. (FFA). Plaintiff was a member of United's MileagePlus Program and filed suit in Illinois federal court alleging that United breached the terms of the FFA by crediting him for miles flown based upon the distance between airports, rather than upon the actual miles flown. He argued that he should have gotten credit for weather diversions and landing delays, so that he would get credit, literally, for every mile that the aircraft stayed in the air for a trip.

The trial court ruled in favor of United, finding that the FFA provided United with the ability to interpret the contract terms, even though the FFA did not specifically define "miles flown." Plaintiff appealed to the Seventh Circuit. The Seventh Circuit examined the terms of United's FFA under plaintiff's breach of contract claim. The court noted that the FFA did not specify the method by which United would determine a "mileage credit." United argued that the silence precluded the Court from adding terms to the FFA. The court disagreed and found that the silence created ambiguity. Plaintiff argued that the ambiguity must be construed in his favor, but the court rejected this argument as well. The court found that the remaining provisions of the FFA clearly allowed United to interpret how to calculate miles, so long as the interpretation was reasonable. Plaintiff did not argue that United's interpretation was unreasonable. He merely argued that his interpretation was better. The Court found this argument to be fatal and affirmed the trial court's ruling.

RULING: The affirmed the trial court's ruling that plaintiff failed to sufficiently allege that United breached the terms of its frequent flyer agreement because the program rules allowed United to use its own discretion to interpret the meaning of the FFA, and because United's interpretation was reasonable. Thus, the basis for calculating miles under the FFA was affirmed, and the dismissal of plaintiff's Complaint was affirmed.

6. Exel Inc. v. Southern Refrigerated Transport, Inc., 2014 WL 4243762 (S.D. Ohio 2014). This case concerns the loss of a shipment of pharmaceuticals, and the broker's attempt to recover the full replacement value of the shipment from the carrier, on behalf of, and for the benefit of, the shipper. Plaintiff, Exel, is a 3PL. Non-party Sandoz (the shipper) contracted with Exel to arrange for the transportation of its goods. Exel, separately, contracted with Southern Refrigerated Transport, Inc. ("SRT"), to transport its shipper's goods, including Sandoz's goods. The contract (the "MTSA") between Exel and SRT contained several key provisions, including the following:

1. A provision stating that SRT would be liable to Exel for loss, damage or injury to goods;

2. Bills of lading are subject to and subordinate to the terms of the contract;

3. The measure of damages is replacement value;

4. SRT must carry $100K in insurance for cargo loss or damage;

5. The $100K insurance provision shall not act as a limitation of liability.

A shipment of Sandoz pharmaceuticals was brokered to SRT by Exel and was stolen in transit. Sandoz demanded $8.5mm from Exel. Exel then demanded the same amount from SRT. Exel did not pay Sandoz for the shipment. When SRT denied the claim and offered $56K pursuant to its own bill of lading's released value provision, Exel filed suit on behalf of Sandoz, pursuant to an assignment. Exel's Complaint contained counts

for breach of contract, breach of bailment, Carmack and a request for declaratory judgment that the $100K insurance requirement acted as a limitation of liability for the loss.

SRT argued that Carmack and not the MTSA, controlled the claim, and that the bill of lading, with its release valuation, was the only contract of carriage for the shipment. SRT filed a Motion for Judgment on the Pleadings, which resulted in the dismissal of the breach of bailment claim. Summary judgment motions were then filed, where the primary issue was whether the Carmack Amendment preempted Exel's breach of contract claim. The trial court ruled that Carmack did not preempt Exel's breach of contract claim against SRT. In other words, Carmack did not preempt a broker's claim for breach of contract against a carrier. Thus, the motion for summary judgment was denied. Additional discovery took place and another round of summary judgment motions followed.

In the last round of motions, Exel argued that the MTSA is an enforceable contract, that SRT breached the MTSA, and that SRT was required to pay full replacement value for the lost shipment. In response, SRT reiterated that Carmack preempted the breach of contract claim, that the MTSA was not an enforceable contract, that Exel was not the proper party in interest, and that the $100K insurance provision acted as a limitation of liability. Finally, SRT argued that the bill of lading limited its liability to $56K.

RULING: The court rejected SRT's Carmack preemption argument, finding that while there was a split among the Circuits as to whether a broker's contract claim against a carrier is preempted, the trial court's decision in the negative was not a manifest error. The court then rejected SRT's argument that the MTSA was not an enforceable contract. Specifically, SRT argued that the contract was not enforceable because it failed to identify the subject matter of the contract, a quantity term, and a price term, and because it fails to define the measure of damages. The court, as noted, rejected each and every one of those arguments. The court looked to the "plain language of the MTSA" to find that SRT was liable to Exel for the loss. The court found that the MTSA, and not the bill of lading, controlled the rights and remedies of the parties, and that the MTSA clearly required Exel to pay the replacement value of goods tendered to it by Exel. The court also rejected SRT's argument that Exel could not recover money from SRT because Exel had not paid its shipper (Sandoz) and, therefore, had suffered no damages. The court found that Sandoz had, in fact, demanded the money for the loss from Exel, and the fact that Sandoz did not file suit against SRT is immaterial.

Finally, citing the clear language of the MTSA regarding the $100K insurance coverage requirement, and the language stating that the insurance requirement shall not act as a limitation of liability, the court rejected SRT's request for declaratory judgment. The court ruled that SRT was liable to Exel for $5,890,338.82, plus prejudgment interest and costs.

7. Exel, Inc. v. Southern Refrigerated Transport, Inc., 2014 U.S. Dist. LEXIS 168762 (S.D. Ohio 2014). This is a continuation of the preceding case, and involves the posting of a supersedeas bond by SRT to cover the judgment in favor of Exel. As noted in the preceding summary, the trial court found in favor of Exel and ordered SRT to pay Exel $5,890,338.82, plus interest and costs. SRT then filed a Motion to Stay Execution of the Judgment and to waive the posting of a supersedeas bond. SRT argued that the Court has discretion to stay execution of the judgment and to waive the posting of a supersedeas bond and that there was no need for SRT to post a supersedeas bond since it had obvious and significant financial resources to cover any judgment should its anticipated appeal ultimately fail. Exel argued that SRT failed to demonstrate the type of "extraordinary circumstances" needed to provide the Court with discretion to waive the bond requirement or to stay execution of the judgment.

The court considered and analyzed Federal Rule 62(d) and noted that its purpose was to ensure that the prevailing party will recover in full if the judgment is affirmed on appeal, and to protect the appellant against the risk that payment cannot be recouped if the trial court's ruling is subsequently reversed on appeal. The court then addressed when the posting of a supersedeas bond may be waived. It noted that the Sixth Circuit had not yet articulated a clear standard for waiver, and that an "extraordinary circumstance" standard had emerged as a standard in the absence of appellate guidance. There was also a dispute about the amount of the bond, particularly the amount of prejudgment interest and the date on which the interest should have started to accrue.

RULING: The court found that SRT failed to satisfy the "extraordinary circumstances" standard for waiver of the bond. The court was not convinced by SRT's unilateral assertions, without further proof, that its parent company, Covenant Transport, would satisfy any judgment. The court also noted that Covenant's earnings had been less than stellar and that its decision to increase its reserves in anticipation of an adverse appellate ruling was, by itself, unpersuasive.

With respect to the amount of the bond, the court noted that the law of the forum state should be applied in diversity cases where the amount of a bond is at issue. The court then calculated an estimate for post-judgment interest, and came up with a bond requirement of $7,212,185.65. The court issued an order directing SRT to post the bond within sixty days. The ruling was issued on December 5, 2014.

II. LIMITATIONS AND NOTICE:

8. Federal Marine Terminals, Inc. v. Dimond Rigging Co., dba Absolute Rigging & Millwrights, 2014 WL 4809427. On September 26, 2014, Judge Donald Nugent of the U.S. District Court for the Northern

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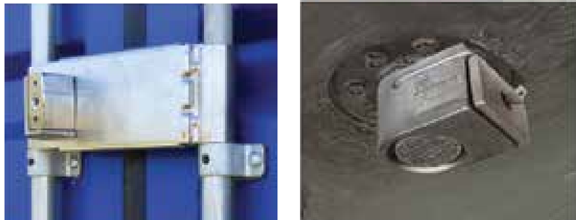

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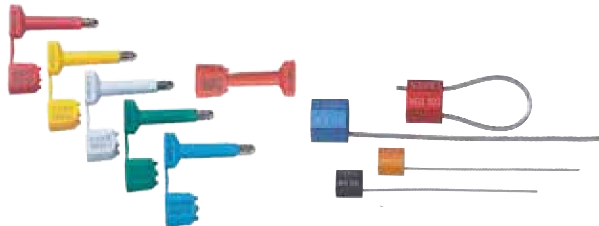

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District of Ohio, Eastern Division, granted Plaintiff/ Counter-Defendant Federal Marine Terminals, Inc.'s ("FMT") motion for summary judgment, dismissing with prejudice all claims raised by defendant Dimond Rigging Co., d/b/a Absolute Rigging & Millwrights ("Absolute"). This dispute arises out of the shipment of a dismantled transfer stamping press from a defunct Chrysler plant in Twinsburg, Ohio. The press was to be shipped out of the Port of Cleveland to a port in China. Absolute contracted with FMT to handle the terminal and storage of the various press pieces prior to shipment, and the carrier separately contracted with FMT to handle the loading of the cargo onto the vessel. Due to numerous issues which arose during loading, only about 25% of the cargo was loaded onto the vessel before it set sail, in order to avoid the closing of the St. Lawrence Seaway for the winter. FMT sued Absolute for additional charges relating to the terminal work, and Absolute counter-claimed, seeking monetary damages arising out of the reshipping of the cargo that was left behind.

FMT moved for summary judgment on the counterclaim, asserting that it was entitled to the protections of COGSA as incorporated in the bill of lading, and extended to subcontractors such as itself via the Himalaya clause. As Absolute had failed to bring its claim within one year from the date of delivery, or expected delivery, FMT claimed Absolute's counterclaim was time-barred. Absolute countered that the bill of lading terms and conditions could not apply to the portion of the cargo that was not ultimately loaded onto the vessel, and further claimed that there was an issue of fact regarding whether FMT was acting as the agent of Absolute or the carrier during loading. The court agreed with FMT that the fact that some of the cargo was not actually loaded onto the vessel did not affect the applicability of the bill of lading terms and conditions, where the parties had exchanged a booking note prior to boarding, as well as form terms and conditions, prior to loading. Therefore, Absolute reasonably should have expected that all of the cargo would have been subject to those bill of lading terms and conditions, citing the rule in Luckenbach S.S. Co., Inc. v. Am. Mills Co., 24 F.2d 704 (5th Cir. 1928). Further, the court found no issue of fact regarding FMT's actions as an independent contractor of the carrier, rather than Absolute, during the loading process, falling squarely within the language and protections of the Himalaya clause. The court agreed that Absolute's claims were not filed in accordance with the COGSA one-year statute of limitations, and, therefore, were time-barred. The court further found that each of Absolute's state-law claims (for breach of contract, negligence, negligent misrepresentation, promissory estoppel, and declaratory judgment), were preempted by the application of COGSA.

9. Sunoco, Inc. (R&M) v. Enbridge Energy, L.P. v. Shell Trading (US) Company and Shell Pipeline Company, L.P., 2014 N.Y. Misc. LEXIS 5394, 2014 N.Y. Slip. Op. 33221 (U) (Sup. Ct., N.Y. Co. 2014). Applying Carmack claim requirements and federal common law claim requirements to a pipeline carrier and finding the claims were time barred. Plaintiff, Sunoco, alleges that between December 2000 through October 2001, Defendant, Enbridge, short delivered 27,000 barrels and 58,000 barrels of oil via a pipeline owned and operated by Defendant, Enbridge. The dispute relates to certain "accounting" errors (the "58,000 Barrel Claim") and, also, whether certain quantities of oil were properly converted from barrels to cubic meters (the "27,000 Barrel Claim"). Combined, the damages sought were over $2,500,000.00. The Defendant filed a Third-Party Complaint against Shell for defense and indemnification.

The pipeline shipments were governed by rate tariffs and rules and regulations which are filed with the Federal Energy Regulatory Commission ("FERC"). As per the Interstate Commerce Act and the Carmack Amendment thereto, FERC approves and publishes the tariffs, which tariffs, in turn, govern liability. According to FERC No. 29 and No. 3, Rule and Regulation No. 17, there is a nine month claim period for delay, damage or loss resulting from the transportation of a shipper's crude oil via pipeline and, further, that the shipper's failure to make a timely claim is a waiver of shipper's right to bring suit.

As it relates to the 27,000 Barrel Claim (involving alleged mistakes converting barrels to cubic meters), Defendant moved for summary judgment asserting Plaintiff failed to make a timely claim and that the lawsuit was thus time barred. The Court reviewed the fact that the Plaintiff shipper received a monthly recapitulation and that accordingly, Plaintiff had all of the information it needed to file a claim at the latest in August 2002. The first time the shipper raised a question (let along an actual claim) was not until December 2004 via an e-mail. Moreover, the lawsuit was not filed until 2009 and so the 27,000 Barrel Claim was time barred. In so holding, the Court cites Mafcote Industries, Inc. v. Milan Exp. Co., Inc., 2011 WL 3924188 (D. Conn. 2011)(stating courts have "strictly applied the claim-filing requirements contemplated by the Carmack Amendment . . .."). Plaintiff countered that the tariff was ambiguous but the Court rejected that argument after applying New York State law on the issue of contract interpretation and concluded that the tariff, as a whole, was not subject to more then one reasonable interpretation. Accordingly, the 27,000 Barrel Claim was time barred.

On the 58,000 Barrel Claim (involving alleged accounting errors), Defendant contended that although a document was sent to the Defendant within nine months, the document did not constitute a "claim" under Federal Common Law and was thus time barred as well. The Court noted that the 49 C.F.R. § 1005.1 claim requirements did not apply to pipeline carriers. Instead, Federal Common Law applied to determine whether a document constituted a claim. The Court then identified case law related to the Federal Common

Law on the issue and it appeared the Federal Common Law was similar (but not as specific) to the requirements for the sufficiency of a claim under 49 C.F.R. § 1005.1. Under the Court's review of Federal Common Law, the claim has to "possess characteristics of a demand for compensation or amount to a notice of intention to claim compensation for loss suffered." Browning, King & Co. v. Davis, 120 Misc. 520 (Sup. Ct., NY Co. 1923, aff'd, 208 A.D. 780 (1st Dept. 1924), aff'd, 238 N.Y. 607 (1924). Relying on an exchange of e-mails both within and after the nine month claim period, Plaintiff asserted its written e-mails were sufficient to constitute a timely claim. The Court disagreed finding instead that read as a whole, the e-mails were largely Plaintiff's internal investigation of the accounting discrepancy instead of a claim against Defendant for damages. As such, the Court concluded that the 58,000 Barrel Claim was time barred. Accordingly, Defendant's motions for summary judgment were granted. As a corollary, the Third Party Defendants' motions for summary judgment to dismiss the defense and indemnity claims were granted because the Court already dismissed the Plaintiff's underlying claims and so there was nothing to defend or indemnify.

III. LIMITATIONS OF LIABILITY

10. Sivak v. United Parcel Service. 2014 WL 2938088 (E.D. Michigan, July 1, 2014). A class of plaintiffs sued UPS arguing that UPS intentionally overcharges customers who purchase additional liability coverage for packages with a declared value of over $300. UPS moved to dismiss. The court addressed three governing documents for shipments at issue: the UPS tariff/terms and conditions of service; the UPS rate and service guide; and the plaintiffs' source document from the shipment. UPS' terms limit its liability for loss or damage over $100. UPS' terms provide a 180 day notice requirement and define third party retailers for purposes of increasing liability for lost or damaged shipments. Plaintiffs claim that UPS documents falsely state that UPS provides the first $100 of coverage for shipments for free, and plaintiffs seek to halt the practice of defrauding UPS customers. Plaintiffs complained that UPS' conduct constitutes a breach of contract, violation of 49 U.S.C. § 13708 regulating a motor carrier's billing and collection practices, unjust enrichment and violations of the RICO statute.
HOLDING: The court held that the shipping contract made clear that UPS' liability for loss and damage is limited to $100 without a declaration of value. Regarding plaintiffs' Section 13708 claim, the court held that even if plaintiffs had a private right of action under this section, plaintiffs failed to set forth any facts indicating that UPS does not disclose the actual rates, charges or allowances under the statute, and Section 13708 does not support a claim that a common carrier overbilled for shipping services. With respect to plaintiffs' RICO claims, the court held plaintiffs did not identify a misrepresentation sufficient to infer a scheme to defraud as required by the RICO statute. Because the fraudulent activity about which plaintiffs complain is derived solely from the plaintiffs' flawed interpretation of the shipping contract, there is no fraudulent conduct to support any of plaintiffs' claims, and the motion to dismiss was granted.

11. Daniel Young, Inc. v. Seneca Insurance Co., 2014 WL 5480810, 2014 U.S. Dist. LEXIS 153922 (E.D. Penn., October 30, 2014). Ductile iron pipes stored by plaintiff Young, "a full service logistics organization," were damaged in the process of loading onto a flat bed truck at the commencement of transportation of the pipes from plaintiff's warehouse in Maryland to Qatar. Upon arrival in Qatar, the consignee rejected the damaged pipes and made a demand upon Young for the replacement cost of the pipes. Plaintiff paid $143,798.79 to resolve the claim and sought reimbursement from its insurer. The insurer, Seneca, paid Young $2,000.00, applying to the four-container load the $500.00 per package limitation set forth in the combined transport bill of lading issued by its ocean carrier subsidiary one week after the pipes were damaged. Plaintiff challenged Seneca's position, asserting that the limitation provision was inapplicable to its claim for coverage because the damage to the pipes occurred before the bill was issued. In response, Seneca took the position that the bill was effective for "the entire time the goods were in the care, custody and control" of Young. Plaintiff sued Seneca for breach of contract and estoppel. Defendant filed a summary judgment motion, asserting that plaintiff's claim for replacement value of the pipes fails as a matter of law.

HOLDING: The Court granted defendant's summary judgment motion, limiting the insurer's liability to $2,000.00. In so doing, the Court focused on the unambiguous language in the insurance policy, which provided that coverage extends to loss of or damage to the personal property of others while in the care, custody or control of the insured and that the valuation of such property is governed by any written contract applicable to the insured's liability. With the bill of lading, by it terms, binding on the shipper and all connecting carriers and covering the entire time of possession of the goods, the bill issued by Young's subsidiary extended to Young and extended to the period of possession by Young prior to the ocean transportation. Therefore, defendant had no duty to Young to cover the full replacement cost of the pipes. The $500.00 per package limitation in the bill capped Seneca's liability to its insured.

12. Engineered Arresting Systems Corp. v. M/V Saudi Hofuf, 2014 WL 4756420 (S.D.N.Y. Sept. 5, 2014). An interesting case involving an analysis of damage to machinery in six trailers which were loaded onto a RoRo carrier ship which is specifically designed to store cargo (like automobiles) which can be rolled on and rolled off of a ship. The shipment here –"mobile aircraft arresting systems"-was damaged

when it was stored on deck rather than below deck and suffered damages caused by exposure to seawater. The ocean carrier filed a motion for summary judgment on the grounds that its liability was limited to $500 per container or $3,000.00. The carrier presented excellent proof by affidavit that it was usual and customary for goods of this nature to be stored on deck rather than below deck. The Court determined that such a practice was not a deviation from the terms of the bill of lading and enforced the COGSA limitation of liability.

13. Chartis Seguros Mexico, S.A. de CV v. HLI Rail & Rigging, LLC, 3 F.Supp.3d 171 (S.D.N.Y. 2014). Freight owner/insurance subrogee seeks to enforce its claim against a shipper and a rail carrier for over $2 million in damaged transformers caused by the derailment of a train moving from Laredo, Texas to Port Arthur, Texas. The freight moved on a price quote, two bills of lading and "Rules Publication 9012". The carrier moved for summary judgment to enforce its limitation of liability to $25,000 which was found in the price quote and incorporated into the bills of lading. Carrier argued that it provided two levels of protection by offering full Carmack liability as well as the $25,000 limited liability.

HOLDING: The Court denies the motion for summary judgment and refuses to limit the liability of the carrier to $25,000. First, the Court determined that the contract between the parties was not a §10709 contract which simply means that the parties had entered into a contract for rail services to which the Carmack Amendment does not apply. In order to constitute a §10709 contract, the Court reviewed the Sompo v. Norfolk Southern decision and determined that the parties evidenced an intent to follow the requirements of Carmack rather than depart from them. Therefore, the Court held that the contract was not a §10709 contract and Carmack could apply. Second, the Court determined that the fact that the movement originated in Mexico did not affect the application of Carmack because the bills of lading designated the origin and destination as Texas. Furthermore, intrastate transportation by rail was covered by Carmack because the freight movement constituted transportation under the STB's jurisdiction because it was transportation "between a State and a place in the same …State as part of the interstate network." See 49 U.S.C. §105012(A).

Having determined that Carmack applied to the movement, the Court addressed the effort to limit the liability of the carrier to $25,000 based upon a price quote incorporated into the bills of lading. The Court denied this effort finding that the carrier did not provide the shipper with alternate levels of liability notwithstanding the argument that the carrier had offered full Carmack protection as one level of liability. The district court engages in an elaborate analysis of limitations of liability in the rail context including constructive notice (based upon the forms on the carrier's website) and incorporation by reference. Finally, the court denied the owner/insurance subrogee's motion for summary judgment on full Carmack liability and determined that genuine issues of material fact as to the delivery of the transformers in good condition prevented the court from granting the motion.

Just for fun, the court provided an advisory opinion that it would enforce Kirby v. Norfolk Southern Ry. Co. and stated that it would enforce any limitation of liability that the shipper/logistics coordinator entered into with the owner of the transformers.

IV. PREEMPTIVE

14. Action Towing, Inc. v. The Mint Leasing, Inc., 2014 WL 6462372 (App. Tex., Houston 1st Dist. 2014). The case involves storage charges and allegations of conversion and violation of the Texas Theft Liability Act, FAAAA preemption and the "safety exception" to FAAAA preemption.

In late 2007, Mint, a vehicle leasing company, leased a 2008 Pontiac to Albert and Anita Martinez. They divorced and Anita took the car to El Paso, Texas where it broke down. Albert towed it to Houston. Anita refused to pay for the towing and so Albert then dropped the vehicle at Action Towing's storage yard in League City, Texas. Action then sent an invoice for $1,735.00 in storage charges to Mint. Mint refused to pay taking the position the Martinez' had to pay but demanded return of the vehicle. Action refused and sold the vehicle at auction. Mint sued for conversion and civil theft under the Texas Theft Liability Act. The

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parties filed cross-motions for summary judgment. Mint argued it never gave permission to Action to store the vehicle and that, as such, Action's garage keeper's lien was invalid and that Action therefore was engaged in a conversion and violation of Texas law. Action countered that Mint's state-created causes of action were barred and preempted by the FAAAA under 49 U.S.C. § 14501 (c). Mint replied that Action bore the burden to prove that Action's actions were not within the "safety exception" to FAAAA preemption. Under the safety exception" to FAAAA, state laws that relate to "safety" and "regulatory authority" of motor vehicles are not preempted. Mint took the position on summary judgment that Action failed to carry its burden to prove that the "safety exception" to FAAAA preemption did not apply. Action countered that conversion and the Texas Theft Liability Act had absolutely nothing to do with the "safety exception" to FAAAA preemption and that, therefore, conversion and the Texas Theft Liability Act were preempted.

On cross-motions for summary judgment, the trial court agreed with Mint, found that Action had not conclusively proven every element of its FAAAA defense and then at a subsequent damages hearing ordered Action to pay $18,496.96 in damages, plus $1,000.00 as per statute, counsel fees and costs, plus interest. On appeal, Action contended it only stored (but did not transport) vehicles carried by others to its facility and that because it offers to make arranges with others to tow vehicles from its facility, that Action qualifies as a broker within the meaning of 49 U.S.C. § 13102. Action contended that as a broker, FAAAA preempted Mint's state-created causes of action. The Texas Court of Appeals then reviewed Dan's City Used Cars, Inc. v. Pelkey, ___ U.S. ___, 133 S. Ct. 1769, 185 L. Ed. 2d 909 (2013), a case involving storage charges as opposed to freight charges. In that case, the United States Supreme Court found that the state-created causes of action for payment of storage charges were not preempted by FAAAA because they were not "'related to' the service of a motor carrier 'with respect to the transportation of property.'" The Texas Court of Appeals concluded that, as in Dan's City, the lawsuit arose out of events occurring after the transportation concluded. Accordingly, the Texas Court of Appeals felt the instant case and the Dan's City case both involved storage charges (not freight charges) and that, therefore, there was no "transportation" and thus no FAAAA preemption.

15. Mitsui Sumitomo Ins. Co. of America v. Basic Enterprises, Inc., 2014 WL 4407645 (N.D. Ind. 2014). Subrogation claim against Basic Enterprises for damages to a shipment of machinery. Basic filed a motion to dismiss the state law claims against it on the grounds that the claims were preempted by the Carmack Amendment. Insurer Mitsui argued that Basic was defending the claims against it on the grounds that it was not a motor carrier but was instead a broker.

HOLDING: Motion to dismiss granted because Mitsui "has not alleged a separate and distinct harm as a result of the alleged state law/common law bailment claim".

16. Gordon v. United Continental Holdings, Inc., Case No. 2:13-cv-05967 (D. N.J., filed Sept, 3, 2014). This is another frequent flyer claim brought under the New Jersey Consumer Fraud Act, the Truth-In Consumer Contract, Warranty and Notice Act, breach of the covenant of good faith and fair dealing, breach of contract, declaratory relief, unjust enrichment and injunctive relief. Mr. Gordon booked a flight for he and Ms. Chan to Japan. He saw that he did not have enough frequent flyer points to book a hotel room but knew that Ms. Chan did have sufficient point. However, when Ms. Chan attempted to book the hotel room, the number of points required exceeded those available to her. Apparently, Mr. Gordon received special rates because of the amount of time he had been in the frequent flyer program.

HOLDING: Following the decision of the U.S. Supreme Court in Northwest, Inc. v. Ginsburg and other decisions, the court granted United's motion to dismiss all of the claims on the preemptive effect of the Airline Deregulation Act with the exception of the breach of contract claim. The court dismissed the contract claim on the grounds that it was not plausible under the plain language of the Program Rules implemented by United.

17. Kendrick v. Southern Hills Movers, Inc., Case No. 2:14-cv-00204 (W.D. Pa., filed October 4, 2014). Plaintiff Trust entered into an agreement with the defendant household goods carrier to haul certain household goods from Pennsylvania to California. Plaintiff submitted a claim for nearly $12,000 in cost to repair or replace the items that were damaged during transit pursuant to the selection of Option 1 in the transportation contract. Plaintiff sued for violation of Carmack, breach of warranty and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL).

HOLDING: Carrier's partial motion to dismiss granted on the grounds that Carmack preempts breach of warranty and UTPCPL claims notwithstanding the argument of the plaintiff that the warranty was "separate and distinct from the delivery of the goods itself".

18. Starr Indemnity & Liability Company a/s/o Camper's World Apparel, LLC v. Atlantic Drayage & Transport, Inc. and Port Kearny Security, Inc., 2014 U.S. Dist. LEXIS 164070 (D.N.J. 2014). Preemption case where the Court denied the Defendant motor carrier's motion to dismiss the Co-Defendant drop yard's state created cross-claims. This is a subrogated $393,668.12 cargo loss case involving 914 cartons of apparel. Defendant carrier, Atlantic Drayage was to transport 2,440 cartons of apparel from Newark, New Jersey to Hicksville, New York. The carrier contracted with the Co-Defendant drop yard, Port Kearny Security ("PKS") to leave the trailer at PKS' secured lot overnight. Upon

delivery of the freight to the consignee the next day, it was noted that 914 cartons were missing. Plaintiff sued Atlantic Drayage pursuant to Carmack and also sued PKS asserting state created causes of action such as negligence and breach of bailment. PKS asserted cross-claims against the carrier, Atlantic Drayage, for breach of fiduciary duty, breach of the covenant of good faith and fair dealing and for indemnity and contribution. Atlantic Drayage moved to dismiss the cross-claims as barred and preempted by Carmack. Among other things, Atlantic Drayage argued the contract with PKS was made pursuant to the interstate transportation and that cross-claims on the contract were made pursuant to Carmack and, accordingly, the state created causes of action in the cross-claim were preempted. The Court denied the motion choosing instead to look at the cross-claims as stemming from the one page written contract between Atlantic Drayage and PKS.

19. AIG Europe, Limited v. General System, Inc., et al., 2014 WL 3671566 (D. Md. 2014).
This lawsuit concerns the truckload theft of pharmaceuticals in interstate transport. AIG, as the subrogated insurer of the cargo owner, sued motor carrier General System, Inc. General System filed a third-party complaint against broker TBB. At issue in the third-party claim was whether TBB advised General that the value of the load exceeded General's $100K insurance coverage limits and whether TBB should have brokered the load to a carrier with higher insurance limits. Plaintiff filed an amended complaint and sued TBB as a direct defendant. TBB then filed a motion to dismiss the claims. Specifically, TBB moved to dismiss AIG's claim that TBB was negligent. The court ruled that the FAAAA did preempt AIG's claims for negligence. However, the court refused to follow the Fourth Circuit's dicta in 5K Logistics and did not find that Carmack preemption applies to claims against brokers. However, since the court had already found that the FAAAA preempted plaintiff's claims, the issue of Carmack preemption was largely moot.

V. JURISDICTION, VENUE REMOVAL

20. Kuehne & Nagel, Inc. v. A.G.R. Eschol Overseas, Ltd., 2014 U.S. Dist. LEXIS 113657 (S.D.N.Y., Aug. 14. 2014). Interesting decision under the forum non conveniens doctrine. Kuehne & Nagel (KN) facilitates the transport of cargo for its customers through the use of third party carriers. APL hired KN to provide logistics services between Afghanistan and Dubai and the US. HN hired a subcontractor based in Israel to support daily operations in the Middle East. Sub in turn hired another company to provide ground support including weighing the cargo. The latter company submitted invoices for services rendered to subcontractor who in turn billed HN who in turn billed APL for payment. APL noted discrepancies in the weigh tickets and, after an audit, determined that subcontractor had overbilled HN. This caused HN damages in its billings to APL. HN in turn sued subcontractor in New York for unspecified damages arising out of breach of contract, indemnity and fraud. Subcontractor moves to dismiss on the grounds of forum non conveniens because the facts giving rise to the dispute occurred in Israel or the Middle East and most all witnesses were located in Israel or the Middle East. Further, the subcontractor was located in Israel.

HOLDING: Motion to dismiss for forum non conveniens granted as the court determined that Israel; was a more convenient forum given the facts of the litigation.

VI. CARRIER-BROKER-THIRD PARTY

21. Asarco LLC v. England Logistics Incorporated, 2014 WL 7339069 (D. Ariz., December 23, 2014). When a shipment of 55 copper anodes went missing in transit between plaintiff Asarco's facilities in Hayden, Arizona and Amarillo, Texas in July 2011, Asarco sued all entities in the transportation chain. Asarco alleged that it had requested that CR England and England Logistics arrange for the transportation; that those entities unilaterally re-brokered and/or re-assigned the shipment to Plumley Trucking, who re-brokered and/or assigned the shipment through Plumley Logistics to non-party Pavlyukh Express, whose driver Andriy Kuba picked up the shipment on July 24, 2011, after which it was never seen again. The Plumley defendants, the England defendants and plaintiff Asarco all filed summary judgment motions.

HOLDING: In their motions, Plumley Logistics asserted that, because it is merely a broker, Carmack does not apply; and Plumley Trucking asserted that it was not the carrier and, in fact, had nothing to do with the shipment, and therefore cannot be held liable for the loss. Asarco responded – and the Court agreed - that there are factual disputes regarding the Plumley defendants' roles regarding the shipment (with much cross-over in operations between the two Plumley entities), thereby precluding the entry of summary judgment on the Carmack claim. The same uncertainty prevented the Court from ruling in Plumley Trucking's favor on its assertion that timely claim notice to Plumley Logistics did not constitute timely notice to it. Similarly, questions of fact exist on the issue of whether contracts between the Plumley entities and the England entities applied to the shipment and, if so, whether a breach occurred.
Though deferring many of the issues to another day, the Court did rule in all defendants' favor on their FAAAA preemption argument, holding that plaintiff's negligence and negligent hiring, retention or supervision claims against the Plumley and England defendants are preempted. The Court also provided the England defendants some relief on their motion on plaintiff's breach of contract claim, granting the motion on Asarco's allegations that England breached

its obligations by dealing with the Plumley defendants and allowing them to select Pavylukh Express to carry the load; and dismissing CR England from the case, finding that it had no involvement with the shipment. However, the Court carved out an exception for the portion of plaintiff's contract claim alleging that the England defendants failed to properly administer the loss claim; and ruled that the breach of contract count is not preempted by FAAAA or Carmack because those defendants served as a broker, not a carrier.

22. Total Quality Logistics v. Macktoon, Inc., 2014 U.S. Dist. LEXIS 125918 (S.D. Ohio 2014). Plaintiff Total Quality Logistics sued defendant Macktoon for an award of attorney's fees and costs under a Broker/Carrier Agreement. Under the BCA, the parties agreed that, for disputes under $10,000.00, they would participate in binding arbitration, and for disputes in excess of $10,000.00, the parties would litigate. If a case is litigated, the BCA stated that the carrier (Macktoon) would pay all reasonable expenses, attorney's fees and costs that the broker (Total Quality Logistics) incurs in any such litigation. A dispute arose between the parties under the BCA. The dispute was in excess of $10,000.00. Total Quality Logistics ("Total") sued Macktoon. Despite the provisions of the BCA regarding disputes over $10,000.00, Macktoon moved to stay the case and refer the case to binding arbitration. The court denied the motion. Discovery ensued, and the case was submitted to the court on depositions. The court found in favor of plaintiff for $36,589.08. Plaintiff then moved for attorney's fees and costs pursuant to the BCA. The court analyzed the fee provision in the BCA and noted initially that Carmack preempts and prohibits the award of attorney's fees. The court then asked whether Carmack preempted a voluntary fee-shifting agreement. The court looked to 49 U.S.C. 14101 for guidance, and found that it allows parties to expressly waive any or all rights otherwise provided under Carmack, including, for purposes of this case, the Carmack preclusion against attorney's fees.

RULING: The court found that the attorney fee provision in the BCA was not a "penalty" as argued by the carrier, and found that the attorney fee provision in the BCA was enforceable. The court awarded $33,375.00 in fees (not bad in a $36K case!!), based upon an hourly rate of $250.00, which it found reasonable for the Cincinnati legal market. The court also awarded $2,918.36 in deposition-related costs.

23. Haulmark Services, Inc. v. Solid Group Trucking, Inc., 2014 WL 5768685 (S.D. Tex., November 5, 2014). Haulmark, a transportation broker, entered into a written agreement with SGT, a carrier, containing an express indemnity provision. Pursuant to the contract, Haulmark assigned a load to SGT, SGT took possession under a bill of lading which contained certain temperature restrictions, the load was rejected as outside of the permitted temperature range and a claim was submitted to Haulmark. Haulmark passed the claim on to SGT and its insurer. SGT did not pay the claim, so Haulmark sued for breach of the indemnity provision in the broker/carrier contract. SGT asserted Carmack preemption. Haulmark opposed, stating that this was not a Carmack case because Haulmark only alleged a claim for indemnification under the contract, not a claim as subrogee of the shipper or owner of the goods.

HOLDING: The Court held that the Carmack Amendment did not preempt the broker's breach of contract cause of action under an indemnity agreement between the broker and the carrier. The Court noted that Carmack protects the rights of shippers suing under a bill of lading; and that there was no showing that Haulmark would have even had standing to sue under Carmack, that is, there was no indication that Haulmark had an assignment from its customer. The case, which had been removed by the carrier, was remanded to proceed strictly under the contract, not under Carmack.

VII. FREIGHT CHARGES

24. United Van Lines, LLC v. Ponzio. Case No. 1:13-cv-00062 (U.S.D.C. S.D. GA, June 23, 2014). Ponzio shipped household goods from Pennsylvania to Georgia. United, via its agent ADSI Moving Systems, loaded and transported the goods. At destination, Ponzio did not have sufficient cash to pay for the transportation. United placed the goods in storage in transit. Ponzio repeatedly failed to pay United's demands for payment of shipping and storage charges. A third party subsequently claimed an ownership interest in the subject goods, and United filed an interpleader action in U.S. District Court claiming a lien on the subject goods and attorneys' fees required in interpleading. United served Ponzio, but she never appeared and was defaulted. nited sought foreclosure of its lien, judicial authorization to sell the subject goods, and in excess of $75,000 in transportation, storage and legal expenses.

HOLDING: The court determined it had subject matter jurisdiction and personal jurisdiction. The court further determined that United had a lien on the goods shipped under the bill of lading and permitted United to sell the goods.

VIII. MISCELLANEOUS

25. Sattva Capital Corp. v. Creston Moly Corp, 2014 SCC 53. As a result of this recent decision of the Supreme Court of Canada ("SCC"), arbitration awards interpreting commercial contracts have now become more difficult to appeal. In light of this decision parties may face an uphill battle in obtaining leave to appeal from arbitral decisions concerning the interpretation of a commercial agreement. In rendering its decision the SCC has also clarified certain key principles to be applied in the interpretation of commercial agreements.

This case involved a contract setting out a finder's fee that was payable as shares. There was a dispute as to the interpretation of the contract and the number of shares to be issued, dependant on which valuation date was to be used for the purpose. The proceedings were costly and took a long time between the initial phase of the arbitrator's decision through to the recent SCC ruling. In deciding this appeal, the SCC reversed a historical approach to contract interpretation. Historically, the legal rights and obligations of the parties under a written contract were considered to be a question of law. As a result of this approach, an appellant could seek to challenge a finding on the basis of an 'error of law'. The SCC however has now held that contractual interpretation involves mixed questions of fact and law rather than pure questions of law. This will naturally now affect the viability of an appeal, given the deference shown by appellate courts to trial courts or courts of first instance on findings of fact 'down below'.

This line of thought is confirmed by the SCC in this decision with its recognition that: "The shift away from the historical approach appears to be based on two developments. The first is an adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract – often referred to as the factual matrix – when interpreting a written contract. The second is the explanation between the difference between questions of law and questions of mixed fact and law. Regarding the first development, the interpretation of contracts has evolved towards a practical, common sense approach not dominated by technical rules of construction. The overriding concern is to determine the "intent of the parties and the scope of their understanding"... As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law. Questions of law "are questions about what the correct legal test is" yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties – a fact specific goal – through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law".

26. Bhasin v. Hrynew 2014 SCC 71 (CanLII). The Supreme Court of Canada ("SCC") recently issued this decision that affirms a new duty on parties to perform contractual obligations honestly and in good faith. The SCC recognized that the common law in Canada (and as augmented by limited certain specific statutory duties of acting in good faith) was both unsettled and "piecemeal" and that matters were at a point where it was time for two incremental steps to be taken to make matters more coherent and "just". The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract that underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty that applies to all contracts to act honestly in the performance of contractual obligations. Taking these two steps will put in place a duty that is just, that accords with the reasonable expectations of the parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

In essence this "organizing principle" is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. The court makes clear that the duty of good faith is not a duty of loyalty or a duty to put the interests of the other contracting party first. It is not intended to significantly displace the freedom of parties to pursue their own economic interests. Nor is it intended to be a basis for a court to scrutinize the motives of contracting parties or to impose its own sense of morality. As noted by the SCC, it is not a fiduciary duty. Rather, what is now being expected, is the general application of that which already exists by way of certain established doctrinal duties to act honestly, reasonably and candidly in contractual performance.

The above said, the court cautions that the development of the principle of good faith in contracts must not veer into a form of ad hoc judicial moralism or "palm tree" justice. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. The duty of honesty does not require a party to disclose material information to the other contracting party; however a party cannot actively mislead or deceive the other contracting party in relation to the performance of a contract.

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The Certified Claims Professional Accreditation Council is pleased to announce that it will be offering both its CCP Primer Class and CCP Exam in conjunction with the TLP&SA Annual Claim & Security Conference at the Lowes O'Hare Hotel in Rosemont (Chicago), IL April 19-21, 2015.

The CCP Primer Class will be conducted on Sunday, April 19, 2015, from 9AM to 4PM. The CCP Primer Class is an Optional Event to the conference and requires separate registration and payment. The class is a fast paced review for those preparing to take the CCP Exam and is not designed or intended as a teaching venue. Attendees must apply and be pre-approved by CCPAC, Inc. in order to attend this class. To find out if you qualify to take the class, go to www.ccpac.com scroll down the home page to the April events and click on the link "CCP Application & Calculation of Points". Download the form and complete pages 2 & 3 to see if you have the 100 point needed to take the class. 25 of the 100 points must be from actual claim handling experience. If you have the minimum points, complete the application and submit with your supporting documents for employment and educational credits claimed.

The CCP Exam will be held on Tuesday, April 21, 2015, beginning around 12:30 noon. The CCP Exam is an optional event to the conference and requires separate registration and payment unless you registered for the CCP Primer Class that includes the CCP Exam. Examinees will be given 3 hours to complete the exam. Those taking the CCP Exam must qualify, apply and be pre-approved by CCPAC, Inc. to sit for the exam. Complete information including the CCP Exam Application and Calculation of Points forms can be found on the website. To find out if you qualify to take the exam, go www.ccpac.com website, scroll down the home page to the April events and click on the link "CCP Application & Calculation of Points". Download the form and complete pages 2 & 3 to see if you have the 100 point needed to take the class. 25 of the 100 points must be from actual claim handling experience. If you meet the minimum qualifications, you can scan and submit your completed CCP Exam Application and Calculation of Points form along with supporting documents showing employment positions held and if claiming additional credits under education, provide a copy of your degree or other certificates via email to director@ccpac.com or you can mail the forms to the address provided on the forms but in any event, this documentation must be received with your payment no later than April 10, 2015.

The text for the current CCP Exam is Freight Claims in Plain English, 4th Edition. This text is available on the website www.ccpac.com under the Book Store tab. Those that join CCPAC as an Associate Member of that apply and pay on line to for the CCP Primer Class and CCP Exam can purchase the 2 volume text at a discount in the Members Area Book Store. Members will need a user ID and PW in order to access the Members Area Book Store.

IMPORTANT NOTE: If you registered for the CCP Primer Class to be held on Sunday, April 19, 2015, and the CCP Exam you do not need to register again for the exam as both fees are included. If you do not wish to attend the CCP Primer Class, then you must register and pay for the CCP Exam that will be given on Tuesday, April 21, 2015.

Any of your questions not answered on the website, contact CCPAC at director@ccpac.com

Cargo Salvage Claims

Volume 1, Issue 1

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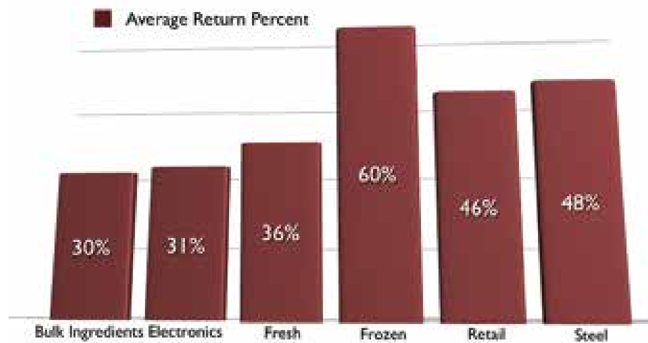

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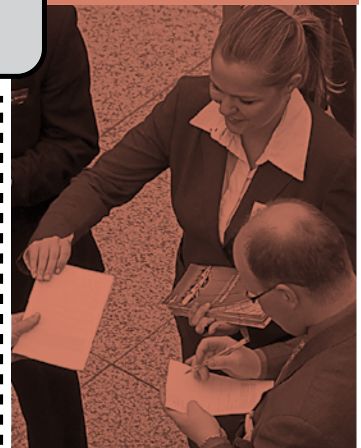

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