In Transit

Transportation Loss Prevention & Security Association

Spring 2011

In This Issue...

Transportation Loss Prevention and Security Association

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CSA 2011—COMPLIANCE, SAFETY AND ACCOUNTABILITY (CSA) REPRISE

By: William D. Bierman — EXECUTIVE DIRECTOR TLP&SA

Rarely has this column dealt with the same issue in two consecutive editions. Nevertheless, we feel CSA is such an important matter which has continued to evolve quickly over the last several months that it is necessary and helpful to bring the transportation industry up to date.

FMCSA SETTLEMENT

Since our last edition of IN TRANSIT the FMCSA and the three industry trade groups who brought suit against it have arrived at a settlement. You have not heard that nor have you heard the terms of the settlement from the main stream press? The reason is for some unknown motive none of the trade papers have prominently published this important information which will affect your business.

LAWSUIT ISSUES

The lawsuit raised the issue publication of the CSA numbers to the public would poison the relationship amongst carriers, shippers and brokers in that shippers and brokers were encouraged to use CSA numbers as a new qualifying standard for carriers even though the FMCSA would eventually classify those carriers as satisfactory. Shippers and brokers were beginning to choose carriers based on CSA numbers. The result, it was argued, was carriers would go out of business before they obtained a satisfactory rating by FMCSA.

The lawsuit further stated that FMCSA should have to go through a rulemaking procedure before it could enact the new CSA. This rulemaking procedure would lay bare the CSA methodology and would give interested parties the right to challenge the methodology as well as the principles underlying the concept of CSA.

SAFETY FIRST

It should be noted all parties to the lawsuit agreed safety was a laudable goal for CSA. Nevertheless, it is curious Transport Topics reported in its April 18, 2011 edition:

FATALITY RATE FALLS AGAIN

14% Drop Sets Lowest Record Level for Trucks

The rate at which fatalities occurred in highway accidents involving large trucks dropped to the lowest level on record, falling 14.1% in 2009 from the previous year, according to an analysis of Department of Transportation data by American Trucking Associations.

The article goes on to conclude trucks traveled more miles with less accidents than at any time in recorded history. Certainly trucking has gotten safer before the advent of CSA and could be predicted to continue that trend with or without CSA. But the trucking industry never fought the concept of CSA, the industry's main concern was the implementation of CSA which attempted to leverage the public to help enforce it. Based on flawed statistics and inconsistent enforcement, the trucking industry argued CSA painted a distorted picture of carrier performance.

Carriers submitted CSA numbers which might be subject to misinterpretation should be for Agency use only to determine which carriers might need further investigation. In this way the goal of CSA would be accomplished without improperly creating the image certain carriers were not satisfactory to use.

SETTLEMENT ACCOMPLISHMENTS

What did the settlement accomplish? The settlement set forth some important principles which protect the integrity of carriers as follows:

1. FMCSA is the agency which solely determines the fitness of carriers and CSA does not create in itself some new standard for rating carriers;
2. The agency's sole duty is to certify a carrier as safe;
3. Unless a motor carrier has received an UNSATISFACTORY safety rating pursuant to 49 CFR 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways;
4. The settlement directs the public to the LICENSING AND INSURANCE portion of its website to determine which carriers are authorized;
5. MOST IMPORTANT IT STATES THAT ALL CARRIERS NOT SHOWN AS UNSATISFACTORY OR OUT OF SERVICE AND UNRATED CARRIERS ARE AUTHORIZED FOR USE.
6. The settlement eliminates the inflammatory term "Under Alert" and replaces it with a symbol which indicates that the FMCSA may prioritize a motor carrier for further monitoring.

RULEMAKING

We now look forward to the rulemaking process coming soon where FMCSA will be required to finally expose the methodology behind CSA and allow for the vetting of the process to see if it squares with the test of objectivity and fairness. We will also be able to address the substantial inconsistencies inherent in state enforcement of rules and regulations. Perhaps we will even be able to find out why if your truck is parked and it is hit by some drunken driver, this accident goes against your CSA score!

Finally, we may be able to look at the Michigan University Study which was commissioned by the FMCSA. The word is this study is critical of CSA and for some reason the study has not come to light.

WHO DID THE WORK?

The transportation industry owes a debt of gratitude to the plaintiffs in their suit against the FMCSA and especially to their counsel, Henry Seaton, Esq. who has taken this industry cause on his shoulders. We also applaud the Transportation Intermediaries Association for their fine work incorporating the settlement terms into a Carrier Selection Framework. TLP&SA salutes them and has pledged to work with them until the matter has been equitably resolved.

CONCLUSION

In pursuit of fairness and to address the scourge of vicarious liability suits against shippers and brokers alike, we call on all interested parties to become knowledgeable about the downside of CSA and to work with your elected officials to stop the abuse of CSA and to address the important concerns of the industry.

TLP&SA's Welcomes the following new members:

Steven M. Block, Esq. – Foster Pepper, LLC – Seattle, WA
Gene F. Zipperle Jr., Esq. – Ward, Hocker & Thornton – Louisville, KY

Some people have all the luck. We were given not 1 but 2 TV's as GrandPrizes (1 donated by Recovery Management, a/k/a Cargo Largo, and the other by Sony Electronics) at our 11th Annual Joint Conference with the TLC Group; and ONE person – Kristen Beshaw of Leading Edge Logistics won them both. Kristen was kind enough to give one back so someone else could win. Thank you, Kristen.

"*It is truly my pleasure to have been invited to this Conference. Networking and business exposure opportunity for my firm is an invaluable asset in servicing the Transportation Industry.*" -

Donna Wyss - Cargo Salvage Claims - Cscsalesnet@earthlink.net


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Recent Court Cases

as analyzed by the Conference of Freight Counsel

Marian Wellert Sauvey, Esq. - Chairperson and Victor Henry, Esq. - Vice-Chairperson

A. Carrier Liability

1. Moreau v. Allied Van Lines, Inc., 2010 WL 2044663 (May 20, 2010)

Plaintiffs' household goods were being transported by Allied from South Carolina to Florida. The freight was initially delivered to a storage facility in Florida to be held from March through September 2004. Two violent hurricanes in September 2004 damaged the storage facility, including taking the roof off and cutting power. As a result Plaintiffs goods were damaged, although they were not informed until December 2004.

In August 2007 Plaintiffs filed an action in South Carolina state court claiming negligence. Allied removed the case to federal court and filed a motion for summary judgment that the Carmack Amendment controlled; that even if Plaintiffs made out a prima facie Carmack case, any damage was due to an act of God; or in the alternative that liability was limited to either $82,400.00 (16,480lbs. @ $5.00 per lb.) or $75,000.00 contractual maximum. The Court found Carmack applied but that even if an act of God caused initial damage, Allied was not necessarily free of negligence in not addressing the structural damage to the storage facility between the hurricanes or otherwise protecting goods stored. The court also found that the $75,000.00 contract maximum applied, but that Plaintiffs had additionally made a declaration items of extraordinary value of $6,000.00 and sua sponte granted Plaintiffs a judgment for $81,000.00.

Allied filed a motion for reconsideration (the Order incorrectly provides it was plaintiffs' motion) that it was not afforded any opportunity to respond to the sua sponte damages judgment (Plaintiffs did not oppose the motion for summary judgment and Plaintiffs certainly did not file their own motion). Allied argued that there were genuine issues of fact as to Plaintiffs' burden to prove the difference in damages from the first hurricane, which was unquestionably an act of God, and any additional damage for the failure or delay to secure the stored goods before the second hurricane and thereafter. Allied also argued that there was a genuine dispute of material fact whether because of the original hurricane it was unable to salvage or otherwise alternatively protect the stored goods, which would not amount to negligence. The motion for reconsideration further argued that any negligence took place after the loss from the act of God of the first hurricane and not being concurrent did not defeat the act of God defense (or at the very least the act of God defense defeats initial damage caused by the hurricane). Finally, Allied argued that it had filed a supplement to its motion for summary judgment that Plaintiffs had not complied with the 9 month claim filing requirement, which issue had not been addressed by the court. The court granted Allied's motion for reconsideration on all bases, all of which could then be addressed at the bench trial.

2. American National Fire Ins. Co. v. M/V Seaboard, 2009 WL 6465299 (S.D. Fla. 2009)

An electronics distributor, Motta International S.A. ("Motta"), as shipper, engaged Defendant, Seaboard Marine, Ltd. ("Defendant" or "Seaboard), as ocean carrier, to transport certain electronics cargo from Miami to Panama. After Motta unloaded Seaboard's container in Panama, it claimed that some of the cargo was missing.

Plaintiff, American National Fire Ins. Co. ("Plaintiff"), as subrogee of Motta, sued Seaboard under COGSA for loss of 1 box of Canon cameras and 252 cartons of Nintendo Wii consoles, plus prejudgment interest and costs.

Plaintiff claimed that it was entitled to judgment for $126,500, representing the 253 "packages" x $500, per COGSA's $500 per package limitation. Defendant claimed that its liability was limited to $3,500, based on the loss of 1 box of Canon cameras and 6 pallets of Wii consoles, or 7 x $500.

Although liability was denied, the court found that Seaboard was clearly liable. The primary issue was the amount of damages, and whether the lost cargo was shipped in "packages" or some other "shipping unit" and what was the number of packages or shipping units.

The bill of lading identified the number of packages as "1" while describing the cargo as "140' [should probably be 1- 40'] dry high cube cntr [container] s.l.w.c. [shippers' load, weight and count] 487 pcs [pieces] contg [containing] electronics-video games photo camera." Based on this ambiguity, the court had to determine whether the description adequately identified the number of packages or whether the cargo had to be classified as "goods not shipped in packages."

The court first opined that the "touchstone" in analyzing whether the goods in a container are enclosed in "packages" is the contractual agreement between the parties, as set forth in the bill of lading. In this case, as stated above, the bill of lading identified the number of packages as "1".

The court further explained that if a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the container itself is the "package" for COGSA limitation of liability purposes. However, when a shipper places goods in packages as used in the ordinary sense of the word and the number of packages within a container is disclosed to the carrier in the bill of lading or otherwise, each described package or unit within the container constitutes a package.

The court next determined that the bill of lading's description of cargo comprised of "pieces" of electronics, cameras and video games indicated to Seaboard that it was shipping "packages" of electronics equipment. The evidence reflected that the "pieces" referenced in the bill of lading were actually cartons of Wiis that each contained 3 Wii consoles. Cartons are unquestionably "packages" as used in the ordinary sense of the word. Further, electronics equipment is a type of cargo that is usually shipped overseas in packaged form.

Therefore, the court held that Plaintiffs were entitled to damages based on the 253 "packages" identified in the bill of lading, even if those "packages" were loaded on pallets before being placed in the container. Thus, Plaintiffs were entitled to damages of $126,500 for the loss of 253 "packages" of cargo, plus prejudgment interest and costs.

As to prejudgment interest, the court stated that prejudgment interest should generally be awarded in admiralty cases, absent peculiar circumstances, such as a legitimate dispute as to liability, mutual fault or an inflated damages demand, which did not exist in this case.

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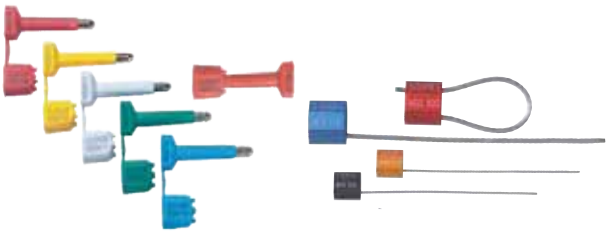

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3. Genaeya Corp. v. Harco National Insurance Co., 2010 WL 892095, 991 A.2d 342 (Pa. Super. 2010).

Declaratory Judgment action by a motor carrier against its insurance company for defense and indemnity of a cargo theft claim.

A freight broker, LAM Truck Brokers, Inc. and BAM Transportation, Inc. ("LAM/BAM") contracted with the motor carrier, Genaeya, to transport freight in interstate commerce. At destination, the truck driver discovered the location to be only a partially fenced in unattended lot. Upon inquiry for instructions, LAM/BAM told the driver to back the trailer up against a wall. The driver did so, unhitched, and left. The trailer was stolen.

The broker, LAM/BAM refused to pay the carrier's freight charge and the carrier then sued the broker. The broker counterclaimed against the motor carrier for the value of the lost cargo, $48,000.00.

The motor carrier, Genaeya, submitted the counterclaim to its insurance company, Harco. Harco declined coverage because the policy only extended coverage to cargo left in a "garage," "terminal," or "depot," and the unattended partially fenced lot did not qualify and therefore there was no coverage under the policy.

The trial court found that there was coverage under the policy. On appeal, the appellate court reversed finding the open unattended lot did not qualify as a covered location under the terms of the policy.

4. Yang Ming Marine Transport Corporation v. Intermodal Cartage Co., Inc.,

685 F.Supp.2d 771 (W.D. Tenn. 2010).

Plaintiff, Yang Ming (an ocean carrier and intermodal equipment provider) sued a motor carrier, Intermodal Cartage Co., Inc. pursuant to their agreement made under the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA") for reimbursement of Yang Ming's $90,000.00 in counsel fees and costs incurred defending a wrongful death action involving the unloading of a container. Yang Ming was successful in that case and obtained a dismissal.

In the lawsuit seeking reimbursement of Yang Ming's fees and costs in defense, the Court interpreted the UIIA's choice of law provisions, which stipulated the law of the State of Maryland governed. In this case, the underlying wrongful death occurred in Tennessee and, therefore, Tennessee would seem to have had the greatest interest in applying its State law. Nevertheless, the Court considered that the parties had a right to contract and to select their own choice of law pursuant to the UIIA. Moreover, transportation cases often touch upon a number of different jurisdictions and so it cannot come as a surprise the law of only one of the jurisdictions would apply to the exclusion of the others – just like any other transportation case.

Defendant asserted there was no duty to defend under the agreement made pursuant to the UIIA because the underlying death did not occur during the "Interchange Period," i.e., the time period Intermodal had possession or control over the container. The Court held that provision did not apply because it only applied to exchanges of containers or equipment between signatories of the agreement, which was not the case herein.

Applying Maryland law, the Court also rejected public policy arguments against defending for one's own negligence because that rule does not apply to an insurance contract. Reviewing the UIIA, the Court treated the agreement between Yang Ming and Intermodal as being akin to an insurance policy and thus rejected the Defendant's public policy argument. The Court found the same result would have obtained under the law of the State of Tennessee as well.

Interpreting the UIIA broadly including responsibility for damages that "arise out of or are related to" the "use" of the containers, the Court found a causal connection was not necessary to trigger the defense obligations of Intermodal in favor of Yang Ming. The Court enforced the defense provisions of the agreement against the Defendant, Intermodal Cartage, to reimburse the Plaintiff's costs and fees incurred in defense of the wrongful death action.

The Court also made a distinction between the duty to defend (which was in issue in this case) and a duty to indemnity. Because Yang Ming was successful in the underlying wrongful death case, the instant case involved only a duty to defend. A duty to defend is interpreted "more broadly than the duty to indemnity." The duty to defend, under Maryland law, applies to claim that "may potentially be covered under the parties' agreement." Walk v. Hartford, 382 Md. 1, 852 A.2d 98, 106 (2004).

5. Straley v. Thomas Logistics, LLC, 2010 WL 2231566 (W.D.N.C.) (June 1, 2010)

Plaintiffs sued Thomas Logistics, LLC, Bekins Van Lines, LLC and Vanliner Insurance Company in North Carolina state court claiming breach of contract, vicarious liability, unfair and deceptive trade practices and attorney's fees, following an interstate household goods move. The case was removed to federal court and Bekins filed a motion to dismiss all of the state law claims as being completely pre-empted by Carmack. Plaintiffs filed an amended complaint, adding a Carmack claim, but maintaining all of the prior state law causes of action. Bekins filed another motion to dismiss the state law claims in the amended complaint. Thomas Logistics jumped on the bandwagon and filed its own motion to dismiss. The motions were referred to a magistrate judge who issued a Memorandum & Recommendation that all of the state law causes of action be dismissed as completely preempted by Carmack. Plaintiffs filed a limited objection to the Recommendation, challenging only the dismissal of the claim for attorney's fees.

Plaintiffs claimed that pursuant to 49 U.S.C. §14708(d) a shipper is entitled to claim attorney's fees. The Court found that this section provides very specific conditions precedent to being entitled to claim attorney's fees, including that a shipper submit a claim within 120 days and that the carrier fails to advise of available arbitration (there are additional alternative conditions for a shipper to be entitled to claim attorney's fees, i.e. if an arbitration decision is not rendered in a timely fashion or for a court action to enforce an arbitration award). Plaintiffs in this case failed to allege they had either made a claim within 120 days of delivery or that the carrier had failed to advise of available arbitration and so the Recommendation of the magistrate judge was accepted.

6. Santos v. Inter Trans Insurance Services, Inc., 2008 N.Y. Misc. LEXIS 8619, 2008 N.Y. Slip Op 32302U (N.Y. Sup. Ct. 2008)

Motion for partial summary judgment to limit the motor carrier's liability to $0.60/lb. granted. Plaintiff hired Defendant to pack his phtogr phy prints and furnishings and to transport them from Brooklyn, New York, keep them in storage for two (2) months at Defendant's storage facility in Bronx, New York and then to transport the goods to Irvine, California. Plain tiff alleges cargo loss and damage upon receipt in California.

Plaintiff purchased moving insurance from AIG, which denied Plaintiff's insurance claim on the basis Plaintiff failed to prove ownership and value of the allegedly damaged goods. Plaintiff declared a value of his goods to the insurance company in the amount of $269,700.00.

Plaintiff then sued the motor carrier. The Defendant motor carrier moved to limit its liability pursuant to the Bill of Lading and Tariff. Plaintiff opposed the motion taking the position the Defendant's actions were grossly negligent and under the law of the State of New York, the Defendant could not limit its liability.

The Court rejected that argument citing Car mack preemption (Adams Express Co. v. Cron inger, 226 U.S. 491, 33 S. Ct. 148, 57 L.Ed. 314 (1913)) and found that the carrier appropriately

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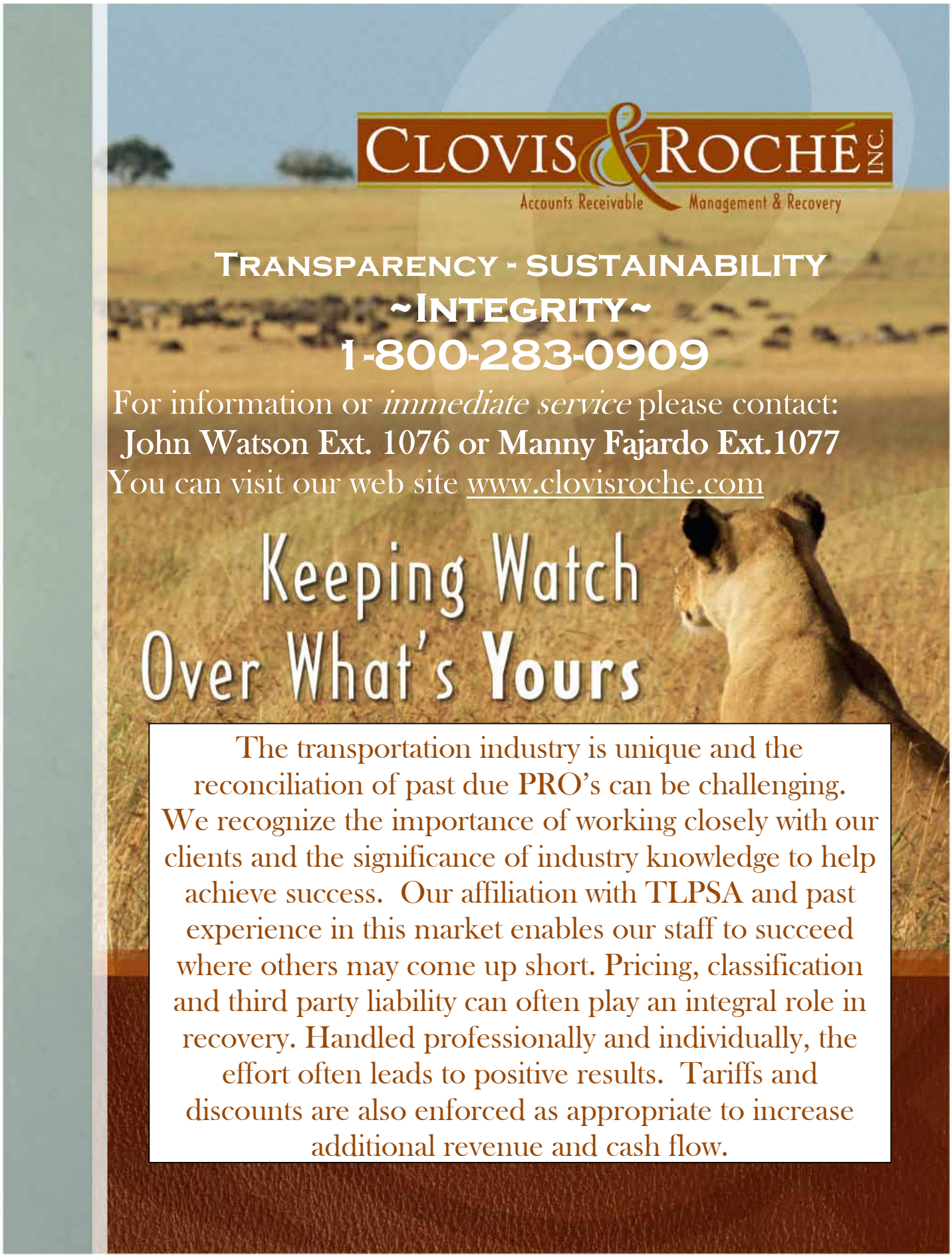
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The transportation industry is unique and the reconciliation of past due PRO's can be challenging. We recognize the importance of working closely with our clients and the significance of industry knowledge to help achieve success. Our affiliation with TLPSA and past experience in this market enables our staff to succeed where others may come up short. Pricing, classification and third party liability can often play an integral role in recovery. Handled professionally and individually, the effort often leads to positive results. Tariffs and discounts are also enforced as appropriate to increase additional revenue and cash flow.

limited its liability to a maximum of $0.60/lb and granted Defendant's motion to limit the damages.

7. The Doug Beat Co. v. Watkins Transportation Co., 2010 U.S. Dist. LEXIS 50322 (N.D. Oh. 2010).

Carmack Amendment case involving cargo loss on a shipment of used goods. Defendant motor carrier moved for summary judgment to limit Plaintiff's damages to the $6,300.00 purchase price and that the Carmack Amendment preempts Plaintiff's state law claims for prejudgment interest and attorneys fees.

On its motion to limit the damages, Defendant argued the Plaintiff's experts failed to provide sufficiently reliable information to support a factual finding of the value of the goods and that, therefore, the damages should be limited to the Plaintiff's $6,300.00 purchase price. The Court conducted a Daubert hearing and found the Plaintiff's experts had provided sufficient indicia of value of the goods to send the question to the jury. Accordingly, Defendant's motion to limit the damages was denied.

Plaintiff did not oppose the merits of the Defendant's motion to dismiss the state-created clams for prejudgment interest and for attorneys fees. Finding the motion "well-taken," the Court granted Defendant's motion to dismiss the state-created claims and limit the case to Carmack.

8. St. Paul Travelers Insurance Co. v. M/V Madame Butterfly, 2010 WL 1244285 (S.D.N.Y. March 31, 2010)

Plaintiff, St. Paul Travelers Insurance Co. ("Plaintiff"), subrogee insurer of a yacht that was damaged when a crane toppled over while the yacht was being offloaded from the M/V Madame Butterfly in California, brought suit against the ocean carrier, Wallenius Wilhelm sen Logistics ("WWL"), which transported the yacht from England, as well as against the crane lessor and the stevedores responsible for offloading the yacht (collectively, the "Defendants"). The damages to the yacht totaled $4,179,938.

Plaintiff argued that the Defendants were liable under a service contract entered into by WWL for the shipment of various yachts with a freight forwarder, as agent for the yacht's manufacturer/seller, which did not include a COGSA limitation of liability. Further, the Plaintiff argued that the bill of lading stated that the yacht weighed a total of 693.36 metric tons. Therefore, if the yacht was not one "package" and COGSA applied, the Defendants' liability was up to $500 x 693.36 metric tons, or $346,680.

The Defendants responded that the service con tract did not apply and that the governing con tract was the bill of lading, which said that suits were not permitted against any other party than WWL, that COGSA, including its $500 per package or customary freight unit limita tion of liability, applied; and, that the yacht was one package.

The central issue was whether the contract governing the carriage of the yacht was the service contract or the bill of lading.

The court held the contract governing the car riage of the yacht was the bill of lading, not the service contract; any errors in the bill of lading did not void application of COGSA's limitation of liability; the yacht was the pack age or customary freight unit; COGSA lim ited the carrier's liability to $500; and, the crane lessor was also protected by COGSA's limitation of liability provision, pursuant to a Himalaya clause in the bill of lading.

The court reasoned that, because the yacht was shipped from England to California, COGSA is the governing statute under the bill of lading. The bill of lading provided that, if COGSA applied, WWL's liability was limited to $500 per package unless a higher freight was paid and a higher value was declared, and no higher value was declared on the bill of lading. Further, the court held that, because the bill of lading contained a clause prohibiting suits against anyone other than the carrier, WWL, the Plaintiff's claims against the crane lessor and the stevedores were dismissed.

9. Sheffler v. Commonwealth Edison Company, 2010 Ill. App. LEXIS 150 (1st Dist., 2010).

"Sheffler...it's in the tariff!"

This is a public utility case, not a transportation case. However, the court applied tariff principles to deny the plaintiffs' claims for damages resulting from a power outage caused by a massive storm. Plaintiffs asked for damages for lost and destroyed goods, for loss of business, and for injunctive relief (best summarized as a demand that the court require the utility to rebuild its electrical system to better withstand storms.)

The court found that the Illinois Commerce Commission had been given extensive jurisdiction to exercise general supervision over all Illinois public utilities under the Illinois Public Utilities Act and, therefore, the court could not grant injunctive relief to require the rebuilding of the system.

Addressing the damages issued, the court left us with some significant quotations:

"The very purpose of the Act is to maintain control over the operation of utilities so as to prevent them from exacting unjust, unreasonable, and discriminatory rates....The theory behind the regulation of public utilities is the protection of the public and the assurance of adequate service while, at the same time, security for the utility a fair opportunity to generate a reasonable return."

"In order to effectuate the above-stated principles, the Act requires public utilities such as ComEd to file tariffs with the Commission."

"Tariff provisions, such as ComEd's tariff, are usually referred to as liability limitations."

"Liability limitations reflect the status of public utilities as regulated monopolies whose operations are subject to extensive restrictions; the requirements of uniform nondiscriminatory rates; and the goal of universal service, achieved through preservation of utility prices that virtually all customers can afford."

The court reduced the damage claims to a matter concerning utility rates. Although lawsuits can be filed against a utility for various reasons, the court found that the Illinois Public Utility Act vested the Illinois Commerce Commission with exclusive jurisdiction over claims that rates are excessive or unjustly discriminatory.

The plaintiffs' claims implicated rates and were, therefore, governed by the tariffs filed by the utility because the plaintiffs "fundamentally" alleged that the utility should provide its customers a greater level of service. Those claims raise the regulatory question of how the utility should recover the costs of raising the level of service it provides. And that question could only be answered by the Illinois Commerce Commission, not the court.

The court did not address which items in the utility's tariffs would affect the plaintiffs' damage claims. However, in reaching its decision that rates were, in fact, implicated and that the utilities tariffs would control the outcome, the court relied heavily on a previous Illinois court decision in which the plaintiffs in a case against a local telephone company were limited to damages specified in the telephone company=s tariffs, which were on file and been approved by the Illinois Commerce Commission.

10. National Union and Fire Insurance of Pittsburgh, PA v. FMI International LLC, et al., USDC Case No. CV09-6065 SJO (PJWx) (C.D. CA 2010)

Partial summary judgment granted for defen-

(continued on page 15)

Our 2011 Exp

Jarrod Brown, David Fair & Lenny Veneziano of CAR int'l. LVeneziano@classactionrefund.com share their expertise with Mark Yunker of RJ Ahmann and Marc Blubaugh of Benesch, Frieldander, Coplan & Aronoff, LLP.

Sal Marino and Richard Kirk of CargoNet Smarino@cargonet.com is visited by John Tabor of National Retail Systems.

Michael Pate of Electric Guard Dog a/k/a Sentry Security Systems Sentry@electricguarddog.com talks with Colin Bell, Esq. of Franklin & Prokopik.

John Watson & Manny Fajardo of Clovis & Roche Jwatson@clovisroche.com are visited by John O'Dell of Landstar and CCPAC.

Donna Wyss of Cargo Salvage Claims Cscsalesnet@earthlink.net speaks with Jodi Wellington of Forward Air and Kathy Class of Travelers Insurance.

Ray Flemming of Flemming Cargo Claims rflemming@fccsflemming.com Entertains Brian Kiel of Nestle USA.

Candace Dell of Coface Collecions Candacedell@coface-trm.com speaks with Tom Martin, Esq. of Nowell Amoroso Klein & Bierman, P.A.

ert Exhibitors

Dee Pack & Dave Myers of Recovery Management a/k/a Cargo Largo myers@cargolargo.com speak with Marc Bostwick of Total Quality Logistics.

Brian Kiel of Nestle USA and John Slinkard of Sun-Maid Growers visit Regiscope Digital Imaging Adamsj@ Regiscope.com represented by Christian Baker & Walt Beadling.

Tina Jordan of VFI and Bill Bierman, Esq. of Nowell Amoroso Klein & Bierman, P.A. and TLP & SA flank the Exhibitor Room Billboard.

Diane Smid of T&LC talks about the Conference with Ed Loughman of TLP&SA.

Fritz Damm, Esq. of Scopelitis, Garvin, Light, Hanson & Feary P.C. stands by the Conference Sponsor billboard.

John Albrecht of Transport Security a/k/a The Enforcer enforcer@transportsecurity.com speaks with Bob Hochwarth of Volvo.

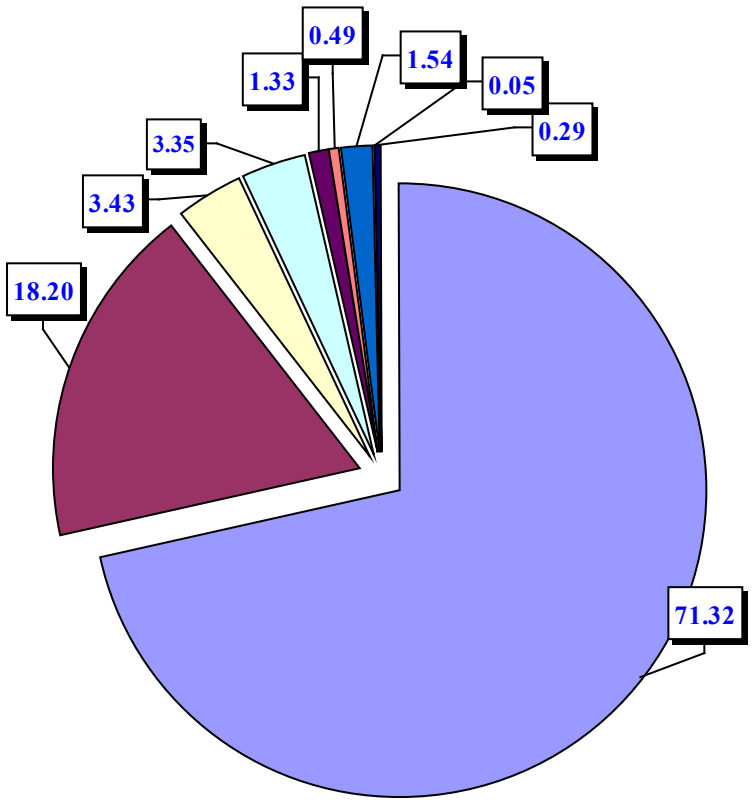
Tina Jordan, Matt Hakes & Janine Dates of VFI a/k/a Virtual Freight Inspections don@vfinspections.com talk with Dean Gobrecht of Marten Transport.

TLP & SA MOTOR CARRIER CLAIMS SURVEY – 2010

CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	18.10 %	10.12 %
Theft / Pilferage	1.33 %	.10 %
Visible Damage	71.32 %	58.10 %
Concealed Damage	3.43 %	3.20 %
Wreck / Catastrophe	3.35 %	.28 %
Delay	.05 %	.05 %
Water	.49 %	.12 %
Heat / Cold	.29 %	.07 %
Other	1.55 %	1.01 %
	100 %	73.05 %

Total numbers of claims paid Vs. number of claims filed.	73.06 %
Total dollars paid Vs. total dollars filed.	37.44 %
Net dollars paid Vs. total dollars filed.	32.70 %
% of claims filed to total number of shipments made.	.61 %
Total company claim ratio.	.96 %
Percent of claims resolved in less than 30 days.	82 %
Percent of claims resolved 31-20 days.	13 %
Percent of claims resolved more than 120 days.	5 %

2010



Visible Damage - 71.32%
Shortage - 18.20%
Concealed Damage- 3.43%
Wreck/Catastrophe - 3.35%
Theft/Pilferage - 1.33%
Water - .49%
Other - 1.54%
Delay .05%
Heat/Cold - 0.29%

M&S INSPECTIONS

17 LAKESIDE DRIVE

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dant carrier upholding limitation of liability in freight forwarder's bill of lading.

The parties were in agreement on the material facts: that FMI International LLC, a freight forwarder, was hired by plaintiff's insured, Vanity Fair/Fruit of the Loom; that FMI hired Southern Cal Transport, Inc., a motor carrier, to transport the goods (a trailer full of brassieres); that FMI presented to Southern Cal for the transportation a bill of lading containing an express limitation of liability provision; and that the trailer caught fire, destroying the contents.

Plaintiff, however, argued that the terms of the bill of lading inured to the benefit of FMI only and not to Southern Cal. The Court wisely ruled that plaintiff had no supporting evidence for that assertion and that FMI was the shipper as to Southern Cal, with authority to bind its customer to the limitation.

B. Preemption

11. Miller v. Air Van Lines, Inc., 2010 WL 1666563 (Conn.Super. 2010).

This is a Carmack preemption case.

Plaintiff sued Air van Lines, Inc., North American Van Lines, Inc. and Sterling Moving and Storage, Inc. for damage to household goods transported in interstate commerce from Connecticut to Hawaii. The Complaint asserted state-created causes of action for negligence and the Connecticut Unfair Trade Practices Act.

Defendants moved to dismiss on the basis of Carmack preemption.

Plaintiff took the position Carmack did not apply because the defendants did not issue a receipt or bill of lading. The Court rejected that argument because 49 U.S.C. § 14706(a)(1)(C) states the failure to issue a receipt or bill of lading "does not affect the liability of the carrier." The Court also cited Dress Barn, Inc. v. The LTA Group, Inc., 822 F. Supp. 88 (D. Conn. 1993) a case finding Carmack preemption despite the lack of a bill of lading.

Plaintiff also argued Carmack did not apply to Air Van and North American because those Defendants acted only as brokers and Carmack does not apply to brokers. Nevertheless, on a motion to dismiss the Complaint, the Court only considers the four corners of the Complaint. The Complaint alleged Air Van and North American negligently handled, packaged and shipped the freight, thus essentially alleging they were carriers. For that reason, the Court granted the Defendants' motion to dismiss as the allegations were preempted by Federal law.

12. Haug v. Dependable Auto Shippers, Inc., 2010 Westlaw 669756 (N.D. Tex).

Ulrich Haug shipped a 2002 Porsche 911 turbo from California to Germany. Haug sued the carrier in state court in Dallas for damage to the car. The carrier removed the case to federal court and filed a motion to dismiss under Rules 12(b)(6) and 12(b)(7) for failure to state a claim upon which relief can be granted and for failure to join parties. The carrier, Dependable, attached to its motion an ocean-through Bill of Lading issued by Troy Container Line. Dependable argued that the Bill of Lading extended coverage under COGSA to the entire shipment. Dependable also contended that because COGSA applies to the entire shipment, Plaintiff has failed to state a claim under the Carmack Amendment or the Harter Act. Dependable also contended that Plaintiff failed to join Troy, an indispensable party. Haug responded that there was an issue of fact with respect to whether a bill of lading was issued. He also argued that COGSA does not apply and that the Harter Act may apply. He also contended that Troy was not a necessary party.

The court determined that the issue surrounding the bill of lading would be better suited for a motion for summary judgment than a motion to dismiss. Even if the court were to consider the Bill of Lading attached to the motion, it was illegible. At this stage in the litigation, the court would not dismiss Haug's claims. The court also determined that Dependable failed to carry its burden to show that Troy was indispensable.

13. Shabani v. Classic Design Services, Inc., _ F. Supp. 2d _, 2010 WL 446084 (C.D.Cal. 2010).

Shipper sued carrier Classis Design Services under state law for damage to a $32,000 porce lain centerpiece. Classic Design removed to federal court and moved to dismiss the state law claims. After reviewing Ninth Circuit case law on Carmack preemption, the court granted the carrier's motion to dismiss, including the shipper's claim for fraud related to alleged misrepresentations about the "insured value" (i.e., declared value") of the cargo.

C Jurisdiction/Removal

14. Select Medical Corporation, et al v. Armstrong Moving and Storage, et al. Court of Common Pleas, Daphin County, PA

Select Medical, a Pennsylvania health care company, acquired another health care company, HealthSouth, in May, 2007, and set about to close several physical therapy clinics in west Texas. Select hired "consultant" Dux to "facilitate" the closures. Dux hired his friend David Martin to personally attend to the closings. Martin hired InSite Logistics, a Unigroup subsidiary, to secure the moving company in west Texas. InSite hired Armstrong, a Texas-based moving and storage company. Armstrong was, at all times material hereto, a United interstate agent. Armstrong was also a party to a Logistics Services Agreement with InSite.

On October 24, 2007, the Armstrong movers moved medical records, exercise equipment and office supplies from a clinic in Levelland, Texas to storage sites in Lubbock and Houston. Armstrong subsequently hired UPS Ground (non-party) to ship some of the equipment from Lubbock to a warehouse in Pennsylvania. Armstrong did not transport items across state lines. Armstrong has no operations in, nor does it conduct or solicit business in, Pennsylvania.

The next morning, approximately 5,000 pieces of "confidential patient information" was found in the dumpster behind the Levelland clinic. The Texas Attorney General filed a civil suit under its newly enacted Privacy Law against Select only. Select settled and paid $990,000 in fines and legal fees and agreed to a five-year compliance program to prevent future incidents in Texas. Select then filed suit against Dux, Martin, InSite, United, Unigroup and Armstrong in Dauphin County, Pennsylvania to recover its fine, attorneys fees and anticipated compliance costs.

We filed Preliminary Objections (basically a 12(b)(2) motion) in response, wherein we argued that the Pennsylvania Court had no specific in personam jurisdiction over Armstrong. The Court's well-reasoned opinion addressed the legal standards under Pennsylvania law required to assert jurisdiction and applied the facts in a manner consistent with the law.

Specifically, the Court understood and agreed with our arguments regarding the difference between Armstrong's relationship with United in interstate transactions and its non-affiliation with United for intrastate transactions, such as the one at issue. The Court also analyzed the internet-based activities of Armstrong and concluded that Armstrong, by soliciting business on line, did not purposely avail itself of Pennsylvania jurisdiction.

15. Bongam Investment Corp. v. Eagle Systems, Inc. et al United States District Court for the District of Maryland, Case No.: 09-965

Shipper, Bongam Investment Corp. ("Bongam") arranged with Co-Defendant, Pioneer Shipping Logistics, Inc. ("Pioneer") (a New York corporation) for the importation through the Port of Baltimore of a shipment of furniture manufac-

(continued on page 17)

tured in China. Pioneer also arranged for the cargo to be picked up at the dock by Eagle Systems, Inc. ("Eagle") and transported to a facility of Bongam in Maryland.

The load arrived from China on December 20, 2008. Eagle apparently picked the load up on December 30, 2008. Pioneer was to arrange for delivery within three (3) business days of being paid for its services, which is alleged by Bongam to have happened on January 6, 2009. Eagle attempted delivery at the designated address but no one was present to accept delivery. A second attempt at delivery was made on January 27, 2009 when again there was no one present to unload the cargo. Eagle's agreement provided 2 hours for off-loading to be carried out by the receiving facility, or extra charges were due for any additional time. Two people of Bongam finally showed up, but with only 30 minutes of the 2 hours remaining. Eagle contacted Pioneer advising additional charges were about to be incurred and Pioneer instructed Eagle not to incur additional charges. The truck left with only a small portion of the cargo having been unloaded and on the instructions of Pioneer, Eagle delivered these to a storage facility arranged by Pioneer in Maryland.

Bongam filed suit in Maryland state court against Pioneer and Eagle, claiming breach of contract and conversion. We act for Eagle and removed the case to the United States District Court for the District of Maryland on original federal jurisdiction (either COGSA or Carmack). Bongam filed a Motion to Remand, which was denied and a copy of the Judge's written opinion and Order is attached. This really only focused on whether Carmack provided federal question jurisdiction and resolved that more facts were necessary than were then available to determine the issue. However, it does appear to indicate that the Judge may be inclined to accept federal jurisdiction on a foreign shipment entering the U.S. and then proceeding on an inland portion of the total intended journey. We also question if there has been any loss, as everyone knows where the goods are, there is just a dispute between Bongam and Pioneer as to the storage charges – which are continuing to accrue as the months roll on.

16. Old Dominion Freight Line, Inc. v. Old Colony Baking Company, Inc., 2010 U.S. Dist. LEXIS 4774; (CD IL 01/21/2010); Order and Opinion

Though only a one page opinion by a magistrate judge, this order gives us something to counter the Sterling Seating case where some guy named Tauscher got whacked by the court with a finding of no SM jurisdiction in a freight charge collection case.

Here the court spoke in terms of "published" tariffs rather than "filed" tariffs, which is correct post ICCTA as they are not filed any more but "maintained" or "published". The Sterling Seating and Transit Homes cases denied jurisdiction on the basis that Thurston was a "filed" tariff case and post ICCTA tariffs are no longer "filed". The magistrate judge used the correct focus – the STB's continuing "regulation" of rates/tariffs and 28 USC 1337's grant of jurisdiction over Acts of Congress regulating commerce; the quote of 49 USC 13501 really isn't on point since no STB order is involved, and could be used to distinguish this opinion.

See also Jeff Simmons's TTL article, Collection of Interstate Freight Change: A Case for Federal Jurisdiction, The Transportation Lawyer, Vol. 8, #3, pp. 23-25 (December 2006) [use this link to go to TTL's December 2006 issue, pages 23-25: http://www.translaw.org./mo/index.cfm?fuse=ttl]

17. Carrie Mehleck v. F.M.S., Incorporated d/b/a Del's Movers, Inc., Illinois Commerce Commission Complaint No. 09-0027

Mehleck claimed that her shipment was damaged on an Illinois intrastate move.
The Illinois Commerce Commission ("the ICC") has its own household goods arbitration procedure, which Mehleck's lawyer used to attempt to recover for her loss.

Mehleck was a resident of CJE, a senior housing complex. CJE decided to renovate the complex and it hired Paxem to facilitate the temporary relocation of the center's residents, including Mehleck. Paxem packed Mehleck's property and, in turn, hired the moving company (Del's Movers) to transport her household goods.

In October 2008, Del's Movers moved some of Mehleck's goods into storage and the remainder to her temporary apartment at another CJE facility. No bill of lading was issued nor was an inventory prepared to identify the items going into storage.

In April 2009, Del's Movers moved Mehleck's property from storage and her temporary apartment back to her newly renovated residence. At that time a bill of lading was prepared on behalf of Mehleck and submitted to Del's Movers. The BOL identified CJE and Paxem as the "Customer". Mehleck's name was not listed anywhere on the BOL. The ICC noted several key deficiencies in the BOL: it lacked a destination address, it lacked consignor and consignee information, was not numbered, charged a flat rate and lacked a shipper-declared valuation.

The ICC cited its rules which provide that a shipper is "any person who utilizes the services of a carrier for the collect-on-delivery transportation of household goods" and affirmed that "a bill of lading and the carrier's published tariff, together, constitute a contract between a shipper and a carrier." The ICC stated that Mehleck could bring a claim against Del's Movers only if she could demonstrate that she was the shipper under the law.

In the absence of a bill of lading for the October 2008 shipment, the ICC found that the April 2009 bill of lading was the only evidence provided as to the relationship between Mehleck and Del's Movers. That BOL clearly stated that the shippers were CJE and Paxem and was signed by a Paxem employee.

The only document Mehleck signed was a lease addendum with CJE. CJE hired Paxem, which then contracted with Del's Movers for transportation. The ICC found that although Mehleck had a property interest in her household goods, she was not the shipper because she did not directly utilize Del's Movers services. Instead, Paxem put itself in the unlawful position of acting as a broker of Mehleck's household goods.

"This Arbitrator cannot enter a damage award in this case due to the lack of privity between Mehleck and Del's Movers." D. F

D. Freight Charges

18. Tran Enterpises v. DHL Express, 2009 WL 604660 (S.D. Tex. 2009).

The U.S. District Court in Texas dismissed a shipper's claim for full reimbursement of amounts it claims a motor carrier collected and failed to remit related to COD shipments. The Court first enunciated the Carmack Amendment defense elements (maintenance of a tariff, securing the shipper's agreement to a particular choice of liability, and providing the shipper reasonable alternatives as to liability) and then found them satisfied by the carrier's practices. The Court stated although the case did not involve loss or damage of goods, Carmack applied equally to situations involving claims related to failure to remit COD payments for goods properly delivered, citing precedent to that effect. Based on its Carmack finding, the Court dismissed state claims for breach of fiduciary duty, breach of contract, conversion and theft of property.

19. L'Occitane, Inc. v. Tran Source Logistics, Inc., 2010 WL 761201 (D. Md. 2010).

Lawsuit between a shipper, L'Occitane, and a freight broker, Tran Source, on the broker's alleged failure to pay freight charges over to a motor carrier, AFC Worldwide Express.

(continued on page 22)

Group in Session

John Bozec (Schneider National) Gordon Hearn (Fernendes, Hearn, LLP Carlos M. Sesma Sr. (Sesma, Sesma & McNeese, S.C.). (Left to right).

Kathleen Jeffries (Scopelitis, Garvin, Light, Hanson & Feary) Ken Hoffman (Dysart, Taylor, Lay, Cotter & McMonigle)

Jerry Smith, Esq. (Pezold, Smith, Hirschmann & Selvaggio) and John Tabor (National Retail Systems)

Eric Zalud and Marc Blubaugh (Benesch, Friedlander, Coplan & Aronoff) Bob Hochwarth (Volvo)

Jan Skouby (MO DOT), Bill Bierman Nowell Amoroso Klein Bierman) and Henry Seaton (Seaton & Husk)

Martha Payne (Benesch, Friedlander, Coplan & Aronoff) - Ray Selvaggio (Pezold, Smith, Hirschmann & Selvaggio) & Rob Strouse (Wooster Brush)

Miles Kavaller (Encino Law Center) Nadia Martin (Blakeman Transportation) Marc Blubaugh (Benesch, Friedlander, Coplan & Aronoff) and Steve Theissen (Schneider Electric).

Ron Williams (Williams & Assoc.) and Kristen Beshaw (Leading Edge Logistics). Kristen returns one of her 2 Grand Prizes for re-drawing. Thanks, Kristen.

Dave Fair, Kathleen Jeffries,
Ken Hoffman, George Pezold,
Dennis Cammarano, Dennis Minichello,
Dirk Beckwith, & John Daley.

Hy Hillenbrand and Alice Solomon
with Bill Bierman.

William D. Bierman, Esq.
(Nowell Amoroso Klein & Bierman)

Mark Solomon (DC Velocity)
Joseph O'Reilly (Inbound Logistics)
Bill Bierman (Nowell Amoroso Klein
& Bierman and TLP&SA) - Nikhil Sathe (Kelron

William D. Bierman (TLP&SA)
Joseph O'Reilly (Inbound Logistics)
Nikhil Sathe (Kelron Logistics)

Bill Bierman (TLP & SA) &
Alice Solomon (Hillenbrand, O'Brian & Solomon).

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Klein Bierman, PA.)
Bill Taylor, Esq. (Hanson, Bridgett LLP)

Bill Bierman, Esq.
(Nowell Amoroso Klein Bierman)
Dan Egler, Esq. (Con-Way Transportation) Nikhil
Sathe (Kelron Logistics)

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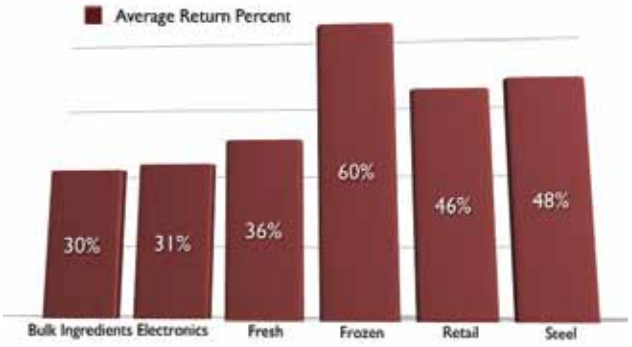

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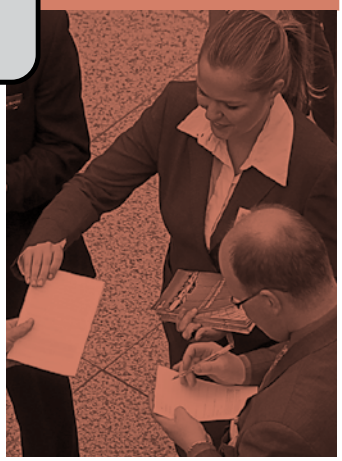

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Plaintiff, shipper, L'Occitane, contracted with the Defendant, freight broker, Tran Source, which, in turn, placed freight with a motor carrier, AFC Worldwide. Unbeknownst to the shipper, the broker had a commission agreement with the carrier to pay the carrier 2.5% of freight charges the broker collected on all of its shipments (including shipments other than those related to L'Occitane). A dispute arose between the broker and the motor carrier as a result of which, the broker stopped paying freight charges. L'Occitance then entered into an agreement directly with the motor carrier without going through the broker.

The carrier had then withheld some of the shipper's freight based on the broker's failure to pay previously billed freight charges. The carrier also asserted it may sue the shipper for the freight charges.

Shipper then sued the broker to, in essence, make it pay the carrier. The broker implead the carrier for indemnity and counterclaimed alleging the shipper's agreement with the carrier amounted to a tortuous interference with prospective business.

The court dismissed the action against the motor carrier because those allegations did not derive from the same subject matter of the shipper/broker lawsuit. The broker opposed the motion asserting that the shipper/carrier agreement created a "special relationship" giving rise to the broker's indemnity claim. The Court rejected that argument. If anything, the broker held the shipper's payments in trust for the benefit of the motor carrier for freight charges.

As for the tortuous interference claim, the shipper had no knowledge of the broker/carrier commission agreement and so the shipper could not have interfered in a business relationship the existence of which the shipper had no knowledge.

20. Illinois Central RR Co v. Fortune Plastics, Northern District of Illinois (08-CV-3690)

Decided in January 2009, Judge Joan Lefkow sitting in the Northern District of Illinois in Chicago goes out of her way to agree with the Third Circuit and give the carrier a judgment based upon the fact that it is named as a consignee on the forty-nine bills of lading presented. In paying lip service to the Seventh Circuit in which she sits, Judge Lefkow finds that the fact that the defendant admitted it was the consignee in its answer to the complaint and that the defendant had failed to comply with Local Federal Rule 56.1 by failing to file a response to the facts submitted by plaintiff or its own statement of additional facts, that the material facts set forth in the Statement of Material Facts of the plaintiff must be deemed admitted. The Court wanted to look no further than the affidavits and pleadings presented and does not even hint that more facts are needed to resolve the issue.
We were fortunate to recently recover the full judgment in an amount in excess of $ 200,000.00 in this matter.

E. Damages

21. Zurich North America v. Triple Crown Services Company, 2008 WL 4642864 (E.D. Mich.)

The shipment of gears were components specifically designed to be incorporated into a specialized mechanical system. According to the testimony of YANA's representative, Woodbridge could not tender any product to YANA in conformity with its contractual specification because the integrity of the gears were "unknown" after their involvement in the accidents. Dkt. # 27-6 at 18. Consequently, the gears were unmarketable to Woodbridge and were damaged for the purpose of the contractual agreement.

F. Miscellaneous

22. Petrie v. Clark Moving & Storage, Inc., 2010 WL 1965801 (W.D.N.Y. May 17, 2010)

In 1999, Plaintiff, Petrie ("Petrie"), along with his employer, Plaintiff, Delphi Corporation ("Delphi") (together with Petrie, the "Plaintiffs"), contracted with Defendant, Clark Moving & Storage, Inc. (the "Defendant") to move Petrie's household goods from his home in Pittsford, New York to a storage facility under Defendant's control in Rochester, New York. Petrie stored over 28,000 pounds of household goods. The storage contract insured the goods at a rate of $.60 per pound, which would limit Defendant's liability to $16,800, if the limitation was valid. The actual value of the goods was approximately $500,000. Delphi paid the storage costs until 2002.

Sometime in 2001, a leak developed at the storage facility, causing extensive damage to Petrie's household goods. In 2003, Petrie arranged for Defendant to move the household goods to his new home in Michigan. When the goods arrived in Michigan, Petrie discovered that the leak had caused mold and water damage to his goods.

In 2009, the parties entered into a binding arbitration agreement. The Plaintiffs argued that there were two separate contracts, one for storage in 1999 and one for moving in 2003. Defendant argued that there was only one transaction, and that it was subject to Carmack, because it transported the household goods from New York to Michigan.

The arbitrator found that there were two contracts, and that Carmack did not apply to the storage contract. The arbitrator ignored the $.60 per pound contractual limitation and entered an award for Plaintiffs for $500,000.

Plaintiffs moved in state court to confirm the arbitration award and the Defendant removed the matter to federal court and cross-moved to vacate the arbitration award. The federal court confirmed the arbitration award for the Plaintiffs and denied the Defendant's motion to vacate the arbitration award.

The court first held that the Federal Arbitration Act (the "FAA") applied to review of the award, not the New York CPLR, because any contract affecting commerce that contains an arbitration clause must be reviewed under federal law. The court held, further, that under the limited standard of review of an arbitration award under the FAA, the court could not disturb the arbitrator's award unless the Defendant proved by clear and convincing evidence that the award was premised on a manifest disregard of the law, which was not the case.

The court reasoned that, for a contract to affect commerce, the contract itself need not contemplate interstate commerce. Rather, the Commerce Clause is implicated in individual cases without showing any specific effect upon interstate commerce if, in the aggregate, the economic activity in question would represent a general practice subject to federal control.

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