# IN TRANSIT

Transportation Loss Prevention & Security Association

Winter Issue 2004

## INSIDE



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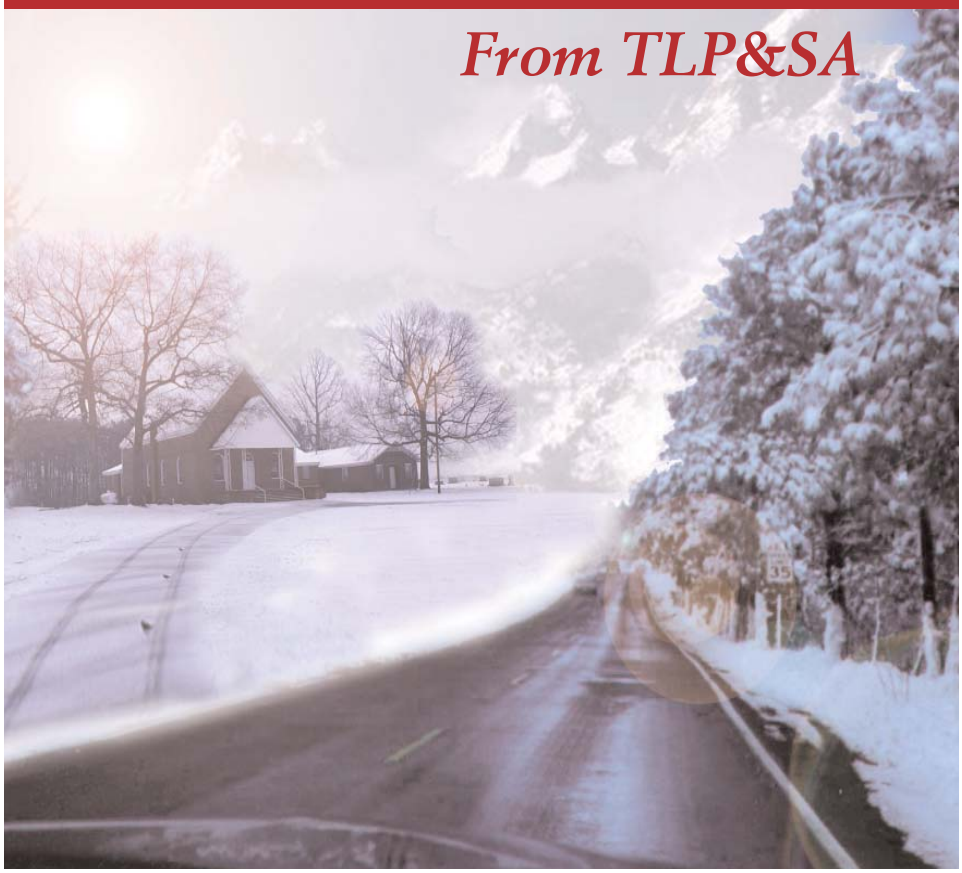
## Happy Holidays

*From TLP&SA*



# FROM THE EXECUTIVE DIRECTOR...

We know that our members and friends receive many Newsletters and Publications from industry sources. Nevertheless, we at TLP&SA strive to provide you with in depth coverage of significant issues that directly effect your business. We attempt to do this in a clear and concise manner so you can immediately grasp the business implications of this information and keep up to date with our fast paced industry.

TLP&SA wishes to thank our contributors who volunteer their time and expertise by providing articles for the In Transit NEWSLETTER. As you can see by our current edition, the information you get here cannot be obtained in any other single source publication. We are pleased to say that this sets us us apart from all other associations.

In our continuing effort to meet the distinct needs of our membership, we seek your comments on our current NEWSLETTER and invite your ideas for future editions. If there are specific issues you wish covered, please e-mail or call us and we will do our best to address your concerns. We specifically wish to thank the following contributors who made our current issue special and unique.

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## HOLIDAY MESSAGE

No one can ever know what the future will bring, but with the new year just a few weeks away and with some of us thinking about New Year's Resolutions, I would like to offer a few predictions for 2005. The one good thing about predictions is that you will forget the predictions that do not come true, and I will not let you forget the predictions that do come true.

PREDICTIONS

1. Bernie Kerik will not be Secretary of Homeland Security (I know that already happened, but I predicted it....ask Ed Loughman).

2. Yellow Roadway will change its name or add some new initials.

3. Colin Barrett will be on the right side of at least one issue.

4. The recently retired Bill Augello will not be on the right side of any issue.

5. The update for Saul Sorkin's book, Goods In Transit, will cost under $10,000.00

6. The trucking industry will continue to consolidate, become more profitable, and one large conglomerate will outpace all others.

7. The brokerage industry will also continue to consolidate, become more profitable, become more sophisticated, and control more of the freight volume.

8. Large and sophisticated shippers will form more intense relationships with carriers and logistics companies so that it will be increasingly more difficult to break those relationships without overwhelming provocation.

9. George W. Bush will not run for reelection. (I have to be guaranteed of at least one accurate prediction).

10. Con-Way Transportation will make at least one move that will change the company significantly for the better.

11. TLP&SA will have a successful Annual Conference on March 20-23, 2005 at the Catamaran Resort Hotel in San Diego, California.

***HAPPY AND HEALTHY HOLIDAYS TO ALL***

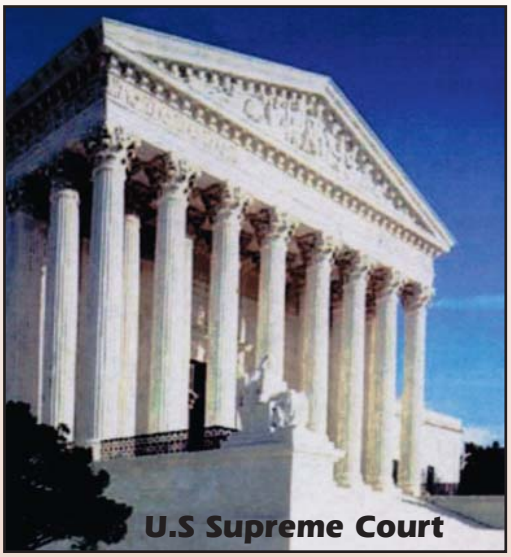
***William D. Bierman, Esq.***
Executive Director

# NORFOLK SOUTHERN V. KIRBY:
## THE SUPREME COURT RECOGNIZES THE NEW TRANSPORTATION REALITIES.

BY *Gordon D. McAuley. Esq.-Hanson, Bridgett, Marcus Vlahos & Rudy, LLP*

"This is a maritime case about a train wreck." That is how Justice Sandra Day O'Connor begins the unanimous opinion in the new U.S. Supreme Court epic decision in Norfolk Southern Railway Co. v. James N. Kirby, et al., 543 U.S. ___ (2004). Justice O'Connor's opening lines foreshadow momentous happenings with its ostensible, but ultimately resolved, contradiction. The Supreme Court's decision concludes events that began with chaos, and ended with a resolution of blissful certainty. The Supreme Court's decision will bring a calm to the stormy seas that motor and rail carriers have battled through in innumerable anachronistic court decisions which refused to recognize the new transportation realities delivered by multimodalism.

The background for this episode is not unusual, but the ensuing events were more dramatic than one could have foreseen at the beginning. An Australian manufacturer ("Kirby") contacted a local "freight forwarder" ("ICC") to arrange transportation of 10 containers of machinery from the shipper's Australian plant to final delivery in Huntsville, Alabama. ICC issued a through bill of lading to Kirby that confirmed that the goods would be transported from Sydney through to final destination in Huntsville. ICC presented Kirby with an opportunity to declare a value for the shipment, at a higher shipping cost. Instead of declaring a value Kirby bought separate cargo insurance, presumably because it was aware of the $500 per package limitation of liability typically asserted by ocean carriers under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. Section 1304(5). The outside insurance most likely was cheaper than declaring a value and paying a declared value premium to ICC.


U.S Supreme Court

The ICC bill of lading listed itself as the carrier, Kirby as the shipper, and contained language extending the ocean carrier's COGSA liability limitations to any "servant, agent or other person including any independent contractors whose services have been used in order to perform the contract." Such language is referred to as a Himalaya Clause, and is intended to extend COGSA protections beyond the point of actual loading and off-loading of the ship, to others who participate in the delivery of the cargo to final destination.

ICC is a transportation intermediary that makes arrangements for door-to-door delivery. ICC is not an actual carrier, but a Non Vessel Operating Common Carrier, NVOCC, or more commonly, an NVO. ICC subcontracted the fulfillment of its transportation obligations to Kirby by entering into a separate contract with the actual ocean carrier, Hamburg Sud. Hamburg Sud issued a separate bill of lading that listed itself as the carrier, and ICC as the shipper. Hamburg Sud agreed to deliver the 10 containers to Huntsville, via the port of Savannah. Hamburg Sud's bill of lading also contained a Himalaya Clause, which extended COGSA liability protection to "all agents…(including inland) carriers … and all independent contractors whatsoever." Hamburg Sud, through its agent, hired Norfolk Southern to complete the inland rail portion of the transportation to Huntsville.

The transportation of the machinery went well for a while. But after discharge of the cargo from the ship in Savannah, to the rail carrier, a train derailment caused considerable insult to the cargo. Kirby's cargo insurer paid the Australian manufacturer for the damage, and filed suit in Georgia against the rail carrier.

The Georgia trial court determined that the railroad's liability for the cargo damage was limited by the Hamburg Sud bill of lading limitations of liability. The railroad had contracted with Hamburg Sud, and was in contractual privity with the steam ship line. The railroad was unaware of Kirby's interest in the cargo, was not in privity with Kirby (or its insurer), and was not a party to the ICC bill of lading.

Kirby knew from its ICC bill that it accepted what the carrier's limitation of liability would be. It paid for a known level of service and cargo

loss protection. Kirby's insurance carrier bought that level of risk when it accepted Kirby's insurance premium. These cargo cases are particularly obnoxious when brought by insurance carriers who try to undo

the contracts agreed to by their insureds. Your author believes that this Supreme Court decision further develops the federal common law by diminishing the opportunities for subrogation actions to undo the agreements entered into by shippers whose motivation is to get the least expensive transportation available, and who agree to limitations of liability to get cheap freight rates.

The Eleventh Circuit made a shambles of the matter, as reported in Kirby et al v. Norfolk Southern Railway (2002) 300 F.3d 1300. The Court of Appeal decision cha-chas through a dizzying dance of legal concepts, ultimately stepping on the toes of legal precedent, and common sense. The appellate court made an unnecessary and ultimately painful dip into agency law. They correctly noted that Kirby would be bound by any contractual limitation of liability entered into on its behalf by an agent of Kirby. They also held (incorrectly the Supremes later determined) that since there was no privity of contract between the railroad and Kirby, Kirby (actually its subrogated insurance carrier) was not bound by the limitation of liability contained in the Hamburg Sud bill of lading.

The Eleventh Circuit held that ICC's status as a freight forwarder was not itself determinative of the agency relationship between it and Kirby, because a freight forwarder's status as agent or principal depends on the specific facts of the case. Sometimes the forwarder is a shipper's agent, sometimes a principal in its relationship with the carrier.

## SAFELY THROUGH THE PANAMA DERAILED IN GEORGIA

*"Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes." Benjamin Franklin, Letter to Jean-Baptiste Leroy [1789]*

The Supreme Court concludes its unanimous decision by noting: "Our decision produces an equitable result….Having undertaken this analysis, we recognize that our decision does no more than provide a legal backdrop against which future bills of lading will be negotiated. It is not, of course, this Court's task to structure the international shipping industry. Future parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate." Kirby Slip. Op. 19.

The Court has confirmed that inland carriers are subject to COGSA liability if the through bill of lading so dictates through an appropriate Himalaya Clause. This can cause some short term problems for the motor and rail carriers who typically rely on their circulars and tariffs to limit liability, and are, but for through bills of lading, otherwise subject to the federal law encompassed in the Carmack Amendment, 49 U.S.C. section 11706 (pertaining to rail carriers, 49 U.S.C. section 14706 pertaining to motor carriers.)

As the Supreme Court notes, the carriers can amend their contracts with the ocean carriers to confirm whether they will be subject to COGSA or Carmack Amendment liability for through transportation. The important distinction is that this holding provides the carriers with an opportunity to avoid Carmack Amendment liability when it is not

commercially advantageous to operate under that statutory scheme. On the other hand, one way to avoid COGSA liability is for the carrier to issue to the ocean carrier a separate bill of lading for the inland carriage, thus establishing segmented carriage, and essentially terminating the through nature of the carriage.

The Supreme Court has given commercial shipping interests a powerful nudge into the 21st Century. Ancient, anachronistic legal legacies are beginning to give way to predictable solutions to contractual provisions for cargo loss and damage claims. The inconvenience of any short term scrambling by the participants to accommodate this decision will likely be offset by the new predictability brought to the relationship.

# TRANSPORTATION CASE SUMMARIES

## (WINTER 2004)

by *Wesley S. Chused* - Looney & Grossman, LLP

***1. Security Insurance Company of Hartford v. Old Dominion Freight line, Inc.,*** 2004 U.S. App. LEXIS 24894 (2nd Cir. 2004). ***(Prima facie case).*** The plaintiff's insured had shipped cigarettes from North Carolina to Montreal, Canada, but the shipment was stolen from a bonded warehouse while awaiting customs clearance at the Canadian border. Only a small portion of the shipment was recovered. The plaintiff, subrogee of the shipper, brought suit to recover the value of the lost shipment, and the district court entered summary judgment in favor of the plaintiff in the sum of $237,963. On appeal, the U.S. Court of Appeals for the Second Circuit reversed, ruling that the plaintiff had not met the first of its three burdens of proof to prevail in a Carmack Amendment lawsuit, namely, proving that the shipment was in "good" condition at the time the carrier received it for transportation. The facts showed that although the plaintiff's insured had detailed systems and procedures in place for the counting and loading of shipments of cigarettes at origin, the shipper's affidavits in this particular case, they failed to show that its witnesses had personal knowledge concerning the particular shipment at issue in this case. Also, although the shipper produced customer and customs invoices and documents showing the weight and number of cases of cigarettes shipped, the shipment was received by the defendant motor carrier on a bill of lading marked "shipper load and count - carrier unload." The Court of Appeals observed that a clean bill of lading is prima facie evidence of delivery of the shipment to the carrier in good condition only where the carrier has an opportunity to inspect the condition and quantity of the cargo upon receipt, but not when the goods are shipped in sealed packages, where the carrier cannot observe the conditions at origin. The Court also held that the plaintiff had failed to meet its burden of proving that the cigarettes were of good quality at origin because some of the recovered cigarettes had been destroyed immediately thereafter, and the Court looked upon that event as enhancing, rather than answering, the question as to their quality at the time of shipment. The Court therefore ruled that the plaintiff had not met its burden of proving that the shipment was in good condition at origin and reversed the lower court's judgment.

***2. EIJ, Inc. d/b/a Beverly Hills Watch Company v. United Parcel Service, Inc.,*** 2004 U.S. Dist. LEXIS 18481 (C.D. Cal. 2004) ***(On-line tariff bars shipper's recovery).*** The plaintiff, a jeweler, had been using UPS to transport about 25 packages a week for over 16 years. UPS operates pursuant to a tariff, available online at www.ups.com, and through a computerized shipping system ("WorldShip"), whereby the shipper affixes to each package an adhesive shipping label and a manifest generated by the computerized software. In generating those documents, UPS's website includes an electronic Licensing Agreement which provides that the terms of shipment are contained in the UPS Service Guide and any applicable tariff in effect. Item 460 of UPS's tariff provides that it will not be liable for loss of any package, the contents of which shippers are prohibited from shipping, and Item 537 provides that excess value insurance does not provide protection for any package having an actual value of more than $50,000, even if a lesser amount is specified by the shipper. In this case, the shipper tendered a package and requested "insurance" for a declared value of $50,000. After the shipment was lost, the shipper sued in state court, asserting numerous state law claims. UPS removed the case to federal court and moved for summary judgment. The court granted the motion, ruling that federal common law governed the plaintiff's claims, and that the plaintiff was a sophisticated, experienced shipper and had adequate notice of UPS's limitation of liability through its familiarity with the Licensing Agreement and its use of UPS's online office software, which incorporated UPS's tariff and Service Guide. The Court further ruled that Item 537 of the tariff applied and, therefore, no insurance protection existed for the plaintiff's shipment; and that UPS had not waived its tariff exclusion by accepting the shipment. The Court also rejected the plaintiff's argument that its claims arose from conduct separate and distinct from the delivery, loss of or damage to the goods and that its state law claims were preempted by the FAAA, 49 U.S.C. §14501(c)(1).

***3. Castine Energy Construction, Inc. v. T.T. Dunphy, Inc.,*** 2004 Me. LEXIS 150 (Me. 2004). ***(Carrier's freedom from negligence).*** This is a very interesting decision because it focuses on the often-overlooked second burden that must be met by a carrier defending a Carmack Amendment lawsuit, namely, that it was free of negligence. In Castine, the plaintiff had shipped 16 fabricated steel filters or "covers," each weighing 2,000 pounds, from Maine to Virginia. The shipper "stitch welded" crossbars onto the A-frame structures of the covers to facilitate loading of the shipment onto the flatbed trailer at origin. When the carrier's driver arrived at the shipper's facility to pick up the shipment, he secured the covers to the trailer using chains, which he attached to the crossbars that the shipper had left welded onto the A-frames. While en route to Virginia, the vehicle went over a bump in the road and all the covers spilled onto the highway and were irreparably damaged. Apparently, the welded crossbars were not designed or adequate for purposes of securing the freight to the trailer. The case was tried to a jury, and the trial court asked the jury to answer two factual questions: whether the carrier was free from negligence and whether the shipper proximately caused the damage. After the jury returned a verdict specifically finding that the carrier was free from negligence and that the shipper had proximately caused the damage to the cov-

ers, the plaintiff appealed. On appeal, the Supreme Judicial Court of Maine reviewed the parties' respective burdens of proof in a Carmack Amendment lawsuit, and focused on whether the motor carrier had met its two-prong defense burden of proving that the loss was the result of an act or omission of the shipper himself and that the carrier was free of any negligence. The plaintiff argued on appeal that the defendant carrier's violation of the DOT's safety regulations pertaining to the safe loading of freight on motor vehicle equipment constituted negligence per se, but the Court disagreed and held that it was merely evidence of negligence. The Court observed that the defendant carrier had called a Maine State Trooper to testify with respect to safety issues and his opinion as to what steps would have been required to properly secure the covers before transporting them. The Court concluded that the trial court properly instructed the jury and ruled that even though a carrier generally assumes responsibility for cargo upon the issuance of a bill of lading, it is not responsible for latent defects. "When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier." The Court concluded that the trial court properly instructed the jury and that the carrier was not liable for latent defects in the shipper's loading.

***4. Schramm v. Foster,*** 2004 U.S. Dist. LEXIS 16875 (D. Md. 2004). ***(Broker Liability).*** This is an interesting personal injury case with noteworthy ramifications for parties involved in freight loss and damage litigation. In Schramm, the plaintiff suffered serious personal injuries as a result of a collision between the plaintiff's pickup truck and a tractor-trailer operated by a driver employed by Groff Brothers Trucking. Defendant C.H. Robinson Worldwide, Inc., a broker, had arranged the shipment and the matter was before the court on Robinson's motion for summary judgment seeking to dismiss all five of the plaintiff's claims against Robinson. The record reflected that Robinson describes its business as a third-party logistics provider that specializes in brokering the shipment of goods via truck, rail, ocean and air; that it provides a "one point of contact" service that insulates the shipper; and that Robinson works only with carriers who carry full insurance coverage. Robinson's contract with Groff required Groff to maintain a satisfactory U.S. D.O.T. safety rating, but at the time it entered into its agreement with Robinson, Groff was a new company and did not have such a rating. The Court granted Robinson's motion for summary judgment and dismissed the plaintiff's negligence/respondeat superior, negligent entrustment claims, and claims for alleged violations of the Federal Motor Carrier Safety Regulations, finding that Robinson was an independent contractor; Groff was to maintain control of the transportation; that there was no evidence that Robinson had "complete control" over the driver's actual conduct and could not be vicariously liable for his negligence; and that the plaintiff did not have a private right of action against Robinson under the FMCSRs. The Court also ruled that Robinson had no obligation to insure the driver's compliance with the FMCSRs, that he was not a statutory employee of Robinson as argued by the plaintiff, and that Robinson's advertising itself as "one point of contact," while relevant to its common law duty to select carriers with reasonable care, was not sufficient to convert Robinson into a motor carrier under federal law. The Court ruled that the fact that Robinson instructed Groff's driver as to the time and place of pickup and delivery did not amount to an assumption of control over the carrier's dispatcher or constitute evidence that Robinson held itself out as transporting the shipment itself. However, the Court narrowly denied Robinson's motion for summary judgment with respect to the plaintiff's negligent hiring claim. In doing so, it noted the broker's duty at common law to use reasonable care in its selection of carriers, which does not create an undue burden on interstate commerce. In spite of certain disclaimers posted by Robinson on its website, the Court noted that the fact that Groff did not have a satisfactory safety rating, was enough to imply a duty upon Robinson to conduct further inquiry as to Groff's safety procedures and observe that Robinson "in conducting its everyday affairs . . .apparently recognized the ambivalence of its position and purchased excess liability coverage, both to protect itself and to gain new customers. It has actively interjected itself into the relationship between shipper and carrier, and it has chosen to do business in a context heavily tinged with the public interest."

***5. Clarke Logistics v. The Burlington Northern and Sante Fe Railway Co.,*** 2004 U.S. Dist. LEXIS 23838 (S.D. Cal. 2004) ***(Rail quote time bar).*** A freight forwarder arranged for the transportation of a shipment of frozen strawberries from San Francisco, California to Ontario. The shipment was damaged in transit, and the plaintiff and its insurance company filed suit to recover approximately $30,000. The defendant railroad moved for summary judgment on the basis that the plaintiff had not filed its loss or damage claim within three months of the date of delivery, a condition precedent to filing suit, and it had failed to file suit within one year of the date of delivery, all as required by the provisions in the defendant's Rules Book 6100-A which were adopted by the contract (rate quote) selected by the shipper. The defendant railroad's rate quote offered the shipper alternative Carmack Amendment liability provisions. The plaintiff attempted to avoid summary judgment by contending that the time limitations in the railroad's Rules Book did not give the plaintiff reasonable notice of those limitations. The Court rejected the plaintiff's arguments and granted the defendant's motion for summary judgment, ruling that the limitations were specifically brought to the shipper's attention in the rate quote, which further referenced the shipper to the railroad's internet website where the Rules Book could be obtained. Moreover, the railroad had provided letters to the shipper expressly informing the shipper that an actual claim had to be filed within three months. The Court further recognized that the shipper was sophisticated and had abundant experience and extensive prior dealings with the railroad; that the plaintiff admitted that it selected the railroad's quote to govern the shipment; and that the railroad's bill of lading referenced its quote as the relevant contract. Finally, the Court rejected the plaintiff's contention that it lacked knowledge of the claim and suit filing limitations at the time of shipment, holding, "Whether an individual employee is actually aware of the conditions is not relevant to whether defendant gave reasonable notice."

# SUPREME COURT OF CANADA RULES - FOREIGN JUDGMENTS ARE BEING ENFORCED AT HOME

BY *Catherine A. Pawluch and Kristen Rudzitis* Gowling Lafleur Henderson LLP

**Introduction**

On December 18, 2003 the Supreme Court of Canada released its decision in the case of Beals v. Saldanha, [2003] 3 S.C.R. 416 ("Beals"). The decision in Beals has largely established how Canadian court will treat foreign judgments which parties are seeking to have enforced in Canada.

While the dispute in Beals involved a real estate transaction, the decision is relevant to all disputes arising from cross-border transactions. Carriers, freight forwarders, load brokers and shippers who are involved in cross-border transactions on a regular basis should take note of the significant implications of Beals.


Supreme Court of Canada

The dispute in Beals arose from a real estate transaction in Florida. The Saldanhas, residents of Ontario, sold a vacant lot located in Florida to the Beals for a price of $8,000.00. A dispute arose as a result of that transaction and the Beals eventually filed two claims against the Saldanhas. The first claim was dismissed because of jurisdictional issues. The Saldanhas failed to properly defend the second claim and this failure resulted in a default judgement being issued against them. A Florida jury awarded damages of $260,000.00 to the Beals. The Beals sought to have the Florida judgment against the Saldanhas enforced in Canada. By the time the action to have the judgement enforced reached the Supreme Court of Canada, with pre-judgment interest and costs, the judgement exceeded $1,000,000.00.

**The Decision**

In a 6-3 split decision the Court upheld the default judgment of the Florida state court. Essentially, in Beals the Court took the opportunity to articulate which test should be applied in determining whether a foreign judgement against a Canadian defendant should be recognized and enforced and the defences available to a defendant in Canada who wishes to dispute recognition and enforcement of a foreign judgment.

**The Impact of Beals on Parties Involved in Cross-border Transactions**

Carriers, freight forwarders, load brokers and shippers who are involved in cross-border transactions on a frequent basis run a higher risk of being involved in litigation in a foreign jurisdiction than parties who do not. While at one time defendants to actions brought in foreign jurisdictions may have been told not to concern themselves with foreign judgments because they were not enforceable in Canada, this is no longer the case.

As a result of the decision in Beals, now only in the rare instances where a defendant can make out the defence of fraud, natural justice or public policy, will they be able to successfully argue that a Canadian court should not recognize and enforce a foreign judgement. None of these defences are easily established.

From a practical perspective, the decision in Beals means that upon being made party to an action a defendant should promptly contact competent legal counsel in the jurisdiction in which the action was initiated. The defendant and their counsel can jointly determine whether the action should be defended and the appropriate procedural steps to be followed. Defendants cannot rely upon their unfamiliarity with the laws and procedures of the foreign jurisdiction as a defence to the enforcement of a judgment.

Parties that are involved in cross border transactions may also want to ensure that their contracts include explicit jurisdiction clauses that clearly express the parties' desire to have any dispute arising under that contract to be decided by the courts of a particular jurisdiction. Although exclusive jurisdiction clauses are not always enforced, they may give the parties an additional level of comfort.

What is clear from the decision in Beals is that as international transactions become more prevalent and the world becomes smaller under the forces of globalization, parties must be prepared for the associated risks.

### Analysis of the Decision

An analysis of the legal underpinnings of the decision are set forth below.

The Court held that the "real and substantial connection test", which was established by the Supreme Court of Canada in Morgaurd Investments Ltd. v. De Savoy, [1990] 3 S.C.R. 1077 ("Morguard"), and has been applied to the determination of whether interprovincial judgments should be recognized and enforced, should apply equally to the recognition and enforcement of foreign judgments. The real and substantial connection test as established in Morgaurd provides that the court of one province should recognize and enforce the judgements of another province if that court properly exercised jurisdiction, more particularly, if it had a real and substantial connection with either the subject matter of the action or the defendant.

In holding that the application of the real and substantial connection test should be extended to foreign judgments, the Court emphasized the need for modern private international law to recognize the prevalence of international cross-border transactions, and to ensure that principles of order and fairness, which are essential to the security of transactions, are present.

The Court also held that reciprocity is a compelling notion in favour of extending the real and substantial connection test to foreign judgments. The Court held that it is "reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a real and substantial connection test."

The Court held that the defences against the recognition and enforcement of foreign judgments are fraud, natural justice and public policy. Although the Court found that none of the defences were satisfied in the present case, it did provide some clarity with respect to the specific instances in which the defences may be successfully argued.

Florida Court House

The Court clarified the issue of whether intrinsic or extrinsic fraud may be raised as an impeachment defence. Going forward, either extrinsic or intrinsic fraud to the recognition or enforcement of a foreign judgment may be a defence. The restriction on raising the defence of intrinsic fraud, however, is that the allegation of fraud must be based on new and material facts, or newly discovered facts, which the defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.

The Court held that in a case such as this, the Saldanhas should not be permitted to fail to appear in foreign legal proceedings that are properly constituted and then complain later of an excessive or fraudulent judgment. The Court found that once the Florida court had properly taken jurisdiction under the real and substantial connection test, the failure of the defendant to appear and defend the claim brought against them would seem to preclude any allegation of fraud in Canada. To do otherwise and recognize the allegation of fraud would essentially be an attempt to re-litigate the foreign decision in Canada.

With respect to the defence of natural justice, the Court stated that as a condition precedent to the successful use of the defence of natural justice, the party must be able to prove that the foreign proceedings were contrary to Canadian notions of fundamental justice. The Canadian court must be satisfied that the foreign court has followed and applied minimum standards of fairness. The domestic court must also be satisfied that the defendant was granted fair process by means of both judicial independence and fair ethical rules. The Court held that although there were particular procedural rules in the state of Florida which the Saldanhas were not familiar with, they were informed of the action, advised of the case to meet and granted a fair opportunity to do so.

With respect to the impeachment defence of public policy, the Court confirmed that this defence is directed at the concept of repugnant laws, not repugnant facts. Public policy remains a very narrow ground of defence and will be used sparingly. The Court held that although the award of damages granted by the Florida court may have been significantly higher than they would have been if such determination had been made in Canada, this was not a basis to refuse to enforce the judgment in Canada.

# THE NEW BREED

BY *Tom Kissane* - Driver for System Freight, Inc.

## A TRUCK DRIVER'S CONCERNS ON LOSS PREVENTION

While most truck drivers of motor carriers are professionally trained, equipped and knowledgeable, there are some that do not have that professionalism, training, proper well kept equipment and knowledge. Those are the few who make it seem that truckers are the 'BAD GUYS', whereas the great majority of truck drivers (those who drive for sophisticated, professional motor carriers) are really the 'GOOD GUYS' on the road.

Look out 'GOOD GUY' drivers - here they come, "The New Breed". The CONTAINER HAULERS, the TRASH HAULERS and the DUMP TRUCK DRIVERS. They tailgate, swerve in and out of traffic, talk on cell phones, refuse to use the directionals, and wait until the last 100 yards to exit the Interstate from the center lane.

No, they are not the four wheelers. They are the new group of so-called "Professional Drivers" that are now driving on the Interstates. Not one day goes by without a rollover or serious accident with injury involving a commercial vehicle in the New York Metro area. This causes massive traffic delays, closed roads, countless thousands of dollars worth of lost product and damaged, if not destroyed equipment.

In my twenty plus years of driving a commercial vehicle, I have noticed over the past five to seven years the degradation of the professional driver. Whether they are not being trained properly, they are under pressure for "on time loads" or they just don't care about safety issues are the questions that need to be addressed.

I will classify the three worst types of drivers that I personally notice five days a week on the Interstates, and my opinion as to why they drive as they do.

### CONTAINER HAULERS

Poor outdated equipment, low pay, and little or no maintenance to tractor and/or chassis. I have noticed that maybe ten percent of these vehicles have working lights (directionals, brake, etc.) and about half have leaking brake chambers or other air related malfunctions. They are generally overweight, since they come from the port and go to local destinations without having to pass a weigh station. They will travel either eighty miles per hour or forty miles per hour on the Interstate.

### TRASH HAULERS

Pay by the load (low pay and no back-hauls). Generally overweight with improper bridge weight distribution. More loads equal more pay causing driver fatigue and violating hours of service rules.

### DUMP TRUCKS

Once again, pay by the load. Combine that with CDL Class B license only needed to drive a 70,000 to 80,000 pound vehicle at speeds over eighty miles per hour and you have a recipe for disaster.

Whatever the reason these drivers drive as they do, something needs to be done to keep our Interstates safe from these demons. My suggestion is that we treat these drivers the same way we treat a convicted DWI driver. For serious violations such as careless or reckless driving, tailgating and excessive speeds while driving a commercial vehicle, not only should the driver pay the fine, but also be mandated to go to a driver safety course at their own expense and time before their license would be reinstated. This would give them some knowledge of the possible consequence of their actions on the Interstates. If this program would save one life, it is well worth it. Hopefully it would save many more lives and make our Interstates safer.

# What Was Old Is New Again!

## CARRIER PROCESSING OF CARGO CLAIMS

1. Stamp claim date received.
2. Assign consecutive number and put it on all pertinent papers.
3. Acknowledge receipt of claim within 30 days.
4. Dispose of claim within 120 days, or advise claimant every 60 days of status.

DISPOSITION OF CARGO CLAIMS

1. Pay it.
2. Decline it, proving positively non-liability.

a) Clear delivery receipt on shortage claims.
b) Free astray shipment clearing shortage.
c) Untimely filing of claim.
d) Improper packaging (cite NMFC packaging requirements &/or appropriate case law).
e) Make a firm compromise settlement offer.

*TEN CHECK POINTS*
*RESEARCHING CARGO CLAIMS*

1. Check how driver signed the bill of lading.
2. Check how consignee signed the delivery receipt.
3. Check if claim is filed timely.
4. Check interline for exceptions on interchange.
5. Check for discounts (be sure you have all pages of the original invoice).
6. Check OS&D department for cross deliveries, returns to shipper, overages that offset shortage, salvaged freight, etc.
7. Check for math errors in the claim.
8. Check to see if freight charges are allowable (and if they were paid).
9. Check for RVNX on the bill of lading.
10. Check for possible duplicate billing or duplicate claim.

*TEN CLAIMS INVESTIGATION HINTS*

1. Look at claim from both the carrier's and claimant's point of view.
2. Before mailing a declination, consider the reply possibilities.
3. Get sales involved. Ask their opinion and suggestions. Let them mitigate the claim.
4. On 'poor packaging' declinations, refer to the proper tariff. BE SURE!
5. Key on the basics. The B/L is your Contract of Carriage. Check dates, RVNX, tariffs, special instructions.
6. If you are liable, PAY IT ASAP. You will save a lot of time and corporate money that way.
7. Use your OS&D people and their records.
8. Talk to your freight handlers, find our what the problems were with the shipment.
9. Retain the claimants mailing envelope on untimely filed claims.
10. Us the tools of your trade. (Freight Claims Rule Book - Various treatises & consult your transportation lawyer when necessary.

**An Adusters Lament**

December, 2004

To Whom It May Concern,

It is with regret that I have come to the conclusion that is is necessary for me to write this letter of resignation, but things being as they are I feel that as a Cargo Claims Adjudicator I am a failure and will never have the qualifications needed to fulfill this unenviable, thankless and melancholy job.

To be a Cargo Claims Adjudicator, one must be courteous, diplomatic, shrewd, persuasive, and expert jollier, of equable temper, slow to anger, a Sherlock Homes, up-to-date, good looking (with honest eyes and a glad hand), have a good memory, good cigars, acute business judgment and the embodiment of virtue, but with a working knowledge of sin and evil in all of its forms.

A Cargo Claims Adjudicator must understand insurance, electricity, chemistry, mechanics, physics, bookkeeping, banking, merchandising, settling, shipping, packaging, contracting, medicine, law, real estate, horse trading and human nature.

They must be a mind reader, a hypnotist and an athlete. They must be acquainted with machinery of all types (including used, et al) and materials of all kinds. They must know the current price of everything from a shoestring to a skyscraper. They must know all, see all and tell nothing, and be everywhere at the same time.

They must satisfy the General Manager, the Controller, the Sales Department, the Insurance Department, the Traffic Department, the Terminal Manager, the Solicitor, the insurer, the shipper, the claimant and the Department of Transportation.

Having heard of only one man with these qualifications, and since we are celebrating His birth this month, I feel that it is impossible for me to ever reach the state of perfection necessary to perform the duties of Cargo Claims Adjudicator, so without further ado, and for the benefit of all, I herby relinquish all right, claim and title-past, present and future as a Cargo Claims Adjudicator; and tender this, my resignation.

Sincerely Yours,

***DO YOU NEED SOMEONE WHO IS KNOWLEDGEABLE IN CLAIMS & /OR TRANSPORTATION SECURITY?***

***ARE YOU LOOKING FOR A POSITION WITH A CARRIER IN THE FIELD OF LOSS PREVENTION?***

***IF YOU ARE A MEMBER OF THE TLP & SA, LET US KNOW AND WE WILL TRY TO HELP YOU FIND SOMEONE OR FIND A JOB.***

**- NO CHARGE!**



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## HOW TO FIND A TRUCKING COMPANY'S INSURANCE CARRIER

**www.FMCSA.dot.gov**

**Under New Entrant Programs**
Click on Licensing & Insurance
Click Continue

**Open Choose Menu Options**
Click on Insurance Filing
Click Go

**Open Choose Menu Options**
Click on Carrier Search
Click Go

**Type in carrier name or MC # & state**
Click on Search
Click on View Details (Report)

# Membership Additions

**The TLP & SA wishes to welcome new members:**

Kevin McGarity & Peter McLaughlin-A. Duie Pyle-West Chester, P.A.
Andreas F. Ahrens--Atlantic Risk Management-Darien, CT.

**Welcome Back:**

Bob Kral & Harold Bender-USF Logistics-Oak Brook Il
Janet Terp-Schneider National- Green Bay, WI
John A. Anderson-Anderson & Yamada, P.C. Portland, OR.


**Bill Bierman and Ed Loughman in the TLP&SA Office Furnished by Nowell Amoroso Klein Bierman Staff working for you.**



Members Only- Check the bank of experts and resource sections in the secure section of our website.

*Anyone who wishes to advertise in our* **In Transit** *quarterly newsletter can do so by completing this form and sending it, along with a copy of your advertisement and your company check to: Ed Loughman, c/o TLP&SA, 155 Polifly Road, Hackensack, NJ 07601.*

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## TRANSPORTATION LOSS PREVENTION and SECURITY ASSOCIATION (TLP & SA)

## APPLICATION FOR MEMBERSHIP

1. Name of Applicant: _____
   *Last* *Middle Initial* *First*
2. Affiliation: _____
   *Indicate the company and position, or, if state or federal agency, the position held.*
3. Other Information:

   Office Address: _____

   City: _____ State or Province: _____ Zip Code: _____

   Office Telephone: (_____) _____ Office Fax: (_____) _____

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4. I am involved in transportation through one or more of the following areas: (please check appropriate listing or listings).

   ____ Freight Claims ____ Labor/Human Resources ____ Rail ____ Logistics

   ____ Litigation ____ Motor Carrier ____ Maritime/Admiralty ____ Aviation

   ____ DOT/NTSB ____ Other _____
   (please specify)

5. **Please enclose payment with application form.**
   Transportation Loss Prevention and Security Association, Inc
   c/o Nowell Amoroso Klein Bierman, P.A.
   155 Polifly Road
   Hackensack, New Jersey 07601

   **2005 Annual Dues $450.00.**

   Please send completed application and payment to:
   (201) 343-1652 (tel)
   (201) 343-5181 (fax)
   E-Mail: **WBierman@NAKBlaw.com**
   **Eloughman@nakblaw.com**

   William D. Bierman, Executive Director

Date: _____ Signature of Applicant: _____

# Transportation Loss Prevention and Security Association, Inc.

**155 Polifly Road - Hackensack, New Jersey 07601**

Tel (201) 343-1652 ***OR*** (201) 343-5001
Fax (201) 343-8040 ***OR*** (201) 343-5181
eloughman@nakblaw.com wbierman@nakblaw.com


## COME EXHIBIT WITH US

***At the Joint Conference of the Transportation Loss Prevention & Security Association and the Transportation Consumer Protection Council in San Diego, California - March 20 through March 23, 2005***

**IN A FEW MONTHS**

**The Transportation Loss Prevention and Security Association *and the* Transportation Consumer Protection Council, will be hosting our fifth Joint Conference in San Diego!**

**Key decision-makers representing the transportation industry nationwide will be assembled together on March 20th through 23rd, 2005 at the Catamaran Resort Hotel.**

**Your company will have an unparalleled opportunity to reach a powerful segment of the transportation industry, shippers, truckers & security; so '*key*' your exhibit toward all.**

***Each exhibitor in the past years received an order for their product(s) from an attendee.***

During the course of the conference, you will have the opportunity to reach hundreds of transportation professionals. These attendees are key decision-makers of their companies. Here is an important way that your company can benefit from this upcoming conference:

**Exhibit**: The trade show provides an unparalleled opportunity to meet conference attendees. Sponsoring a booth will allow you to **interact with conference participants**, shake their hands, answer their questions and supply them with information about your products and services, write up an order!

As an exhibitor, you will be in a prime position to **generate more leads** and achieve an excellent return on your marketing investment. There is no better time to get involved, and no better introduction for your company than participating in the March, 2005 Conference. **Exhibit, advertise**...it's easy, rewarding and profitable! ***Send your contract and check in early & we will announce it in our 'In Transit' Newsletters.***

***More for your money***....

Complete the enclosed contract and return it with your payment to the **Transportation Loss Prevention and Security Association** to get the best exhibit space and value from your sponsorship exposure. If you have any questions, please do not hesitate to call Ed Loughman @ (201) 343-1652. Ed will be more than happy to assist you. Thank you in advance for your support of the Transportation Loss Prevention and Security Association and I look forward to meeting you in San Diego.

# MARK YOUR CALENDAR!

## TLP&SA's 5th ANNUAL JOINT CONFERENCE

MARCH 20–MARCH 25, 2005

*At the Catamaran Resort Hotel in San Diego, California*

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