In Transit

Transportation Loss Prevention & Security Association

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In This Issue...

Transportation Loss Prevention and Security Association

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The Times, they are changing. . . .

Especially in the Transportation Industry!

See the article on page 5 for details

Mark your calendars for the upcoming April 2010 Joint Conference

See page 12 for details

THE PIÑATA PRINCIPLE
STATES' RIGHTS AND STATES' WRONGS

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

Amidst all the fiscal chaos being experienced in the country, it appears states are seeking new ways to distract their citizenry. One way is to smack the perennial piñata, the trucking industry. Both the states of New Jersey and New York have grabbed the piñata stick.

NEW JERSEY ICE & SNOW LAW

Recently Gov. Corzine, the now lame duck governor of the state of New Jersey, signed into law a bill requiring drivers to remove snow and ice from their vehicles or be fined. While the law applies to both commercial and non-commercial vehicles, it was clearly aimed at the trucking industry.

Instead of focusing on New Jersey's more than 8 billion dollar debt, the Governor and State Legislature turned the state's attention to snow and ice. Ignoring the input from the New Jersey Motor Truck Association which pointed out the law was dangerous and nearly impossible to comply with, the state trumpeted safety concerns of motorists based on stories of accidents and near accidents trying to avoid snow and ice coming off trucks on the highway.

PROBLEMS WITH THE LAW

Although preventing accidents is a laudable goal, this law creates more problems than it solves. First, trailers are not housed in heated garages which would allow for the melting of snow and ice. Second, there is no machinery we know of that can safely remove snow and ice without someone going up on the roof, a dangerous undertaking at best. Third, drivers do not carry 15 to 20 foot ladders to gain access to the trailer roof in freezing weather. Finally, some enforcement official will have to determine whether all reasonable efforts have been made to remove accumulated snow or ice. This is a compliance and enforcement nightmare.

ICE & SNOW LAW CONDITIONS

Bolstering our feeling this law was a public relations ploy albeit a dangerous one are the conditions in the law which provide:

1. The law does not take effect for commercial vehicles until one year after its enactment;
2. No summons will be issued if the vehicle left the terminal before snow and ice accumulated;
3. No summons will be issued if the vehicle is on its way to a snow and ice removal facility;
4. No summons will be issued if the vehicle or container was picked up from someone else;
5. The law is subject to amendments before it goes into effect.

This law is clearly a states' wrong!

NEW YORK TAKES A SWIPE AT THE PIÑATA

Another embattled governor is David Paterson of New York, a Lieutenant Governor who became governor on the resignation of his predecessor Elliot Spitzer. It has been reported that President Obama has asked Paterson not to run for a full term in part because of his low approval rating.

GPS & BRIDGE STRIKES

Governor Paterson has proposed penalties including jail time and confiscation of trucks on drivers who use GPS—global positioning systems—to take more hazardous routes and end up striking bridges which are too low for their rigs. New York state alone has seen more than 1,400 bridge strikes in the past 15 years, including 46 so far this year. Nevertheless, no study has been done demonstrating these strikes were caused by misuse of GPS. Most companies rely on GPS services for dispatching and fleet management to direct and track vehicles. Surely software can be devised, if none presently exists, to program a truck's GPS to avoid bridges too low to pass under.

This law is clearly a states' wrong!

TRUCK BASHING

This is just one more example of political "truck bashing." Taken together with the union inspired clean truck plan wherein the Ports of Long Beach and Los Angeles attempted to exclude owner operators in the name of environmental progress, the motor carrier industry continues to be under attack. So far, with the able assistance of ATA, trucks have been able to hold their own, based on the overarching federal law that prohibits state and local entities from actions that regulate the rates, routes and services of motor carriers.

Nevertheless, it appears we must be continuously vigilante against the improper use of states' rights to commit states' wrongs or better known as the "Piñata Principle."

THE DEATH OF PREJUDGMENT ATTACHMENT OF ELECTRONIC FUNDS TRANSFERS UNDER MARITIME AND ADMIRALTY LAW

By: Rick A. Steinberg, Esq. • Nowell Amoroso Klein Berman, P.A.

INTRODUCTION

Prior to October 16, 2009, a shipper or other plaintiff could sue a carrier or other defendant on a cargo claim or other cause of action in a New York federal court, if the defendant did not have a physical presence in New York, and obtain an order for pre-judgment attachment of a wire transfer either sent by or to the defendant, when the wire transfer passed through an intermediary bank or bank clearing house located in New York. This pre-judgment attachment order could then be used by the plaintiff as leverage to negotiate a settlement of a cargo claim or other claim, because the carrier would otherwise have to move to vacate the attachment pending disposition of the case. If the plaintiff could not succeed in vacating the attachment, then it remained in place as security for a judgment or arbitration award pending litigation, arbitration or other adjudication of the case on the merits.

On October 16, 2009, the Second Circuit Court of Appeals, which covers New York, Connecticut and Vermont, decided that plaintiffs, such as shippers, may no longer use this popular maritime prejudgment attachment remedy to restrain electronic funds wire transfers. This decision represents a sea change in the law, to the benefit of carriers and other defendants and the detriment of shippers and other plaintiffs.

THE COURT'S DECISION

In a case called *The Shipping Corporation of India v. Jaldhi Overseas Pte Ltd.*, 2009 WL 3319675 (2d Cir. October 16, 2009), the Second Circuit Court of Appeals held that "beneficiary" wire transfers or electronic funds transfers ("EFTS") are not attachable property under Rule B of the Supplemental Rules for Admiralty or Maritime Claims of the Federal Rules of Civil Procedure ("Rule B"). Further, in its decision, the Second Circuit opined that it is probable that "originator" wire transfers are likewise not attachable. Thus, it is probable that Rule B may no longer be used to attach EFTS in the hands of intermediary banks.

THE DEATH OF WINTER STORM

In deciding *The Shipping Corp. of India* case, the Second Circuit overruled a case called *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), the first in a trilogy of cases involving the use of Rule B attachments of EFTS passing through intermediary banks in New York. Further, in its decision, the Second Circuit ruled that all cases relying on *Winter Storm*, such as the third case in the trilogy, *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008), are also no longer good law and should no longer be followed.[1]

MARITIME "RULE B" ATTACHMENTS

Maritime Rule B provides in pertinent part that: "[i]f a defendant is not found within the district, when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process."

In other words, Rule B allows for attachment of a defendant's assets *prior to entry of a judgment* against a defendant, upon filing a verified complaint and an affidavit, when the defendant is not otherwise subject to jurisdiction in the federal district where the complaint is filed, such as the Southern District of New York. Thus, Rule B is a powerful tool in the hands of plaintiffs.

THE ISSUES ON APPEAL

In *The Shipping Corp. of India*, the issue on appeal was whether EFTS of which defendants are beneficiaries are attachable property of the defendant pursuant to Rule B, *Winter Storm* and the other cases in the Court's trilogy. The Second Circuit held that *Winter Storm* was erroneously decided and therefore should no longer be binding precedent in the Second Circuit. The Second Circuit reasoned that the effects of *Winter Storm* on the federal courts and international banks in New York were too significant to let the error go uncorrected.

THE COURT'S RATIONALE

The Second Circuit also reasoned that, for maritime attachments under Rule B, the question of ownership is critical. The validity of a Rule B attachment depends entirely on the determination that the property at issue is the property of the *defendant* at the moment that the property is attached. Thus, the Second Circuit looked to New York state law to determine whether EFTS can be considered a defendant's property for purposes of attachment under Rule B.

NEW YORK STATE LAW OF ATTACHMENT OF WIRE TRANSFERS

The Second Circuit court ruled that New York state law does not permit attachments of EFTS that are in the possession of an intermediary bank. New York law establishes that EFTS are *not* the property of the originator or the beneficiary while briefly in the possession of an intermediary bank. Because EFTS in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary under New York law, they cannot be subject to attachment under Rule B, since Rule B only allows attachment of a *defendant's* property.

CONCLUSION

In sum, the Second Circuit concluded that, because there is no governing federal law on the issue and New York law clearly prohibits attachments of EFTS, then EFTS being processed by an intermediary bank in New York are *not* subject to Rule B attachment.

The practical effect of the Court's holding will likely be the death of maritime Rule B attachments of electronic funds transfers, whether the defendant is the beneficiary or the originator of the wire transfer. This result bodes well for carriers, as they defend against cargo claims and other claims by shippers or other plaintiffs.

[1] The second case in the trilogy was *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006).

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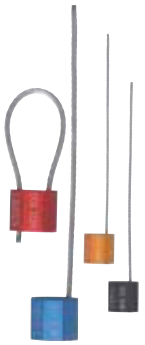

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TIMES WERE SIMPLER THEN!

By: Ed Loughman — ASSOCIATE EXECUTIVE DIRECTOR TLP&SA

The Times, they are changing. … Especially in the Transportation Industry.

The photo on the front cover is a picture of Branch Motor Express' first truck, a 1916 Model 'T' Ford circa 1977—right in the midst of DE-REGULATION. Times were simpler then. All we were concerned with was cleaning the windshield before a showing of Branch's truck. All we were concerned with was transporting goods from point A to point B on time and without damage.

Since then politicians thought they could run the trucking industry (in fact all modes of transportation) better than we could.

We have been de-regulated, re-regulated and de-regulated some more. The problem is NOT the trucking industry; the problem is the political regulations put forth by the politicians who never drove a truck or stepped foot in a terminal or had to be responsible for on time delivery.

Whenever I was told by a boss to look into a problem area, I ALWAYS went to the people doing the job, asking them what they did, how they did it and why they did it that way. Then, and only then (after I found out the details of the job) did I make any adjustments. It seems to me, our politicians should do the same before passing any regulations changing what had been working for decades.

Today, few remain who remember the "Way It Was" and many, if not most, can't seem to find a way around the de-regulations to make it the "Way It Should Be".

By the way, that truck was still in working condition back in 1977 and so was I. I was the young fella cleaning the windows. I'm older now, but I still remember when … although maybe not how!

TLP&SA Mourns the Passing of Ed Loughman's Wife, Joan

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

We are sad to report that Joan Loughman, the wife of our Assistant Director Ed Loughman, passed away on October 14, 2009. We remember Joan from our various Conferences as she assisted Ed with his many tasks.

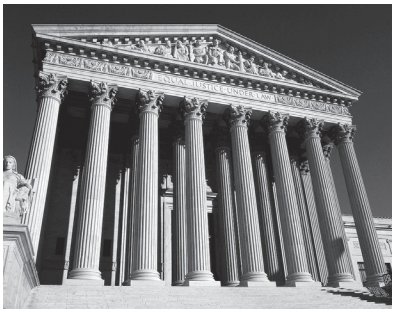
Joan and Ed were married for 51 years, yet he always referred to her as his "bride." Joan is also survived by her two children, two grandchildren, two step-grandchildren and one step great-grandchild. Joan was an optimistic and upbeat person who was formidable in her own right. She was Secretary for the Irvington Board of Education for 29 years and she was a member of many philanthropic organizations.

There is a wonderful poem by Linda Ellis called *The Dash* that speaks of Joan's life. Part of the poem eulogizes:

I read of a man who stood to speak
at the funeral of a friend
He referred to the dates on her tombstone
from the beginning to the end
He noted that first came the date of her birth
and spoke the following date with tears,
But he said what mattered most of all
was the dash between those years
For that dash represents all the time
that she spent alive on earth
And now only those who loved her
know what that little line is worth.
****
So, when your eulogy is being read
with your life's actions to rehash
Would you be proud of the things they say
About how you spent your dash?

I thought about that poem at Joan's funeral and I looked at the dates on the church wall. One thing about which I am sure is we can all be proud of how Joan spent her dash! We extend Condolences to Ed and his family. Joan will be missed.

***TLP&SA welcomes a new member*… Bryan Stookey of Central Refrigerated Service — West Valley City, UT**



Recent Court Cases

as analyzed by the Conference of Freight Counsel

William D. Bierman, Esq., Chairman • Marian Weilert Sauvey, Esq., Vice-Chairman

A. Carrier Liability/ Indemnification

1. Air Express International USA, Inc., d/b/a DHL Global Forwarding v. FFE Transportation Services, Inc.; et al, 2009 U.S. Dist. LEXIS 68503, C.D. Calif. (7/30/09).

This rather cryptic opinion concerns the efforts of a Defendant/Cross-Plaintiff/Third Party Plaintiff delivering or originating carrier, who was liable to the shipper for lost cargo, to obtain statutory indemnity under Carmack from the carrier alleged to be in possession of the cargo at the time of the cargo loss or damage.

49 USC §14706(b) provides that a bill of lading issuing carrier or delivering carrier who has paid a judgment to a shipper is entitled to statutory indemnity from the carrier who was in possession of the cargo at the time of the cargo loss or damage. However, the bill of lading issuing carrier or delivering carrier must prove, by a preponderance of the evidence, that the cargo loss or damage did not occur while cargo was in its possession, but instead occurred while the cargo was in possession of the carrier it is suing for indemnity. Here, the Third Party Plaintiff carrier could not produce any evidence that the cargo of frozen shrimp was ever in the possession of Third Party Defendant; Third Party Defendant produced evidence that the shrimp was not in its possession as it had ceased operations approximately one month before the shipment was tendered to Third Party Plaintiff. Thus, Third Party Defendant was granted summary judgment on the Carmack indemnity claim.

The opinion itself does not indicate why Third Party Plaintiff alleged Third Party Defendant had carried the freight when in fact it had ceased operations the month prior to the shipment.

B. Broker Liability

2. Huntington Operating Corp. v. Sybonney Express, Inc., 2009 WL 2423860 (S.D. Tex.)

Plaintiff Huntington employed Custom, a transportation broker, to arrange a shipment of perfume from Florida to Texas. Custom hired Sybonney Express to transport the shipment from Miami to Houston. This shipment was stolen at a truck stop in Florida. Huntington sued Custom for failing to ensure that Sybonney had adequate insurance to cover the cargo. Huntington also sued for violations of the Texas Deceptive Trade Practices Act, negligent misrepresentation, fraud, negligence, negligent entrustment, breach of fiduciary duty and breach of contract. Custom moved for summary judgment. Custom argued that its actions as broker were not a producing cause of the shipper's damages. The court determined that producing cause, which is the statutory standard under the Texas DTPA, is not primary cause, and held that the transportation broker bore the responsibility of ensuring that the carrier had insurance to cover the shipper's cargo, and that the broker cannot escape liability by claiming it relied upon the carrier's misrepresentations regarding coverage. While noting that there is scarce authority on what duty is owed by broker to a shipper, the court ruled that even though as a broker, Custom did not have custody or control of this shipment at any time, Custom owes duty to prevent loss by ensuring that the carrier had insurance and was a reliable carrier. The court found that fact issues precluded summary judgment under this standard. The court granted Custom's motion on the fraud and negligent entrustment claims and denied the motion with respect to breach of contract.

C. Attorney's Fees

3. Osman v. International Freight Logistics, Ltd, et al, 2009 WL 3273840 (E.D. Mich., 10/09/2009).

The first two opinions appeared on the June 2009 Agenda.

Co-defendant Towne Air was granted summary judgment shortly before trial and defendant International Freight Logistics (IFL) tried the matter. A verdict of $12,000 was rendered in Plaintiff's favor. Thereafter, Plaintiff' moved for attorney fees in excess of $50,000. After post-trial briefing, the court denied the motion for attorney fees. Plaintiff claimed that IFL was liable for attorney fees under 49 USC §14708 which, arguably, applies only to household goods movers. However, Plaintiff, relying upon the *Trepel II* decision, maintained that §14708 applied to all carriers since the generic term "carrier" was used in the statute and there is nothing of any binding authority indicating it applied only to household goods carriers. The court looked at the section's title which mentioned household goods carriers, but noted this was not dispositive. IFL argued that *Trepel II* was distinguishable because the underlying definitions found in 49 USC §13102 had been amended since *Trepel II* and an explicit definition for household goods motor carrier is now found at USC §13102(12). The court observed that while §13102 was amended to add a definition of household goods carrier, that definition was not added to §14708. However, the court also observed that Congress included the following provision in 2005 legislation that added the specific definition of household goods motor carrier to 49 USC §13102:

> "Application of certain provisions of law.—The Provisions of title 49, United States Code, and this subtitle (including any amendments made by this subtitle), that relate to the transportation of household goods apply only to a household goods motor carrier (as defined in section 13102 of title 49, United States Code)."

The court noted this language was fully enacted by Congress and, therefore, is fully binding law despite the fact that it was not codified in the United States Code. Since §14708(d) only applies to disputes that concern the transportation of household goods, the "Application of Certain Provisions of Law" provision clearly indicates that §14708(d) only applies to household goods motor carriers as defined by U.S.C. § 13102(12). Therefore, because IFL does not qualify as a household goods motor carrier under §13102(12), Plaintiff could not recover attorney fees under §14708(d).

Plaintiff filed a Notice of Appeal two days after issuance of the opinion. It is not yet known whether Plaintiff will appeal the summary judgment granted Towne Air or only the denial of attorney fees.

D. Limitation of Liability

4. Pacific Indemnity Co. v. Pickens Kane Moving & Storage Co.; Atlas Van Lines, Inc., 2009 WL 2905717 (D. Ariz. September 9, 2009).

This case arises out of a loss of household goods by fire during shipment from Illinois to Arizona. The District of Arizona Court followed *Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14 (2004) and *Werner Enterprises, Inc. v. Westwind Maritime Int'l., Inc.,* 554 F. 3d. 1319 (11th Cir. 2009), holding that a shipper (and its subrogating insurer) are bound by the limitations of the downstream motor carrier's (Atlas') bill of lading and tariff where intermediaries were used to make the shipping arrangements.

In October 2006, the shippers, Ina and Murray Manaster, contracted with Defendant Pickens Kane Moving & Storage Company for the transportation of their high-end antiques and fine art from Illinois to Arizona. Pickens Kane tendered the shipment to Transportation Consultants International ("TCI"), a freight broker in the art shipping business, without declaring any value or obtaining insurance on the goods. Then, TCI tendered the shipment to Atlas for the interstate transportation of the household goods. Before the transportation of the goods from the Manasters' Chicago home to Pickens Kane's warehouse, the Manasters signed the Pickens Kane bill of lading releasing the shipment for a declared value of $1 million, but Pickens Kane did not contact TCI to amend its agreement to include the $1 million valuation.

When Atlas picked up the shipment from the Pickens Kane warehouse in Chicago, it issued in its own interstate bill of lading, identifying "TCI Pickens Kane Fine Art" as the shipper and the Manasters as the "consignee" ("Atlas bill of lading"). Pickens Kane also issued its own bill of lading showing "PK Fine Arts/T.C.I." as the shipper. Pickens Kane did not declare a value for the goods on either the Atlas bill of lading or on its own bill of lading.

The shipment was destroyed by fire during transport. The Manasters had insured the full value of their goods through Plaintiff Pacific Indemnity, the subrogating insurer.

The court ruled on three motions: (1) Plaintiff's motion for summary judgment against both Pickens Kane and Atlas, seeking judgment against them in the amount of $1 million (the declared value of the shipment); (2) Pickens Kane's motion for summary judgment against Atlas seeking indemnity under 49 U.S.C. § 14706(b) for an apportionment of $1 million against Atlas, the carrier over whose line or route the loss or injury occurred; and (3) Atlas' motion for partial summary judgment seeking the court's enforcement of its limitation of liability against both Pacific Indemnity and Pickens Kane in an amount not to exceed $5.00 per pound.

First, the court granted Pacific Indemnity's motion as to Pickens Kane, finding Pickens Kane liable to Pacific Indemnity under the Carmack Amendment for $1 million, the full declared value of the shipment. The court then determined the proper apportionment of liability as between Pickens Kane and Atlas under § 14706(b). Pickens Kane argued that because the loss occurred while in Atlas' custody, it was entitled to full indemnification of $1 million regardless of any contractual limitation of liability contained in the Atlas bill of lading. The court disagreed.

Following *Kirby*, the court found that: (1) when an intermediary contracts with a downstream carrier to transport goods, the cargo owner's recovery against the downstream carrier is "limited by the liability of limitation to which the intermediary and carrier agreed," and (2) the downstream carrier "could not be expected to know if the [intermediary] had any outstanding, conflicting obligation to another party." Finding that Pickens Kane was the only party that knew about the Manasters $1 million declared valuation and that Pickens Kane was a party to both the Manasters and Atlas bills of lading, the court found that "it seems logical" that Pickens Kane "should bear responsibility for any gap between the liability of limitations in the bills."

Next, the court considered whether the contract between Pickens Kane and Atlas effectively limited Atlas' liability under Section 14706(f), which provides, in part, that a carrier must receive a written waiver from the shipper in order to limit its obligation to provide "full value protection." Interpreting the relevant Surface Transportation Board ("STB") decisions, the court found that in the event a shipper elects "full value protection" but does not declare a value on the bill of lading, the "assumed valuation" of the shipment, and therefore a carrier's maximum liability for the "full value" of the shipment is $4.00 per pound (which Atlas' Exceptions Tariff 104-G increased to $5.00 per pound). In an attempt to avoid the limitation of liability, Pickens Kane argued that because it did not complete the valuation provision on the Atlas bill of lading, and did not provide a written waiver of liability as required by Section 14706(f)(3), Atlas did not effectively limit its liability to below the declared amount of $1 million.

The court rejected Pickens Kane's argument, finding: (1) Atlas had no knowledge of the $1 million valuation, and Atlas was not required to investigate any upstream contract to discover that the Manasters had declared a value (relying on *Kirby* and *Werner Enterprises*); (2) as a sophisticated shipper, Pickens Kane is bound by the expressed terms of its agreement; (3) a written waiver is not required to provide "full value protection" limited to $5.00 per pound under both the STB decisions and Atlas' Tariff 400-N; and (4) even if a written waiver is required, the Atlas' bill of lading was sufficient to limit Atlas' liability under the four-pronged test found in *Hughes Aircraft Co. v. North American Van Lines,* 970 F. 2d. 609 (9th Cir. 1992). For these reasons, the court granted Atlas' motion for partial summary judgment, finding that Pickens Kane agreed to Atlas' maximum liability of $5.00 per pound.

Finally, the court found that an issue of fact existed with respect to the weight of the Manasters' shipment. Pacific Indemnity claimed that the total weight of the shipment was 21,000 pounds but Atlas contended that there was only one shipment with a total weight of 10,500 pounds. Before a trial on this sole issue, the parties stipulated that the total weight of the shipment was 10,500 pounds, thereby limiting Atlas' liability to $52,500.00 ($5.00 x 10,500 pounds).

E. Carrier Liability/ Jurisdiction/Removal

5. Gary Smallwood v. Allied Pickfords, LLC, et al, 2009 U.S. Dist. LEXIS 91141, S.D. Calif. (9/29/09).

Plaintiff Smallwood took a job in Abu Dhabi, UAE, and made arrangements with Defendant Allied Pickfords to store some of his household goods and move others to his new job. Other defendants included Allied Van Lines, its agent Atlas Transfer and Storage and SIRVA, Inc., the parent company of Allied and the alleged parent of Allied Pickfords.

Plaintiff alleged "bait and switch" tactics regarding his shipment once he had moved to UAE and ultimately asked that only a portion of his goods be shipped. When the shipment arrived he was called down to the port, where he was arrested because some of the goods that had been taken from the container included firearms, which he had intended to leave in storage in California. He was jailed and ultimately found out he had been convicted of illegal arms trafficking and was due for deportation. He filed suit in California for negligence and negligent infliction of emotional distress, intentional infliction of emotional distress, defamation, breach of fiduciary duty, fraudulent deceit and breach of contract. Thereafter, Plaintiff attempted to serve the various defendants with varying levels of success. Two of the defendants filed a Removal Notice and a later served defendant filed a subsequent Removal Notice in which the earlier defendants joined. The parties thereafter filed numerous motions, four of which were dealt with by the court in this opinion. First, Plaintiff moved to remand; second, defendant Atlas moved for an extension of time to respond; third, defendants Allied and SIRVA moved to dismiss the complaint; and fourth, Allied Pickfords also moved to dismiss. The court granted the motion for time to respond, denied Plaintiff's motion to remand, and granted in part and denied in part the motions to dismiss.

On the motion to remand, the court went through an extensive discussion of the procedural requirements for removal, including the unanimity rule and whether to apply the "first served" or "last served" defendant rule. The court ultimately found the first removal notice was defective, however, after adopting the last served defendant rule the second removal was proper. The court then addressed federal subject matter jurisdiction and found that Carmack complete preemption permitted removal of the contract and negligence claims, and that it could exercise supplemental jurisdiction over the other state law claims.

Regarding the motions to dismiss, Allied Pickfords argued that it was not properly served with process. The court ultimately found that though service was ineffective, it could exercise its discretion to merely quash service rather than dismiss the action, and did so, granting Plaintiff sixty days additional time to serve Allied Pickfords. As for personal jurisdiction over the parties, the court found it could not exercise general personal jurisdiction over Allied Pickfords but that Allied Pickfords purposely availed itself of the privileges and benefits of California forum and thus, denied the motion to dismiss for lack of personal jurisdiction. As to Allied and SIRVA, the court found that Plaintiff's allegations that Atlas was their agent was sufficient to establish jurisdiction for purposes of the motion to dismiss.

As to the motion to dismiss, because of the preemptive effective Carmack, the court had, in earlier discussion, found complete preemption of the breach of contract and negligence claims. The court found that Carmack also preempted the breach of fiduciary duty and negligent infliction of emotional distress claims because they were not based on conduct separate and distinct from the delivery. However, the intentional infliction of emotional distress, defamation and

fraudulent deceit causes of action were based on conduct separate and distinct from delivery, loss of and damage to Plaintiff's goods as they were based upon Plaintiff's claim that Defendants lured him down to the port in Abu Dabhi and told the UAE custom officials that he had requested the weapons be shipped to the UAE.

Finally, the defendants had argued that the litigation should be dismissed for forum non conveniens and because of an arbitration clause requiring arbitration in UAE. The court found that California was no more inconvenient than UAE would be and denied that motion. As to arbitration, the court found that because Carmack applied to the case, the arbitration clause was unenforceable. The court noted two other circuits (2d and 6th) have found forum selection clauses in BOLs unenforceable because, as to forum selection, Carmack has specific jurisdictional rules as to where a suit may be brought. Here the arbitration clause required arbitration in UAE and thus, was unenforceable.

F. Jurisdiction/ Removal

6. Smithfield Beef Group-Tollesson, Inc. v. Knight Refrigerated, LLC, 2009 WL 1651289, Fed. Carr. Cas. P 84,609 (D. Ariz. June 12, 2009).

Defendant Knight Refrigerated, LLC ("Knight") transported beef for Plaintiff Smithfield Beef Group ("Smithfield") pursuant to a transportation agreement. This case arises out of a July 2007 shipment where Knight allegedly failed to deliver the beef to the consignee by the specified date, causing the beef to spoil. Smithfield filed an action in state court for breach of contract and unjust enrichment claims. Knight removed the case and filed a motion to dismiss the complaint on the grounds that the Carmack Amendment preempted Smithfield's state law claims. Smithfield then filed a motion to remand, arguing that the parties had contractually waived the application of the Carmack Amendment. The Court agreed with Smithfield, and remanded the case to state court.

Although in the initial recitals of the transportation agreement the parties "expressly waive[d] any and all rights and remedies under the ICC Termination Act for the transportation provided hereunder pursuant to 49 U.S.C. § 14101(b)(1)," the Court conveniently ignored (and even failed to quote) section 7(a) of the transportation agreement regarding liability for loss, damage, or delay for shipments, which provided:

> CARRIER [Knight] agrees that, in the transportation of all goods hereunder, it assumes the liability of a common carrier for full actual loss, **subject to Provision 49 U.S.C. § 14706 (Carmack Amendment)** and 49 C.F.R. § 370 (Claim Regulations), and such liability to exist from the time of the receipt of any said goods by [Knight] until proper delivery has been made.

(Emphasis added.) Based on section 7(a) and the parties' reference to ICCTA provisions in at least four other places in the transportation agreement, Knight argued that the parties did not expressly waive the application of the Carmack Amendment. Specifically, Knight argued that the parties' reference to the Carmack Amendment throughout the transportation agreement directly contradicted the recital at the beginning of the agreement purporting to waive these provisions and, at the very least, demonstrated the intent of the parties to incorporate certain provisions of ICCTA (including Carmack) back into the transportation agreement.

The Court rejected Knight's position, finding that "the parties agreed to waive the Carmack Amendment as a whole, but chose to selectively incorporate certain aspects of it back into their agreement without adopting it as a whole." It appears that the Court mistakenly believed that all provisions under ICCTA are part of the "Carmack Amendment." Although various provisions of ICCTA are found throughout the transportation agreement, such as 49 U.S.C. § 13708 and 49 U.S.C. § 14709, the Carmack Amendment (i.e., 49 U.S.C. § 14706) is mentioned as a whole, not in parts (as the Court suggests).

7. Forest M. Starling and Linda Starling v. Grosse Pointe Moving Co., Grosse Pointe Moving Co. d/b/a Grosse Pointe Moving and Storage Co., and Grosse Pointe Moving and Storage Company, 2009 U. S. Dist. LEXIS 79034 (E.D. Mich 9/2/09).

Plaintiff filed a six count complaint alleging what appeared to be solely state law claims. Defendants removed to Federal court. The court ordered Defendants to show cause why the matter should not be remanded for lack of federal question jurisdiction and Defendants responded. Their response established that the state law claims were completely preempted by Carmack and therefore removal to federal court was proper.

G. Miscellaneous/ Insurance

8. Budway Enterprises, Inc. v. Federal Insurance Company, 2009 U.S. Dist. LEXIS 31584 (4/14/2009), CD Calif.

Plaintiff Budway purchased a motor truck cargo insurance policy from Defendants Federal Insurance and Chubb Insurance. The policy covered all damages Plaintiff would become legally obligated to pay to "a common carrier truckman, a contract truckman, or other truckman for hire because of the direct physical loss or damage to freight being transported by Plaintiff". The policy limits were $100,000 per occurrence.

Plaintiff's customer tendered two shipments with separate Bills of Lading and separate delivery numbers which Plaintiff loaded onto two separate trailers, pulled by separate tractors. Several days later, both tractors and trailers were stolen from Plaintiff's freight yard; the vehicles were recovered but not the cargo. Plaintiff's customer submitted separate claims for each shipment, which together totaled almost $151,000. Defendants refused to pay, contending there was only one occurrence of theft, thereby triggering the $100,000 per claims policy limit.

Plaintiff filed a complaint alleging Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing, which Defendants removed on the basis of diversity jurisdiction. Thereafter, Defendants filed a Rule 12(b)(6) Motion to Dismiss.

The court was quite strict and precise in reviewing the motion and responses, as well as the complaint itself. Plaintiff's complaint alleged that the term occurrence was not defined in the policy and was therefore ambiguous and must be construed in its favor. It also alleged in motion related pleadings that its expectation upon contracting was that occurrence meant shipment, whereby each shipment would be insured up to $100,000. However, this latter point was only made in the responsive pleadings whereas the former was alleged in the complaint and the court limited analysis to allegations in the complaint. The court found that Plaintiff failed to state a claim that the term occurrence was ambiguous because the basis for the allegation rested solely on the definition of the term in the contract.

The court went on to discuss the "cause standard". This standard applies when determining the number of occurrences covered by an applicable insurance policy and can, depending upon the language of the policy and the facts of the case, lead to multiple incidents being deemed one occurrence. The court here adopted the cause standard. In utilizing that standard and reviewing the complaint, the court found that the policy language could lead to treating multiple incidents as one occurrence and that Plaintiff's complaint lacked factual allegations to show multiple occurrences caused the injury. Thus, the motion to dismiss that count was granted, but with leave to amend. The court denied Defendants' motion to dismiss the count for Breach of Implied Covenant of Good Faith and Fair Dealing, and requests for punitive damages and attorney fees.

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