In Transit

Autumn 2006 Transportation Loss Prevention & Security Association

In This Issue...

From our Executive Director 2

Court Case Summaries 4-6

Fear of Removal 7

Second Circuit Vacuums Kirby Into a Void 10-12

Background Checks 19

Application for Membership Back Cover

Transportation Loss Prevention and Security Association

155 Polifly Road
Hackensack, NJ 07601

201-343-5001
201-343-5181 FAX

William Bierman
Executive Director

wbierman@nakblaw.com
www.TLPSA.org

Plan to get an Education in Transportation Loss Prevention and Security.

The Seventh Annual Joint Conference of the TLP&SA and the T&LC

will be held in **Sunny Orlando, Florida.**

April 15 – 18, 2007

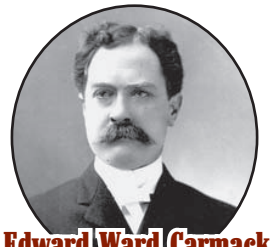
at the **Hotel Royal Plaza Lake Buena Vista.**

Meet new and old friends – see updates at the Exhibit Center –
Learn ways to save your company time and money –
Enjoy while you learn!

SENATOR
EDWARD WARD CARMACK

In 1906, the 'Hepburn Act',

contained what is commonly referred to as the 'Carmack Amendment'. This amendment was to provide a more uniform standard of liability for carriers. Senator Carmack was a Tennessee Democrat who served in the Senate from 1903 until 1907. He was killed in a gun fight in Nashville, Tennessee on November 9, 1908.



Edward Ward Carmack
1858 – 1908

From the Executive Director....

THE ASSASSINATION OF CARMACK

Assassination is the deliberate killing of an important person, a political figure or other strategically important individual usually with an ideological or political agenda. Although Senator Carmack, who lent his name to the well-known Carmack Amendment to the Interstate Commerce Act, died tragically, he himself was not assassinated, but rather it is his legacy which is being assassinated. The assassination we refer to is that of an idea, a concept, specifically the Carmack Amendment and the very nature of uniformity which has guided interstate commerce since 1906.

PREDICTABILITY

One might say this statement is hyperbole merely to get attention. Perhaps, but follow the argument and see if you do not agree. All parties involved with the transportation of goods seek predictability. In order to manage risk and set prices in the transportation field, one must determine cost and provide for intangibles such as loss or damage.

UNIFORMITY

Even when an area is not preempted by Constitutional mandate, States have recognized the need for predictability by enacting Uniform Laws such as the Uniform Commercial Code, the Uniform Collection of Judgments Act; the Uniform Partnership Act just to name a few. These Uniform Laws are in large measure a response to the business community which increasingly functions in areas throughout the United States. In most instances the consumer bears the burden of risk which is built into the price; therefore, the more predictable the risk, the lower the price. The same is true with transportation.

PREEMPTION

Over the years Congress has enacted legislation so as to preempt the field of interstate transportation and the cornerstone of that legislation is the Carmack Amendment. Courts have consistently recognized the preemptive effect of the Carmack Amendment over all other causes of action.

CARMACK SOLE REMEDY

Basically the Carmack Amendment has codified the preexisting common law and provides the sole avenue of recovery in a cargo claim case. Therefore, a carrier will have predictability as to the nature of its liability in case of loss or damage. State law claims such as breach of contract; fraud; Deceptive Trade Practices and the like are preempted. In exchange for this predictability, shippers received a reduced burden to prove their case. The shipper merely has to prove; (1) that the shipment was received by the carrier in good condition; (2) that the shipment was delivered at destination in damaged condition; and (3) the amount of damages.

Unfortunately, in a deregulated environment permeated by contract carriage, both politicians and business interests forget the benefits of the Carmack Amendment. Add to this some lawyers working on big contingencies and you get a recipe for economic disaster. We should all keep in mind that countries such as Canada have the ultimate in predictability a straight forward recovery of $2.50 lb. Canadian. This type of per pound limitation also applies to international air freight. Furthermore, in many instances a shipper can declare a value in case of loss for an increased charge.

CONGRESS AUTHORIZES CARGO LIABILITY STUDY

When the Interstate Commerce Commission Termination Act was past, Congress authorized a Cargo Liability Study which was completed in 1997 and 1998. This Study cites with approval a 1996 survey on base rate liability indicating that:

"…if the limited liability dollar figure had been set at $2.00 per pound, 55 percent of the cargo would have been transported at full value. If the figure had been set at $3.00, 71 percent would have been carried at full value; and if the limit had been set at $5.00, 85 percent would have been carried at full value."

Such conclusion suggests that an agreed upon limited liability dollar amount would provide absolute predictability, full value and basically no legal fees to the shipper. Carriers have proposed this type of system for years, but to no avail. Therefore, Carmack presents the next best procedure for resolving cargo claims.

The Cargo Liability Study further points out that presently under Carmack liability is borne by three parties: the shipper; the carrier; and the insurance interests. The shipper can protect the full value of its shipment by taking out insurance. The carrier can offer lower freight rates by having predictable liability and the insurance company will get a premium for providing full payment to the shipper in the event of loss.

CARMACK IS THE GOLD STANDARD

To "assassinate" Carmack in favor of a wild west lottery system makes no practical or economic sense. Both for uniformity and predictability of outcome as well as for overall harmony internationally, Carmack provides the most rational response. It allows the carrier and shipper the ability to assess business risk and to price their product accordingly. Carmack has been the gold standard since 1906 for a reason. That reason is even more important in today's commerce. To "assassinate" Carmack would be a national business tragedy.
DON'T DO IT!

William D. Bierman

Sad News

In the latest edition of the TRANSDIGEST, our friend and colleague, Bill Augello, announced that he has been diagnosed with a terminal illness. This is truly sad news as there are some things that clearly transcend our normal work life. I have known Bill for more than 30 years. I have argued with him; I have litigated against him; I have had dinner with him; I have listened to him play the piano; I have sung with him; I have laughed with him; and I have laughed at him. Nevertheless, in all, I have respected what he accomplished.

No matter what positions we have taken for our clients, one cannot help but admire Bill's style. He is a zealous advocate for his positions; a tenacious adversary; a dedicated teacher; and one heck of a lawyer. All that having been said, he is one of the few attorneys in our era that is truly unique. He perceived a vacuum in the transportation industry and he proceeded to fill it with the force of his personality. He created something that was not there before and something that will exist far into the future. I have always looked forward to being in his company or talking to him on the phone. As a raconteur, he is one of the best. As we lawyers say, there will be Bill Augello stories

"to the time when the memory of man runneth not to the contrary."

I am sure we will all keep Bill in our prayers as he takes on his toughest fight.

Transportation Court Case Summaries

By: Wesley S. Chused, Esq. – Looney & Grossman, LLP – Boston, MA
Chairman of the Transportation Lawyers Association Freight Claim Committee

1. Gulf Rice Arkansas v. Union Pacific Railroad Co., Claim filing – 376 F.Supp.2d 715 (S.D. Tex. 2005)

Gulf Rice hired Union Pacific to ship beans from Texas to Mexico. Union Pacific refused to ship three of the six railcars until Gulf Rice paid outstanding demurrage charges. Gulf Rice made a payment, but Union Pacific claimed more was owed. Gulf Rice claims, and Union Pacific denies, that Gulf Rice orally directed Union Pacific not to make the shipments. Gulf Rice paid the remaining balance owed, and Union Pacific shipped the goods to Mexico. The Goods were lost or stolen in Mexico.

Gulf Rice filed suit and Union Pacific moved for summary judgment claiming that Gulf Rice failed to file suit within the one year limitation period proscribed in the bill of lading. The Court held that rail carriers may require a limitation period shorter than one year so long as they provide the option of purchasing a two-year limitation period. The Court analyzed the claim under the four-part Hughes' test and upheld shippers choice of a one-year statute. The Court granted summary judgment for Union Pacific.

In so doing, the Court held that a denial letter indicating that the claim was disallowed, even though it requested additional information, was sufficient to start the running of the statute of limitations.

2. Just Take Action v. GST and Central Transport, Limitation of Liability – 2005 U.S. Dist. LEXIS 8432 (D. Minn. 2005)

Shipper hired GST to transport two beer fermenter tanks from Ithaca, New York to Duluth, Minnesota. Shipper told GST that the tanks were worth $15,000.00 and requested full coverage, which GST promised to provide. GST then hired Central to transport the goods to Duluth. Shipper had no contract with Central and had no knowledge they had been retained. Further, GST never provided shipper with a bill of lading or a copy of its tariff. GST also failed to provide shipper with an opportunity to select a level of liability for the tanks.

Central's driver did not use a load bar to secure the tanks and the tanks were damaged during transport. Central provided a delivery receipt noting the damage. Shipper contacted GST about the damage, and GST promised to take care of the repairs. GST selected a repair company to fix the damaged tanks. Following the repairs, GST and Central both denied liability for the cost of repairs and lost revenues.

Shipper filed suit against GST and Central on state law and Carmack claims. Both GST and Central moved for summary judgment.

GST argued that it acted as a broker; therefore, it is exempt from Carmack claims. The Court denied GST's motion, finding a factual dispute existed as to GST's status because they negotiated liability coverage, drafted a bill of lading, directed the shipment, and selected the repair company. GST also moved for summary judgment on the state law negligence claim on the grounds that as a broker its only duty was to locate a reputable shipper. The Court found that GST undertook a more expansive duty when it promised full liability coverage. The Court found that GST acted as the shipper's agent in arranging the transportation and had a duty to disclose all facts affecting shipper's rights and interests. The Court also denied GST's motion for summary judgment on the breach of contract claim because GST's actions created a factual issue as to the terms of the contract.

Central moved for summary judgment on the grounds that its liability was limited by the released rate in the bill of lading. The Court denied the motion because Central failed to produce and evidence that the shipper actually saw the bill of lading or knew of the liability limitations under the Hughes Aircraft analysis. The Court granted summary judgment on the state law claims against Central because shipper admitted that Central acted as a "motor carrier".

3. Kuehn v. United Van Lines, Preemption – 367 F. Supp. 2d 1047 (S.D. Miss. 2005)

The Kuehns hired United to transport their household goods from Florida to a storage facility in Mississippi in July, 1995. United delivered the goods on September 6, 1995. In 1997, the Kuehns removed the goods from storage and discovered that they were damaged. They filed a damage claim with the storage facility on February 4, 1998. The storage facility sent a letter denying responsibility on March 4, 1998. On July 21, 2000, Plaintiffs filed suit in state court for breach of contract, negligence, and loss of use. The case was removed to federal court on July 29, 2004 and United subsequently moved for summary judgment on preemption and statute of limitations grounds.

The Court granted summary judgment on the Kuehns' state law claims and on the grounds of Carmack preemption. The Court then granted summary judgment on the Carmack contract claim because the Kuehns failed to bring suit in the proper time. The bill of lading required that the Kuehns file a damage claim with United within nine-months of the date of delivery. The Kuehns failed to file any claim of damage with United. The Kuehns claimed that they filed claim with the storage facility, an agent of United. The Court held that filing a claim with the storage facility was insufficient, but even if it had met the requirements of the bill of lading, the Kuehns failed to timely file suit. The bill of lading also required that any suit be filed

within two years and a day from receiving the notice denying the damage claim. The Kuehns filed suit beyond that time period and the Court granted summary judgment on the Carmack claim.

4. Ducham v. Reebie Alllied Moving & Storage, Preemption – 2005 U.S. Dist LEXIS 11080 (N.D. Ill. June 3, 2005).

Ducham Filed suit in Illinois state court against Reebie alleging breach of contract, intentional misrepresentation and violations of the Illinois Consumer Fraud Act. Ducham claimed that Reebie provided a "guaranteed price pledge:" to ship his household goods for $16,635.45. Once Reebie took possession of Ducham's goods, the price went up to $25,564.67.

Reebie removed to federal court, but the Court remanded the case sua sponte. The Court held that Carmack preempts state law claims for loss or damage to goods, not the price disputes involving fraudulent business dealings. Reebie may have a federal defense to Ducham's state law claims, but the Court reasoned that is insufficient for removal. According to the Court, Ducham's claims did not concern the loss or damage of his goods, but "rather in the extortion of a large added payment under duress".

5. Coughlin v. United Van Lines, Preemption – 362 F. Supp. 2d 1166 (C.D. Cal. 2005)

Shipper sued United under state law claims of negligence and breach of contract for damage to her household goods. The Court granted United's Motion to Dismiss on Carmack preemption grounds.

6. Royal Insurance v. Caro-Trans International, Insurance – 2005 U.S. Dist LEXIS 11969 (S.D. N.Y. June 20, 2005).

In a subrogation action, Royal brought suit under Carmack to recover for damaged cargo. The amount in controversy was less than $7,500.00. The Court granted Defendant's motion to dismiss for lack of subject matter jurisdiction on the grounds that the amount in controversy did not exceed $10,000.00 as set forth in 28 U.S.C. § 1337(a).

7. Cetek Technologies v. North American Van Lines, Damages – 2005 U.S. App. LEXIS 6584 (2nd Cir. 2005)

The Second Circuit affirmed a verdict against the plaintiff shipper when they failed to establish the amount of loss as required under Carmack.

8. United Van Lines v. Marks Jurisdiction – 366 F. Supp. 2d 468 (S.D. Tex. 2005)

This case arises out of damage to the Marks' household goods. The Marks hired IEI to pack and store their property for a move from Mexico to Texas. IEI packed the goods and stored them for eight months at its warehouse. When it came time to transport the goods, IEI arranged for United Van Lines to complete the move. United's agent loaded the goods. IEI transported the goods to San Diego where United's agent took possession and placed them in storage. United's agent then transported the goods to Texas and were placed in storage again with Suddath, United's destination agent. When the goods were finally received at the Marks' home, the Marks claimed items were missing and damaged.

The Marks filed suit in Texas state court against Suddath to recover value of the damaged goods. United filed a declaratory judgment action in the Texas federal district court system against the Marks. Suddath removed to federal court and successfully moved for summary judgment. The Marks then filed a third-party action against IEI and a counterclaim against United in the pending United case. United filed a cross-claim against IEI seeking a declaratory judgment of each party's rights under the bill of lading. IEI moved to dismiss for the lack of personal jurisdiction, improper venue, and forum non conveniens.

The Court held that it had personal jurisdiction over IEI. It found sufficient minimum contacts had been established because IEI's bill of lading specifically provides for the shipment of the Marks' goods from Mexico to Texas. The Court also found that since the goods were located in Texas, the Marks resided in Texas, and the alleged damage at least partly occurred in Texas that IEI would not be prohibitively burdened by litigating in Texas.

The Court denied IEI's motion to change venue because a third-party defendant is protected from an improper venue by the necessity of personal jurisdiction. The Court denied the motion to dismiss for forum non conveniens on similar grounds, also holding that IEI failed to establish that Mexico would be an available and adequate forum.

9. Kaye v. Southwest Airlines, Removal – 2005 U.S. Dist. LEXIS 18389 (N.D. Tex. 2005)

Plaintiff purchased a ticket from Southwest Airlines but never used it. Plaintiff filed a punitive class action suit against Southwest Airlines alleging breach of contract and unjust enrichment from Southwest's failure to refund a Passenger Facility Charge and the September 11 Security Fee. Southwest contends that the fare was nonrefundable, but Plaintiff claimed the fees were not part of the fare because Southwest was not required to pay the fees to the federal government until the ticket was used. Southwest removed the case based on preemption under the Aviation and Transportation Security Act ("ATSA") and on the grounds that it was acting as a federal officer in collecting the fees. Plaintiff moved to remand.

Southwest claims that the ATSA creates a federal cause of action that preempts state law. The Court disagreed, finding that the ATSA merely authorized the refund of security fees under certain circumstances. The Court also rejected Southwest's contention that it acted as a federal officer when it collected the fees. The Court found that collecting fees proscribed by the government does not make Southwest a federal officer. The Court granted Plaintiff's motion to remand. ***Cont. on pg 6.***

10. Mountaire Farms, Inc. v. Williams, Independent Contractor or Employee – 2005 Del. Super. LEXIS 165 (Del. Supr. Ct. 2005)

Mountaire hired Williams to deliver produce from Delaware to two different locations in New York. Williams owned two trucks that he used to haul produce. Williams hired Hall to use Williams' truck and deliver the produce to one of the locations. Hall took possession of Williams' truck and Mountaire's produce. Unbeknownst to Williams, Hall had a raging drug habit, and he got sidetracked on the way to New York. Hall disappeared on a two-week binge and by the time he reappeared the produce had spoiled. Mountaire sued Williams for breach of contract and respondeat superior for Hall's actions.

Williams argued that Hall acted as an independent contractor and therefore, respondeat superior did not apply. The Court rejected this argument. In making this determination the Court considered that Williams agreed to pay Hall a percentage of the load as a salary, Williams withheld social security for Hall, provided equipment including the truck and CB radio, and provided specific routes for the transport. These factors all established that Hall was an employee of Williams and not an independent contractor. The federal regulations also required that Williams subject Hall to a drug test, which he failed to do.

Williams also claimed that the defense of impracticability barred Mountaire's breach of contract claim. The Court rejected this argument as well finding that Williams' failure to submit Hall to a drug test as well as his status as an employer negated this defense because the impracticability cannot be caused by the one claiming the defense.

There is no mention of the Carmack Amendment's applicability to this loss, perhaps based on some type of argument that the shipment is an except commodity, although this is no stated.

11. Masson v. Ecolab, Inc., Carmack (Transporting documents vs. goods) – 2005 U.S. Dist. LEXIS 18022 (S.D. N.Y. 2005)

Plaintiff sued for overtime wages under the Fair Labor Standards Act. Defendant repaired and maintained commercial dishwashing machines. Defendant claimed is was a motor carrier under Carmack and that Plaintiff was exempt from the FLSA's requirement because the DOT's hours of service rules governed Plaintiff's action. Defendant claimed that Plaintiff transported customer checks across state lines and therefore was engaged in the transportation of goods under Carmack. The Court rejected this argument. The primary purpose of Plaintiff's employment was not the transportation of customer checks. The Court left open the possibility that the motor carrier exemption would apply if Plaintiff transported Ecolab equipment across state lines.

12. Rogers v. Savings First Mortgage, Carmack (Transporting documents vs. goods) – 362 F.Supp.2d 624 (D. Md. 2005)

Plaintiff loan officers sued Defendant employer for overtime wages under the Fair Labor Standards Act. Defendant is a residential mortgage company that markets its loans in four states and whose officers travel to the four states to close the loans. Defendant claimed it engaged in interstate transport and was therefore exempt from the FLSA's overtime requirements. The Court ruled that transporting loan documents across state lines does not constitute the "transportation of property".

13. Tayssoun Transportation, Inc. v. Universal Am-Can, LTD., "Truth in Leasing" – 20005 WL 1185811 (S.D. Tex. 2005)

Universal Am-Can, Ltd. ("UACL") is a registered motor carrier with the DOT. It hired Tayssoun Transportation ("Tayssoun") as an independent owner-operator to pick-up, haul, and deliver cargo. Under their agreement, UACL provides Tayssoun the necessary DOT certification, insurance, a customer base, and certain administrative services. UACL shippers can only obtain compensation from UACL if cargo is damaged. In exchange for these services, Tayssoun agrees to share revenue with UACL on a percentage basis subject to certain chargebacks.

Federal "Truth in Leasing" regulations require that lease agreements between carriers and owner-operators contain certain disclosures regarding compensation and insurance. The parties' agreement terminated in February 2004. At that time, UACL informed Tayssoun that it would not pay certain compensation because Tayssoun's damage to cargo exceeded the amount owed. Tayssoun filed suit seeking over $300,000 in compensation and UACL counterclaimed seeking over $800,000 for reimbursement of cargo damage caused by Tayssoun.

The Court dismissed each of Tayssoun's state law claims but allowed its federal Truth in Leasing claim to move forward. The Court found that primary purpose of the Truth in Leasing regulations is to 'prevent large carriers from taking advantage of owner-operator's inferior bargaining position". The Court held that § 14704(a) provides an express right of action for violations of the Truth in Leasing regulations.

Fear of Removal

By: William D. Bierman Esq. -
Nowell Amoroso Klein Bierman, P.A.

Before December 2005 any attorney who sought to remove a case from state to federal court based on anything but text book grounds, faced the specter of not only a remand but an award to the prevailing party of costs, actual expenses and attorneys fees. This would give any lawyer pause and acted as a chilling effect on a reasonable removal if the odds of remaining in federal court were not overwhelming. Therefore, a client's constitutional right to remove may have been thwarted.

THE STATUTE

28 U.S.C. ¶¶ 1447(c) provides:

c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

WILL THE COURT REQUIRE PAYMENT OF COSTS?

It is that section of the statute wherein the court "may require payment of just costs and any actual expenses, including attorneys fees……." on remand that has caused such a problem as to split the circuits.

THE BENEFIT OF REMOVAL

Removal is a powerful right which allows a litigant to have its case heard in the federal court. There are a number of reasons a litigant may want to exercise this right such as:

1. An out of state defendant suspects the possibility of a home town verdict in the local state court;
2. The issues involved is based on federal law which may best be interpreted by a federal judge;
3. A matter usually is assigned to one fed eral judge who handles the case from beginning to end;
4. There is a possibility because of a $75,000 diversity minimum. A plaintiff would stipulate to a maximum under the $75,000 amount in order to return to state court allowing the defendant to cap its reserve.

CONFLICT BETWEEN THE CIRCUITS

Nevertheless, as in many legal arguments, it is the word "just" that produced competing interpretations. The Seventh Circuit held that costs were to be presumed, Sirotsky v New York Stock Exchange, 347 F.3d 985 (7th Cir. 2003). On the other hand, the Fifth Circuit came down on the side of an "objectively reasonable" standard, Hornbuckle v State Farm Lloyds, 385 F3d 538 (5th Cir. 2004). Straddling the fence was the Third Circuit which felt that costs were within the Court's discretion taking into consideration all of the facts of the case, Mints v Educational Testing Service, 99 F3d 1253 (3d Cir.1996).

SUPREME COURT RESOLVES THE ISSUE

Fortunately the Supreme Court took up the question and sought to cut the Gordian knot in the seminal case of Martin v Franklin Capital Corp., 126 S. Ct. 704, 163 L, Ed. 2d 547 (Dec. 7, 2005) wherein our new Chief Justice rendered the opinion for a unanimous Court. This case arose out of a diversity removal where the amount in controversy was not clear as the removing party argued that the punitive damage claim and attorneys fees sought could be aggregated in making the calculation. The District Court denied the remand motion but the Tenth Court of Appeals reversed with instructions to remand to state court. When the District Court remanded it denied the state court plaintiff's motion for costs and attorneys fees stating that the removing party had legitimate grounds for believing this case fell within federal-court jurisdiction. That issue was appealed to the Circuit Court which affirmed the denial of fees and the Supreme Court granted Certiorari.

Chief Justice Roberts held that:

1. the attorney fee provision of the removal statute does not create a strong presumption in favor of awarding fees on remand, nor does it create a strong bias against fee awards and
2. absent unusual circumstances, courts may award attorney fees under the attorney fee provision of the removal statute only where the removing party lacked an objective reasonable basis for seeking removal.

CONCLUSION

While the Martin case does not give a removing party carte blanch to remove on a whim, it gives an objectively reasonable removing party some comfort that under a good faith decision to remove, the removing party will not be hit with punitive costs and fees, should the court decide to remand the case to state court. To use an example that comes up in transportation personal injury defense all the time, a diverse carrier seeks to remove based on a state complaint alleging "serious and permanent personal injury" but without a dollar figure demand. The diverse carrier seeks to remove within the 30 day window. In good faith the carrier argues that the wording in the complaint and the injury claimed demonstrates an injury which would be worth more than the $75,000 diversity minimum. The Martin case indicates that the removing party should not be penalized and chilled from removing based on this reasonable argument.

Although cases decided after Martin have granted costs and fees, the fact patterns have tended toward the egregious misuse of removal rather than close questions. (See Kantha, M.D. v Pacific Life Insurance Company, 2006 WL 2583239 (D. N. J. 2006), (where the court found that removal was not even a close question as it had been denied before on the same grounds). Therefore, it is safe to say at this time all federal court must now look at the award of costs and fees in a remand situation with a new standard in mind.

Thank the Lord (or the Supreme Court); our fear of removal may be cured.

Q Sales & Leasing Products at a Glance

Thermal Variation Protection Products

CargoQuilts™

Cover an entire load or partial load of freight in an enclosed trailer, both domestically and internationally. Prevents freezing, heat and condensation damage.

PalletQuilts™

PalletQuilts are used to protect an individual pallet of product that is temperature sensitive. Covers case goods, drums, pails, and totes.

DrumQuilts™

Units accommodate 55-gallon steel, plastic or fiber drums. DrumQuilts are slipped over the top of the drum and down to the floor. Protects product that is temperature sensitive.

Overseas Container Kits™

Q-Sales provides further protection for entire container loads by insulating the top & sides of freight. Everything needed to install these kits is included. Flexible to accommodate all styles of boxes

Therma-Paks™

The same hi-tech materials in the Cargo Quilt are used to manufacture the Therma-Pak line for protecting frozen, chilled, and hot products.

CargoQuilt® is Recyclable

Insulated Carton Liners

Q-Sales offers a variety of insulated units eliminating or reducing the amount of gel packs and/or dry ice. Insulated Carton Liners can be used in standard shipping boxes for 2nd or 3rd day deliveries, reducing the need for next day service.

Q Sales & Leasing
16720 S. Mozart Ave.
Hazel Crest, IL. 60429
(708) 331-0094
Visit our Website
www.QSales.com

MB 201 00 41402 ©

Protecting Your Deliveries

Whether your delivery is a target for Theft or Tampering, We've got the Products You Can Turn to for Complete Protection.

POWER-IN-LOCK®
CARGO ANTI-THEFT PROTECTION

Local Deliveries

Over the Road

On-Site Storage Containers

Delivery Trucks, Trailers and Containers....With the Power In-Lock® internal lock you are guaranteed 100% Compliance with Locking the Doors...

Your Complete Solution for Electronic Protection and Monitoring
Power In-Lock® Internal Locking System:

- No External locks to Cut or Break
- Locks and Audits Truck Door Status Automatically
- Works with Roll Up and Swing Out Doors
- Exclusive Driver Management System
- Monitors Temperature and Logs Changes
- Complete Activity Audits (Door Open/Door Closed, Lock/Unlock Status) with Date and Time Stamp

To learn more about the latest in transportation security and the benefits of the Power In-Lock® internal lock, give us a call

Authorized Power In-Lock Distributor:

Q SALES & LEASING L.L.C.
(708)-331-0094
www.qsales.com

Second Circuit Vacuums Kirby into a Void

By Gordon D. McAuley - Partner,
Hanson Bridgett, Marcus Vlahos & Rudy, San Francisco

A philosopher…doesn't think in a vacuum. Even his most abstract ideas are, to some extent, conditioned by what is or is not known in the time when he lives."
Alfred North Whitehead, Dialogues [1943]

Less than two years ago the U.S. Supreme Court unanimously decided James N. Kirby v. Norfolk Southern Ry. Co., 543 U.S. 14, 125 S.Ct. 385 (2004). Your author, showing the same prescience as when he invested heavily in an expected resurgence of mechanical typewriters, confidently proclaimed, "The Supreme Court's decision will bring a calm to the stormy seas that railroads have battled through in innumerable anachronistic court decisions which refused to recognize the new transportation realities delivered by multimodalism." Much to the surprise of those who thought the U.S. Supreme Court provides the final word on legal questions, on July 10, 2006

"The Supreme Court's decision will bring a calm to the stormy seas that railroads have battled through in innumerable anachronistic court decisions which refused to recognize the new transportation realities delivered by multimodalism."

the Second Circuit issued its decision in Sompo Japan Ins. Co. of America v. Union Pacific Railroad Co., 456 F.3d 54 (2nd Cir. 2006), which boldly asserts that the Supremes did not fully consider the truly relevant issues in Kirby. The Sompo Court attempts to relegate Kirby into a vacuum of irrelevant and ill-conceived proclamations by our Supreme Court. The Sompo Court has thrown the transportation industry back into the primordial ooze from which it temporarily progressed through the maturation developed by the evolutionary Kirby decision. As the astrologists would say, the law is in retrograde; or so it appears in the occluded heavens above the Second Circuit.

The Sompo case first met public scrutiny in Sompo Japan Ins. of America v. Union Pacific, 2003 U.S. Dist. Lexis 19757. That decision, issued one year before the U.S. Supreme Court Kirby opinion, set forth simple facts that closely mirror those before the Kirby judges. After paying the insured shipper Kubota about $480,000, Sompo filed a subrogation action against the defendant railroad for damage to Kubota tractors damaged during a derailment while en route from the Port of Los Angeles to Swanee, Georgia. The railroad admitted liability, but asserted that its liability was limited by the terms of the applicable ocean bills of lading. 32 tractors had been shipped from Japan to Georgia pursuant to 3 ocean through bills of lading. A through bill of lading provides for transportation from the origin port to an inland destination beyond the destination port, using more than one mode of transportation. Where the goods are transported by ocean, the ocean bill of lading often is the only contract that names the original shipper. The Kubota tractors, fresh from their sea voyage, were placed on railcars at the Port of Los Angeles, and the railroad issued electronic waybills to its customer/shipper CSX Intermodal for the inland portion of the tractor migration. No contract existed between the original shipper Kubota and the railroad. Kubota did not declare a value on the ocean bills of lading for the 32 tractors. The shipper also did not pay the ocean carrier for any increased protection in case of loss or damage to the shipment, despite the available option to do so. The rail carrier issued electronic bills of lading to the ocean carrier. The rail bills did not offer full Carmack liability because they were pursuant to exempt contract autho-

"The Sompo Court attempts to relegate Kirby into a vacuum of irrelevant and ill-conceived proclamations by our Supreme Court."

rized by the Staggers Rail Act, 49 U.S.C. § 10502(f).

The Sompo trial court reviewed the law applicable to efforts to extend ocean carrier's limitations of liability to inland carriers. The "Himalaya Clause" is the contractual means by which ocean carriers and shippers may extend to inland carriers the $500 per package limitation of liability established by the Carriage of Goods By Sea Act ("COGSA"), 46 App. U.S.C. §1300, et seq. Those efforts are strictly construed against doing so unless the bill of lading language clearly expresses that intent. Robt. C. Herd & Sons v. Krawill Mach. Corp. 359 U.S. 297, 305 (1959). The learned Sompo trial judge found no problem lithely listing the lucid lading liability language of the ocean bills that extend the COGSA package limitations to the railroad, and found that its legitimate liability was limited to $500 per tractor, or $16,000.

Plaintiff Sompo's counsel apparently argued to the trial judge that the railroad is subject to federal regulation, including the

Carmack Amendment (49 U.S.C. §11706), and that parties may not contract out of the federal regulations that apply by force of law. The trial court smote that argument a mighty blow by finding that yes, of course parties may contract out of the Carmack Amendment's liability provisions, as long as the shipper is offered an opportunity to purchase Carmack-level liability protection. 49 U.S.C. §10502(3) says so. Cases have so confirmed. Toshiba International Corp. v. M/V Sea Land Express, 841 F.Supp.123 (S.D.N.Y.1994).

"The learned Sompo trial judge found no problem lithely listing the lucid lading liability language of the ocean bills that extend the COGSA package limitations to the railroad, and found that its legitimate liability was limited to $500 per tractor, or $16,000."

After this unremarkable decision was published in 2003, the Supreme Court published the Kirby case in late 2004. Kirby involved an Australian shipper who, perhaps over shrimp on the barbee, negotiated with a local freight forwarder to arrange the transportation of several containers of machinery from an Australian manufacturing plant to an inland destination in Huntsville, Alabama. The forwarder issued to the shipper Kirby a through bill of lading to cover the entire movement from the origin factory to final destination in Swanee. Kirby was offered an option to declare a value for the goods in excess of the $500 per package limitation provided by COGSA, and as expressly stated in the ocean bills of lading for the shipment. Instead, Kirby purchased separate cargo insurance from insurance company Sompo which undoubtedly charged rates lower than the ocean carrier's for such full-value protection. The ocean carrier issued a separate bill of lading to the shipper's freight forwarder. Both bills of lading contained Himalaya clauses that extended COGSA liability limits to agents of the ocean carrier, although expressed in slightly differing language. Sadly, cargo damage occurred during the inland rail portion of the transportation.

"Nature abhors a vacuum." Benedict Spinoza, Ethics [1677]

The Supreme Court rejected the argument by Kirby's subrogated insurance company that the ocean carrier's bill of lading did not bind Kirby because there was no privity of contract between Kirby and the ocean carrier's sub-contracting rail carrier. The Supremes found that the original bill of lading provided the shipper with notice that the ocean carrier's subcontracting agents are protected by the same liability terms as the ocean carrier. While undoubtedly better at investments than your author, the unanimous Court also thought its decision would provide certainty to the transportation community: "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, 125 S. Ct. 385, 400.

Well, one would have thought that the question was resolved: a shipper who enters into a contract for through transportation that includes an ocean leg is bound by any Himalaya clause that extends COGSA liability to the ocean carrier's subcontractors or agents. Provided, however, that the inland carrier issues a separate bill of lading to the original shipper which would signal the end the ocean transportation. The inland carrier, and the shipper, then would be bound by the terms of that separate agreement, and would be subject to the Carmack Amendment. Shao v. Link Cargo (Taiwan) Ltd., 986 F.2 700, 703 (4th Cir. 1993); American Road Service Co., v. Consolidated Rail, 348 F.3d 565, 568 (6th Cir. 2003).

"The sea lies all about us. The commerce of all lands must cross it. … So all at last returns to the sea." Rachel Carson, The Sea Around Us [1951]

"So long as a bill of lading requires a substantial carriage of goods by sea, its purposeis to effectuate maritime commerce-and thus it is a maritime contract." Kirby, 125 S.Ct. at 395. The Second Circuit failed to consider that the matter before it involved a maritime commercial transaction governed by COGSA, and hence was subject to admiralty jurisdiction, despite the clear guidance of the Supreme Court. The Second Circuit in Sompo demonstrated that a decision can be brilliantly researched, logically developed, and still end up with the wrong answer. The court conducted a scholarly review of the history of the Interstate Commerce Commission, the Carmack Amendment, the Carriage of Goods by Sea Act, the Harter Act, and the Staggers Rail Act of 1980. The Court's logic is apparent as it wends through the statutes, but its conclusion is still wrong.

The Sompo syllogism looks like this: (1) COGSA applies only to the delivery port by force of treaty, although the statute allows parties to contractually extend the COGSA scheme to inland carriage (46 U.S.C. App.§1307); (2) the Harter Act applies by force of statute to any further water delivery within the U.S.: any conflicting contractual terms are void; (3) the Carmack Amendment, 49 U.S.C. § 11706, applies to all domestic rail transport by force of statute, including to import and export rail traffic which is part of a continuous movement involving international transport; (4) deregulation of rail carriage through the Staggers Rail Act (§11706) did not absolve rail carriers from the statutory requirement to offer shippers full liability protection as an option for a lower release rate; (5) the rail carrier's electronic bills of lading did not offer full liability options to the shipper; (6) ergo, the

"…the unanimous Court also thought its decision would provide certainty to the transportation community: "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, 125 S. Ct. 385, 400.*

rail carrier has full liability for the damage to the cargo. Q.E.D.

"The sea lies all about us. The commerce of all lands must cross it…So all at last returns to the sea."
Rachel Carson, The Sea Around Us [1951]

So, where is the logical fallacy in the Sompo syllogism? Step 3 is wrong! The Carmack Amendment applies to rail transport within the United States by force of statute, but it does not trump the application of the Carriage of Goods by Sea Act, a statute derived from the Hague Rules international treaty of 1921. Treaties trump statutes, and it is critical for international commerce that liability for loss or damage be predictable for international shippers and carriers alike. Without question, if the carrier issues a separate bill of lading to the shipper for the inland leg of the carriage, COGSA no longer applies because the ocean transportation has terminated. Swift Textiles, Inc. v. Watkins Motor Lines, 799 F.2d 697, 394 (11th Cir. 1986). Moreover, the issuance of a separate bill of lading confirms that the shipper no longer intended the terms of the ocean bill of lading to apply. But if the shipper contracts with only one broker, freight forwarder, or ocean carrier by means of a through bill of lading, it should be bound by the contractual terms of its bargain.

The Second Circuit exulted Carmack over COGSA by stating Carmack is a strict liability statute, whereas COGSA sets a (lesser) negligence standard for liability claims. Citing 49 U.S.C. 10502(e), the court found that rail carriers may not contract out of Carmack liability unless they offer the shipper full Carmack-level liability as an alternative to the contract-level liability. This is a correct statement of the law: it just does not apply to through bills of lading for import traffic subject to COGSA, particularly where there is no privity of contract between the inland carrier and the original shipper.

"He that commands the sea is at great liberty, and may take as much and as little of the war as he will." Francis Bacon, Of the True Greatness of Kingdoms, [1625]

In an Eleventh Circuit decision published on August 7, 2006, Altadis USA, Inc. v. Sea Star Line, 2006 U.S. App. Lexis 20125, which decided the binding effect of an ocean through bill of lading for an import shipment involving damage during the domestic inland leg by motor carrier, the Court found that Carmack did not apply because the motor carrier did not issue a separate bill of lading for the inland segment. The 11th Circuit acknowledged the guidance of the Supreme Court Kirby decision: "The [Supreme] court emphasized the importance of the uniformity of the general maritime law, and accordingly the need to reinforce the liability regime Congress established in COGSA, and the apparent purpose of COGSA to facilitate efficient contracting in contracts for carriage by sea." The Eleventh Circuit in Altadis noted the mischief inherent in refusing to acknowledge the requirement for uniformity and predictability in international commercial transactions, and amply demonstrated in the Sompo decision. The international transportation community is well aware of COGSA's $500 per package limitation of liability. Certainly Sompo's insured had knowledge of that liability scheme and took commercially reasonable steps to obtain additional insurance to protect its cargo.

"He that commands the sea is at great liberty, and may take as much and as little of the war as he will."
Francis Bacon, Of the True Greatness of Kingdoms, [1625].

Unfortunately the Sompo court has bestowed an unexpected and unearned windfall on the shipper's insurance company. The uncertainty that arises from this decision will plague the Second Circuit until the Supreme Court tells it that the Supreme Court said what it meant, and meant what it said in Kirby.

"Unfortunately the Sompo court has bestowed an unexpected and unearned windfall on the shipper's insurance company. The uncertainty that arises from this decision will plague the Second Circuit until the Supreme Court tells it that the Supreme Court said what it meant, and meant what it said in Kirby."

[1]Trains Travel on Narrow Gauge Oceans: The Supreme Court Recognizes the New Transportation Realities, by Gordon D. McAuley, Benedicts Maritime Bulletin, Vol.2, No.4 (2004), pg. 313.

[2]49 U.S.C. §14706 applies to motor carriers, and also is referred to the Carmack Amendment. Both sections provide for nearly strict liability for loss or damage to cargo unless the shipper agrees to limit that liability by written contract. Plaintiff bears the initial prima facie burden of establishing the condition of the goods on tender to the carrier, delivery in lesser condition, and the amount of loss. Fine Foliage of Fla, Inc. v. Bowman Transp., Inc., 901 F.2d 1034 (11th Cir. 1990).

[3]"Whereas COGSA establishes a negligence-like liability regime, Carmack "imposes something close to strict liability upon originating and delivery carriers." [citation] Sompo at 59.

SEE PG 17 TO ADVERTISE WITH US!

The ENFORCER ™

ENFORCER™
Adjustable Door Lock
**Totally portable and requires no permanent installation*

ENFORCER™
Roll-up Door Lock
**Locks automatically without decision from driver*

ENFORCER™
King Pin Lock
**Locks without a key*

ENFORCER™
Air Cuff Lock **Prevents tractor theft*

We also have:

ENFORCER™
Rear Door Lock
**Bolt cutter resistant*

TRANSPORT SECURITY, INC.

Phone & Fax: (952) 442-LOCK (5625) (800) 328-3442

http://www.transportsecurity.com 820 South Pine Street Waconia, MN 55387

Transportation Loss Prevention & Security Association, Inc.
Officers - Directors and Staff

Daniel Saviola-Chairman
Yellow-Roadway Corp.

James Attridge, Esq. - Vice Chairman
Attridge Law Firm

Tom Rotunda-Treasurer
Yellow-Roadway Corp.

Ken De Vries- Past Chairman
USF Holland Inc.

Ernie Benge - Director
Old Dominion Freight Line

Moe Galante - Director
New Penn Motor Express

Martha J. Payne, Esq. - Director
Benesch, Coplan, Friedlander & Aronoff LLP

Richard Lang - Director
ABF Freight System

William D. Bierman, Esq.- Executive Director
Nowell Amoroso Klein Bierman, P.A.

John Gibbs - Director
FedEx National LTL

Michael Willis - Director
Fed Ex Freight

Edward M. Loughman- Associate Executive Director
TLP&SA

TLP & SA welcomes the following new members:

Burt Mallinger – UPS Freight (formerly Overnite Transportation) – Richmond, VA

Peter Madia – Ultra Logistics – Elmwood Park, NJ

Elena Valentinovna Melanich and **Natalia Plastinina** – Brooks LM Ltd. – Moscow, Russia

Peter Smith – SolSource Logistics – Carlsbad, CA

Welcome back:

Dawn Cole & Bill Frank – Lawrence Transportation – Rochester, MN

Tamara L. Warn – Interstate Distributor Co. – Tacoma, WA

Help Wanted: Cargo Claims Adjudicator and O, S & D person Full or Part time – North Jersey area.

Must have a background in transportation, claims procedures, O, S & D processing. Must be computer literate. Send resume to TLP & SA 155 Polifly Rd. Hackensack, NJ 07601 to the attention of Ed Loughman.

PLEASE SUPPORT OUR ADVERTISERS!

Do you need someone who is

KNOWLEDGEABLE IN CLAIMS AND/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!

VISIT OUR WEBSITE!

WWW.TLPSA.ORG

Turn up the sound on your speakers
You will find:

- Bank of Experts
- Listings of our Officers and Staff
- Breaking Transportation News
- Member Roster
- Transportation Abbreviations
- Related web addresses
- All previous In Transit newsletters

Check Out the Photo Gallery!

ADVERTISE
IN OUR NEWSLETTER!

ASK HOW! **201-343-1652** **ELOUGHMAN@NAKBLAW.COM**

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.*

Company Name: _____

Contact Name: _____

Company Address : _____

_____

_____

Telephone: ( )

Fax: ( )

E-mail: _____

AD RATES: $150.00 Business Card $250.00 Half page
$200.00 Quarter Page $350.00 Full page

Donna Wyss
Proprietor, Salvage Specialist
cscsalesnet@earthlink.net

CSC
CARGO SALVAGE CLAIMS

Toll Free: 800-654-7629

Fire

Flood

Temperature

Wreckage

Trust in CSC for all your salvage needs:

We have the expertise to assist you on all your Cargo Claims.
Our assitance will insure prompt service and
accuracy needed to expidite the claim.

Claims involving:

Cargo Damage, Derailments,
Temperature, Fire, Theft,
Shortage & Overages & Time sensitive freight

Our services include:

Inspections
Cargo Damage Assessments
Salvage Sales
Inventory
Reclamation
Storage

Trust in CSC for all your salvage needs:

Toll Free: 800-654-7629 **Phone: 317-781-9014** **Fax: 317-781-1714**

Employee Background Checks: What Do You Need To Know?

By: Ronald A. Lane, Esq.
Fletcher & Sippel, LLC
Chicago, IL

1. What laws govern employee background checks?

- Fair Credit Reporting Act (FCRA)
- Fair and Accurate Credit Transactions Act (FACTA)
- Privacy Act of 1974
- Family Educational Rights and Privacy Act (FERPA)
- Americans with Disabilities Act (ADA)
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967
- US Department of Labor Regulations
- Department of Homeland Security immigration regulations
- Various state laws

2. Do these laws govern all background checks done by employers?

No. The key laws are the FRCA and FACTA which govern background checks performed for an employer by a 3rd party. Internally conducted background checks should be reviewed for compliance with federal and state privacy laws.

3. What constitutes a "background check" governed by FCRA or FACTA?

A background check performed by a 3rd party includes any report performed for any employment-related purpose and includes any information sought about an applicant, employee or employee of an independent contractor such as the person's creditworthiness, character, general reputation, mode of living, criminal or civil background, education or employment history. Simple reference checks limited to calling a former employer to verify dates, salary and job title are not included.

4. Do employers need permission from the applicant/employee to perform a background check?

In most cases, yes. Notice and permission must be included on a separate form. If the background check will include medical records or interviews with neighbors, friends, associates, etc. specific notice of that fact must be given. In some cases, the person involved can ask for additional information and, for medical information, the person must affirmatively consent to the check and the information sought must be relevant to the job. The requirements can vary from state to state.

5. Is the employer obligated to provide a copy of the report to the person investigated?

Most laws, including most state laws, allow some form of access to the report. If the report was one of the factors that resulted in an adverse decision, the person usually is allowed a copy of the report free of charge. Otherwise, the employer may be allowed to charge for copying costs.

6. Do these laws apply when a 3rd party conducts a misconduct investigation for an employer?

Yes, although employers do not need to give notice or get permission to conduct a misconduct investigation. If, however, the employer takes some action as a result of the investigation, the person involved must get an "adverse action" notice with a summary of the investigation report after the action has been taken. Also, FCRA does not provide the same dispute rights for misconduct reports.

FOR MORE INFORMATION ON EMPLOYER RIGHTS AND OBLIGATIONS WHEN CONDUCTING BACKGROUND CHECKS, CONTACT RONALD A. LANE AT FLETCHER & SIPPEL – CHICAGO, IL

This article is being reprinted with the permission of Mr. Ronald A. Lane, Esq.

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: (_____) _____

E-mail: _____

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)

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

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

Dues $450.00 per year per corporation

Your Password to our website _____

Date: _____ Signature of Applicant: _____