In Transit

Transportation Loss Prevention & Security Association

November 2007

In This Issue...

Transportation Loss Prevention and Security Association

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FROM THE EXECUTIVE DIRECTOR:
STB SENDS MIXED SIGNALS TO MOTOR CARRIERS

Like a privileged child, the motor carrier industry grew up in a regulated environment.

As long as it followed the rules and listened to the Interstate Commerce Commission, the industry had guaranteed freight rates and a guaranteed profit. The Carmack Amendment and the carrier's tariffs provided claim procedures and gave the carrier many advantages to protect the industry from unreasonable claims. But according to the Surface Transportation Board (STB), wicked step brother of the ICC, the motor carrier industry must now compete in the cold cruel world stripped of many former protections. It has been argued that shipper interests heavily lobbied the STB for this decision behind the scenes for many years.

Recently the STB issued its decision Ex Parte No.656 which terminated approval of motor carrier bureaus to engage in rate-related collective activities. This 33 page opinion with 102 footnotes requires motor carriers to now independently set transportation rates and publish their own tariffs without consultation with other carriers. The rationale of the decision was stated by the Board as follows:

Our action today represents the final step in a process that began more than a quarter of a century ago of making the motor carrier industry fully competitive. The 11 remaining rate bureaus constitute the vestige of a system of collective rate making developed during a period of extensive regulatory intervention in the transportation marketplace. Given the maturity and vitality of the motor carrier industry, that system is incompatible with a free market-based and fully competitive system.

The STB went on to review the history of motor carrier regulation from prior to 1935 to the present to justify its premise that their decision will help the consumer (shippers) and increase completion among carriers. The STB failed to mention all the continuing restraints still placed on the industry such as the new hours of service rules; insurance regulations; safety requirements and the like which all impact on the motor carriers ability to make a profit.

The STB also failed to mention the problems which occurred after the deregulation of the banking and airline industries. Many experts have opined for example that the deregulation of the airline industry may be a cause of airline safety problems and contributes to on time delays that plague the system.

So what can we expect from this new era of competition? If history is any guide, we will have more bankruptcies; more mergers and acquisitions; more delayed safety checks and more unfulfilled promises of smaller carriers. As we predicted in this NEWSLETTER some time ago, the industry will be dominated by a few large carriers (UPS, FedEx, and YRCW Enterprises and perhaps DHL) and several regional niche carriers. When fewer carriers compete, prices tend to rise. When price increases are set by monopolies, what does the government do? Regulate!

Can it be that the STB's mixed signals will eventually lead to the regulated industry that the voiding of anti-trust immunity sought to eliminate? We believe such a possibility may be inevitable.

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TLP & SA welcomes the following new members:

Bob Kral -
YRC Logistics (formerly Meridian IQ) – Roselle, IL
Darrel Sekin -
DJS International Services – Colleyville, TX
Pete Zack - **Shockwatch**

Welcome Back:

Karen Shiers -
Brown Transfer – Kearney, NE
Ingi Torfason -
Bullet Freight Systems – Anaheim, CA

THE WHEEL IS ROUND

By: William D. Bierman, Esq.
Nowell Amoroso Klein Bierman, PA

OR HOW TO DEFEND AGAINST A SUBROGATING INSURER

It is always frustrating when a motor carrier receives a claim from a subrogating insurance company for the full amount of a loss when the carrier knows there was a released rate or limitation of liability on the shipment. The shipper has already been paid full value under the insurance contract and now the insurance company is suing the carrier for full value and to void any released rate or limitation of liability. Under these circumstances, how does the carrier best present its position?

MUST CONSIDER BOTH LEGAL AND PRACTICAL ISSUES

The issue is both legal and practical. From a legal point of view, we have to show the court the released rate or limitation is valid and enforceable. But from a practical point of view, we must demonstrate to the court that the contractual relationship among all three parties reveals a commercial reality where all parties have received the benefit of their bargain.

As all attorneys who practice in our industry know, most judges, be they state or federal, have little or no knowledge of the transportation industry. Some have had a passing acquaintance with the Interstate Commerce Act, but few have ever heard of the Carmack Amendment. Nevertheless, not only must we educate the court, we must give the judge a darn good reason to find in our favor. In other words, our argument must make sense to the court.

SIMPLE COMMERCIAL TRANSACTION

In the first instance, it is a toss up as to which party the court dislikes most; the insurance company or the motor carrier. Therefore, we must try to persuade the court that transportation is a simple circular commercial transaction between sophisticated parties, and that the parties in question from the beginning are the shipper; the carrier; and the insurance company. Once this is accomplished, we can explain why the wheel is round and our scenario is compelling.

WHAT IS THE STORY?

Most judges like most jurors are intrigued by a story that makes sense. We present the shipping transaction as such a story. The shipper wants to ship its goods with the least risk possible and at the lowest freight rate. Thus, the shipper obtains insurance for its goods and pays a premium to the insurance company. The insurance company makes its profit by spreading the risk among all policy holders. Armed with insurance, the shipper seeks the lowest freight rate from the carrier who obliges by offering a limitation of liability or released rate. Since the carrier has managed its risk, it is able to provide a low rate. So far so good.

THE INSURANCE CARRIER BREAKS THE RULES

When a damage or loss claim is made by the shipper, the insurance company pays the shipper full value pursuant to its contract. Ah, but here's the rub. The insurance carrier turns around and subrogates against the motor carrier for full value. Any self respecting referee must call a foul because the insurance company is upsetting the entire commercial transaction.

Hopefully the court is now ready to accept our story. The shipper gets what it wants by paying a premium; full value in the event of loss or damage and a low freight rate. The insurance company makes a profit on the premium by spreading the risk among policy holders. The motor carrier manages its risk so it can charge a low freight rate. And the insurance company under its right of subrogation is entitled to receive the released rate or limitation of liability. The insurance company, it could be argued, receives a windfall by getting paid by the motor carrier at all. Thus, each party gets what it bargained for.

MORAL

The moral of our little story is: The insurance company has no right to ask for or receive full value from the motor carrier. The wheel is only round when each party gets only what it deserves.

TLP&SA EXECUTIVE DIRECTOR SPEAKS TO CANADA'S LARGEST TRANSPORTATION GROUP

On Tuesday, September 25th 2007, William Bierman, Executive Director of TLP&SA gave a presentation to the 21st Annual Transportation Innovation and Cost Savings Conference in Toronto, Canada. This Conference is purported to be one of the largest in that country. Because of the number of attendees, the Conference was held in the Ontario Science Centre.

Attorneys, Professors and transportation experts from around the world were on the program. Mr. Bierman's topic was "U.S. Surface Transportation Board Tells Motor Carriers: "You Are On Your Own". Bill discussed the history of the new STB decision voiding anti-trust immunity to rate bureaus and opined as to the impact of the decision and how shippers and carriers may react to the new rules.

CONGRATULATIONS GORDON McAULEY!

In a classic good news bad news situation, TLP & SA takes this opportunity to give our best wishes to Gordon McAuley formerly a partner with Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP - San Francisco, CA who has accepted the position of Assistant General Counsel of the Pasha Group of Corte Madera, CA.

That is the good news. The bad news is that regretfully Gordon must retire from our Board of Directors. Even though Gordon has only served for a short period of time on the Board, he has made his presence felt. Not only has he provided wise counsel, but he has been a constant contributor to our NEWSLETTER and a familiar speaker at our Conferences. We will miss Gordon's hard work and good humor. Bon Voyage to our good friend and colleague.

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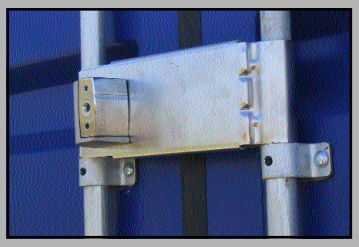

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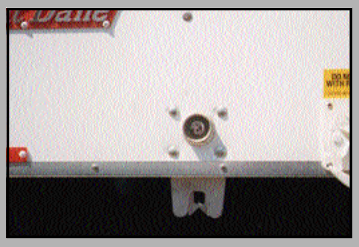

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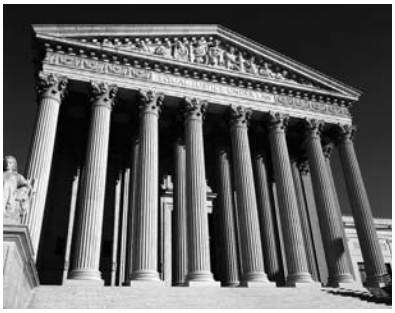

Recent Court Cases

as analyzed by the Conference of Freight Counsel

Wesley S. Chused, Esq., Chairman • William D. Bierman, Esq. Vice Chairman,

1. Mosso v. Dependable Auto Shippers, 2007 U.S. Dist. LEXIS 73272; 2007 WL 2746723 (E.D. Cal.) Sept. 19, 2007. (Bill of Lading Interpretation)

This case concerns claims for damages to plaintiff's automobile caused by defendant auto shippers while car was in transit from Michigan to California. Plaintiff filed original complaint in state court and defendant removed under Carmack. Plaintiff seeks damages in excess of $20,000 plus interest, costs and attorney fees based on a bill of lading contract. Defendant filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (6) claiming damages in excess of $250 and attorney's fees are not recoverable under the Carmack Amendment.

The court denied the carrier's motion on two grounds: (1) The last sentence of paragraph 14 of the BOL Terms clearly indicates the prevailing party in a dispute under the contract is entitled to attorney's fees; and (2) Although the shipper did not enter the Actual Cash Value on the form provided, the shipper did, indeed, pay additional charges to obtain additional value coverage. The court allowed the case to proceed to trial.

2. Andrews v. Atlas Van Lines, 2007 U.S. Dist. LEXIS 2916 (Preemption)

In their complaint, plaintiffs allege that, in July 2006, they contracted with defendant Atlas Van Lines, Inc. ('Atlas') for the transport of their household goods from Madisonville, Louisiana to Mineral Bluff, Georgia. According to plaintiffs, their possessions were destroyed, damaged, or otherwise rendered unusable as the result of defendants' alleged negligence. On June 1, 2007, plaintiffs filed a complaint in the Superior Court of Fannin County, Georgia, alleging state law claims of gross negligence against defendants. Plaintiffs seek monetary damages for their actual pecuniary loss and mental anguish; they also seek attorneys' fees, costs of litigation, and exemplary damages.

Defendants removed the case to federal court on June 29, 2007, asserting that federal jurisdiction existed because plaintiffs' claims arose exclusively under the Carmack Amendment of the Interstate Commerce Act, 49 U.S.C. § 13101 et seq. Defendants then filed a motion to dismiss in which they argue that plaintiffs' state law claims are preempted by the Carmack Amendment.

In a good discussion of the well-pleaded complaint versus complete preemption, the court held:

(1) Carmack Amendment to Interstate Commerce Act preempted cargo owners' state law claims, and

(2) since complete preemption applied, the complaint alleging only state law claims stated federal claim within district court's subject matter jurisdiction.

3. VIS Sales v. Old School Transport, 2007 U.S. Dist. LEXIS 60972; 2007 WL 2409709 (What Constitutes a Carmack Claim)

The facts underlying the Complaint and the First Amended Complaint are simple. Plaintiff, a company licensed to sell used motor vehicles, alleges that it purchased three vehicles at an auction in Michigan, including a 2003 Cadillac Escalade which was a 'specialty vehicle,' and entered into a contract with the defendants to transport the vehicles to Las Vegas, Nevada, where plaintiff had a buyer waiting for the Escalade. The contract price for the transport was $800 per vehicle. Plaintiff alleges that the Escalade was significantly damaged in transport and that the purchaser refused to accept it, causing plaintiff to suffer damages.

This Complaint was removed to federal court by the defendants on the assertion that, although framed in terms of state law, it actually constituted a federal question involving commerce under 49 U.S.C. § 14706. The First Amended Complaint asserts federal question jurisdiction under 28 U.S.C. § 1331 and 1337 and 49 U.S.C. § 14706. Although many of the allegations are still framed in terms of 'material breach of the transport agreement,' the First Amended Complaint arguably sets forth a single claim under the Carmack Amendment.

Having concluded, for purposes of a motion to dismiss filed very early in the proceedings, that plaintiff's First Amended Complaint arguably states a claim under the Carmack Amendment of the Interstate Commerce Act, the defendants' motion to dismiss for failure to state a claim is denied.

4. Electroplated Metal v. American Services, 2007 U.S. Dist. LEXIS 43849; 500 F.Supp. 2d 974 (Forum Selection Clause & Venue)

Plaintiff Electroplated Metal Solutions, Inc. (hereinafter, 'Plaintiff'), brings this action under 49 U.S.C. § 14706 (the 'Carmack Amendment') and related common law causes of action seeking recovery for damage allegedly sustained to industrial machinery that the defendants handled and shipped for Plaintiff. Defendant American Services, Inc., d/b/a American Riggers (hereinafter, 'American'), has moved to dismiss the counts against it pursuant to Federal Rule of Civil Procedure 12(b)(3), or in the alternative, to transfer the action under 28 U.S.C. § 1404(a). The court denied the motion on the following grounds:

(1) consignee did not receive reasonable notice of the company's forum selection clause, and thus was not bound by it;

(2) the Northern District of Illinois was a proper venue; and

(3) the action would not be transferred to California for the convenience of the parties and witnesses.

Although there was a forum selection clause in the transportation documents, the plaintiff argued that it had never seen or agreed to it and the transportation intermediary was not its agent to bind it to a forum selection. The court observed that while a transportation intermediary

could bind its principal to a liability limitation, the Carmack Amendment provides no guidance, by contrast, regarding a carrier's or other intermediary's ability to limit a shipper's choice of litigation forum.

5. Brennan v. A-A Auto Transport, 2007 U.S. Dist. LEXIS 72121; 2007 WL 2886355 (Complete Preemption)

Plaintiff Charles Brennan filed suit against A-A Auto Transport and other defendants including DD & S Express, Inc. in the Common Pleas Court of Summit County which was removed by defendant DD & S Express, Inc. of Baltimore, Maryland on the basis of federal question jurisdiction based on the Carmack Amendment (49 U.S.C. § 14706). Mr. Brennan alleged in his complaint that on May 27, 2005 he contracted with defendant A-A Auto Transport, Inc. to transport two 24-foot long straight trucks and one Oldsmobile Bravada from San Diego, California to Cuyahoga Falls, Ohio. Mr. Brennan advised A-A Auto Transport's agent that costly professional tools and supplies were in one of the straight trucks.

Mr. Brennan discovered that the second truck was missing approximately $80,000.00 of professional tools and supplies, which he reported to the local police department. Mr. Brennan claims that he lost wages due to the loss of professional equipment and supplies in addition and demands $150,000.00 plus costs and attorney fees. Presumably, the court observed, the basis of this claim is breach of contract and perhaps negligence.

DD & S Express relies on the decision in Automated Window Machinery, Inc. v. McKay Ins. Agency, Inc., 320 F.Supp.2d 619 (N.D .Ohio 2004). In Automated Window Machinery, Inc. this court held that state law causes of action against an interstate motor carrier for fraud, tort, intentional and negligent infliction of emotional distress, breach of contract, breach of implied warranty, breach of expressed warranty and state deceptive trade practices are pre-empted. Id. at 621; and see Smith v. United Parcel Service, Inc., 296 F.3d 1244, 194 A.L.R. Fed. 745 (11th Cir.2002), cert. denied. 537 U.S. 1172 (2003). The doctrine of complete pre-emption eliminates the state law claims against the carrier and accordingly DD & S Express, Inc.'s motion to dismiss is granted pursuant to Rule 12(b)(6).

6. Zehrbach v. Con-way, 2007 U.S. Dist. LEXIS 71084; 2007 WL 2815636 (Interpretation of Carmack Claim)

This case arises from a shipment of an airplane engine under a valid bill of lading from West Virginia to California. Plaintiff is suing for alleged damages to that engine. Plaintiff filed his complaint in state court. Defendants removed the case under federal question jurisdiction.

Defendants allege that the Court should dismiss with prejudice all of plaintiff's stated causes of action because (1) all such state law causes of action are completely preempted by the Carmack Amendment to the Interstate Commerce Act of 1887, 49 U.S.C. 14706 et seq. (the 'Carmack Amendment'), and (2) plaintiff has failed to file his lawsuit within the applicable statute of limitations.

In response, the plaintiff alleges that the defendants had notice of the damages within the statute of limitations and that notice should toll the statute of limitations. The plaintiff also alleges that this claim should be subject to West Virginia insurance law.

In this case, the plaintiff pled only state law causes of action. Plaintiff also does not dispute that the goods in question were shipped in interstate commerce pursuant to a valid bill of lading. The Supreme Court of the United States and the Fourth Circuit Court of Appeals have both held that the Carmack Amendment completely preempts all state law and common law for damages to freight shipped in interstate commerce under a bill of lading. Adams Express Co. v. Croninger, 226 U.S. 491, 505-06 (1913); Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 705 (4th Cir.1993). Therefore, all of plaintiff's asserted claims are preempted by the Carmack Amendment and must be dismissed with prejudice as it appears to a certainty that there is no set of facts which could be proved to support a claim or which would entitle the plaintiff to relief.

Furthermore, even if this Court were to construe plaintiff's complaint as asserting claims under the Carmack Amendment, this Court would still dismiss such claims with prejudice because the plaintiff failed to file those claims within the applicable statute of limitations.

In this case, it is undisputed that the plaintiff never filed a formal claim with the defendants. It is also undisputed that the plaintiff filed his lawsuit more than two years and one day after the defendants disallowed the plaintiff's informal claim. There is no provision of applicable law which would toll this statute of limitations under these circumstances. Therefore, had the plaintiff asserted Carmack Amendment claims, those claims would be dismissed with prejudice as untimely.

7. Jones v. D'Souza, 2007 U.S. Dist. LEXIS 66993; 2007 WL 2688332 (Broker Liability)

This personal injury action arose from a serious accident involving two tractor-trailers.

Plaintiff asserts state common law claims for negligence, negligent hiring and supervision, and negligent entrustment, and federal claims under the Motor Carrier Act and the Federal Motor Carrier Safety Regulations.

C.H. Robinson moved to dismiss a negligence claim, negligent hiring and suit provision claims, a negligent entrustment case, and a Section 14704(a)(2) claim brought against it as a broker. Apparently it hired a carrier with an unsatisfactory conditional rating and was sued by a victim of an auto accident by the carrier. Judge Conrad denied Robinson's Motion to Dismiss the negligent hiring claim, relying upon respondiat superior and plaintiff's vicarious liability theory. The Court allowed the negligent hiring claim to remain based on the alleged facts. The Court did kick the 14704 claim.

Our friend Hank Seaton observes, lost in the analysis, and apparently in Robinson's argument, is the argument that a broker is an arranger of transportation, not a provider and that its retention obligations stop under the broker regulations with retaining an authorized carrier. Clearly, state law, whether Maryland, Virginia, or elsewhere, is not helpful in these cases.

8. Travelers v. A.D. Transport, 2007 U.S. Dist. LEXIS 64623; 2007 WL 2571957 (Course of Dealing and Limit of Liability)

Plaintiff Travelers Property Casualty Company of America ('Plaintiff' or 'Travelers') brings this action seeking to recover damages from Defendant, A,D, Transport Express, Inc. ('Defendant' or 'A.D. Transport') arising out of the loss of a truckload of merchandise that was stolen while being transported by Defendant.

On May 3, 2004, A.D. Transport picked up a truckload of garments from Summit's warehouse in Secaucus, which were to be delivered to Ann Taylor in Louisville. The goods were loaded by Summit onto A.D. Transport's trailer. At the time of pick-up, Summit presented a bill of lading bearing number S50905, which Summit prepared on it bill of lading form, to Lee Hobson ('Hobson'), the driver of the A.D. Transport trailer. Hobson signed the bill of lad-

ing. The bill of lading contains a box captioned 'Value,' which provides a space for a possible value to be inserted. Id. No value is listed. Id.
The goods were stolen in the course of transit to Ann Taylor and therefore were never delivered to Ann Taylor. As a result of the loss, Ann Taylor presented a claim to Summit in the amount of $1,715,198.91. Pursuant to an insurance policy issued by Travelers to Summit, Travelers paid Ann Taylor's subrogated insurer, American Home Assurance Company ('AHAC'), $650,000 for the landed costs of the goods in full settlement of Summit's liability for the loss. In exchange, Travelers received an assignment of all claims arising out of the loss of the goods from both Ann Taylor and AHAC.
Travelers thereafter commenced the instant action against A.D. Transport seeking to recover the $650,000 it paid to AHAC.
Travelers moves for summary judgment on the grounds that pursuant to the Carmack Amendment, 49 U.S.C. § 14706, et seq. , A.D. Transport is liable for the full value of the stolen goods. A.D. Transport moves for partial summary judgment, arguing that Plaintiff's complaint must be dismissed because Plaintiff cannot prove that the goods were in good order when tendered to A.D. Transport. Defendant further argues that in any event, A.D. Transport's liability is limited to $10,000 in accordance with the released value provisions of its tariff and its bills of lading.
There was an extensive course of dealing between the parties even though the Pro Bills or Bill of Ladings were sent to the shipper after the delivery. the Court was satisfied that these documents constitute a written agreement that properly limits A.D. Transport's liability in this case, particularly in light of the extensive course of dealing between A.D. Transport and Summit. Moreover, the Court also noted that Summit did not declare a valuation in the 'Value' box on the bill of lading drafted by Summit pertaining to the shipment, which Summit presented to the A.D. Transport driver at the time the driver received the goods. Nor is there any evidence that Summit declared a value for any of the prior shipments.
Upon examining the shipping documents provided by the parties and considering the course of dealing between A.D. Transport and Summit surrounding the documents, the Court found that A.D. Transport properly limited its liability to $10,000.

9. Barber Auto Sales v. UPS, 2007 U.S. Dist. LEXIS 48460; 494 F. Supp. 2d 1290. (Preemption & Limitation Period under ICCTA)

Shipper, Barber, brought putative class action for breach of contract against motor carrier, UPS, alleging manipulation of audit procedures resulting in artificially high shipping charges, and seeking both monetary damages for shipper and equitable relief for entire class. Carrier moved for judgment on the pleadings as to equitable remedies.

The Court held that:
(1) Federal Aviation Administration Authorization Act (FAAAA) preempted claim for equitable relief, and
(2) Interstate Commerce Act's 18-month limitations period for actions to recover overcharges was applicable to breach of contract claim.
The court found Barber's claims for injunctive relief were preempted by the FAAAA. See Deerskin, 972 F.Supp. at 673 ('The Court also finds that the extraordinary award of injunctive relief would remove a contract claim from the realm of ' routine breach of contract actions.' ') (quoting Wolens, 513 U.S. at 232, 115 S.Ct. 817).
Barber also sought an order of the court to void the contract with UPS 'to the extent that the defendant assessed improper shipping charge corrections. The court found that Barber's equitable claim for rescission of the contract is also preempted by the FAAAA because it would constitute an enlargement or enhancement of the parties' bargain. See Deerskin, 972 F.Supp. at 674-75 ('the granting of equitable relief cannot be said to be routine, especially as a remedy for a breach of contract').
Certification of a class under Rule 23(b)(2) is applicable when final injunctive relief or corresponding declaratory relief with respect to the class is appropriate. See FED. R. CIV. P. 23(b)(2). Because the court found that UPS is entitled to a judgment on the pleadings with respect to Barber's claims for injunctive relief, UPS is also entitled to a judgment on the pleadings with respect to Barber's class allegations brought under Rule 23(b)(2).
The court also found that the 18 month limitations period set out in § 14705(b) applies to Barber's state-law breach of contract claim. UPS's motion for a judgment on the pleadings was granted to the extent that Barber sought recovery for any breach that accrued more than 18 months before filing the lawsuit.
In addition, the court held UPS is entitled to a judgment on the pleadings on Barber's breach of contract claim with respect to any alleged breaches in which Barber did not give notice to UPS of the disputed charges within 180 days of receiving the invoice. Said claims are barred for failure to meet a contractual condition precedent to recovery.

10. Meserole v. CSX; 2007 U.S. Dist. LEXIS 72790; 2007 WL 2891424. (Transfer of Venue)

Plaintiff Meserole Street Recycling ('Meserole') has filed suit against defendants CSX Transportation, Inc. ('CSX'), C & V Logistics, LLC, ('C & V'), Marquette Rail, LLC ('Marquette'), and Vortex, Inc. ('Vortex'). CSX and Marquette have moved to dismiss the case pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure for improper venue or, in the alternative, to transfer the case to the Western District of Michigan pursuant to 28 U.S.C. § 1406(a). The Court granted the defendants' motion to transfer the case.
Meserole filed suit in New York federal court to recover for losses allegedly incurred during the shipment of certain cargo. Meserole and C & V arranged for paper products to be transported from Meserole's facility in Brooklyn to C & V's location in Michigan. Meserole asserts that CSX and Marquette never delivered the railcars to C & V.
With regard to the venue motion, the court stated: The Carmack Amendment allows a shipper to recover damages 'for the actual loss or injury to the property caused by-(1) the receiving rail carrier; (2) the delivering rail carrier; or (3) another rail carrier over whose line or route the property is transported ... under a through bill of lading.' 49 U.S.C. § 14706(a)(1). The Carmack Amendment has a special venue provision, subsection 11706(d)(2)(A). Special venue provisions are typically attached to statutes providing substantive rights and are intended to control all claims brought under such statutes. See Pacer Global Logistics, Inc. v. Nat'l Passenger R.R. Corp., 272 F.Supp.2d 784 (E.D.Wis.2003).
The court found venue is not proper in the Eastern District of New York under either § 11706(d)(2)(A)(i) ('subsection (d)(2)(A) (i)') or § 11706(d)(2)(A)(ii) ('subsection (d)(2)(A) (ii)'). Although the Eastern District of New York was the point of origin of the property at issue, Meserole has not sued the originating rail carrier, N.Y. & Atlantic. Accordingly, venue is not appropriate in the Eastern District of New York under subsection (d)(2)(A)(i). In addition, Marquette, the delivering rail carrier, does not operate a railroad or a route through New York. Accordingly, venue is not proper in the Eastern District of New York under subsection (d)(2)(A)(ii). Venue would be proper under this section in the Western District of Michigan, the point of destination and through which Marquette, the delivering rail carrier, operates railroads.

Continued on page 9

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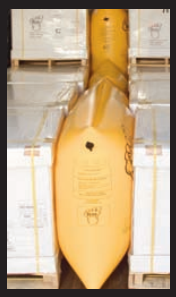

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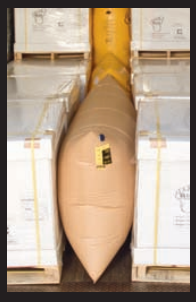

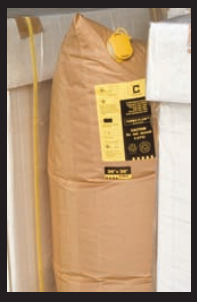

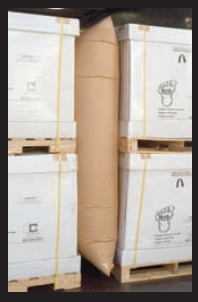

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The court also held venue is not proper in Eastern District of New York under § 11706(d)(2)(A)(iii) ('subsection (d)(2)(A)(iii)'), as the loss or damage is not alleged to have occurred in this district and Meserole's state law claims are properly venued with its Carmack Amendment claims under the doctrine of pendent venue.

11. Land O Lakes v. Superior Service, 2007 U.S. Dist. LEXIS 47122; 500 F.Supp.2d 1150, Fed. Carr. Cas. P 84,498.(Broker Liability & Damages)

Plaintiff, Land O'Lakes, Inc. ('LOL') brought this action to recover damages it claims it incurred when the truck carrying a shipment of butter from its facility in Wisconsin to its New Jersey customer crashed. The defendants include Superior Service Transportation of Wisconsin, Inc. ('Superior'), the trucking company with whom LOL has a contract for transportation of its products; Runabout Express, Inc. ('Runabout'), the trucking company that actually hauled the load; and Owner Operator Services, Inc. ('OOS'), Runabout's insurer. LOL claims that the two trucking companies are jointly and severally liable for the full value of the shipment under the Carmack Amendment to the Interstate Commerce Act (ICA), 49 U.S.C 14706. LOL has also asserted a state law claim for conversion against OOS for the amount OOS received as salvage for the butter. Federal jurisdiction exists under 28 U.S.C. §§ 1331 and 1367.

The District Court held that:
(1) carrier that brokered transport was acting as a motor carrier for purposes of the Carmack Amendment;
(2) genuine issue of material fact as to whether shipper delivered goods to carrier in good condition precluded summary judgment; and
(3) genuine issue of material fact as to whether shipper took reasonable steps to mitigate its damages precluded summary judgment.

12. United Van Lines v. Edwards, 2007 U.S. Dist. LEXIS 74288; 2007 WL 2900220 (Facts Constituting Carmack Claim)

United Van Lines, LLC and Mayflower Transit, LLC ('collectively Plaintiffs') filed a breach of contract action against Gaile Edwards ('Edwards') seeking to recover for services rendered in transporting Edwards' household goods from California to Montana. Edwards filed a cross-complaint alleging breach of contract and failure to exercise due care. Plaintiffs now seek dismissal of the cross-complaint pursuant to Rule 12(b)(6) on the ground that the claims alleged therein are pre-empted by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706 ('Carmack Amendment'). Alternatively, Plaintiffs seek dismissal on the ground that the cross-complaint is untimely.
The court held that The Carmack Amendment, 49 U.S.C. § 14706, provides ' 'a uniform national liability policy for interstate carriers' ' and 'is the exclusive cause of action for interstate-shipping contract claims alleging loss or damage to property.' Hall v. North American Van Lines, Inc., 476 F.3d 683, 687-88 (9th Cir.2007). Accordingly, because Edwards' cross-complaint alleges a claim for breach of an interstate-shipping contract based on loss and damage to household goods, and does not allege that this claim is brought pursuant to the Carmack Amendment, it is dismissed with leave to amend. A claim under the Carmack Amendment is the exclusive remedy for breach of an interstate-shipping contract.

13. Shapiro v. Prime Moving & Storage, Inc. 2007 U.SW. Dist. LEXIS 64883; 2007 WL 2572116 (Knowledge of Limitation & Sophisticated Shipper)

In this civil action, Maria and Saadia Shapiro ('Plaintiffs') allege that the Defendant failed to carefully transport, store, and deliver their household goods and is therefore liable for breach of contract and other state law claims. Defendant moves for summary judgment, arguing that Plaintiffs agreed to limit Defendant's liability in a manner that was proper under the Interstate Commerce Act
This case is far closer to those cases in which courts held that a shipper does not have a reasonable opportunity to select between different levels of coverage (or, in the least, that there was a material question of fact as to whether shipper had a reasonable opportunity) when the carrier misled or deceived the shipper. See Carmana Designs, 943 F.2d at 320-21 (shipper did not have reasonable opportunity to select level of coverage where carrier misled shipper by stating on bill of lading that (1) coverage was for $1.25 per pound of actual weight and (2) the net weight of the shipment was 24,000 pounds (rather than actual weight of 9,275 pounds)); Chandler v. Aero Mayflower Transit Co., 374 F.2d 129, 136-37 (4th Cir.1967) (on remand, district court should consider whether shipper had reasonable opportunity to select level of coverage where carrier misled shipper by telling him that he was signing inventory sheets as opposed to bill of lading). Cf. Technical Prospects LLC v. Atlas Van Lines, Inc., No. 06-C-0174, 2006 WL 2591296, at *3 (E.D.Wis. Aug.10, 2006)
("Materially changing the terms of the parties' agreement [providing for a high-level of insurance coverage] by instructing the shippers agent to sign a bill of lading [providing for a low-level of insurance coverage] after the shipment is loaded without explaining the significance of the change can hardly be considered a reasonable opportunity to choose between different levels of liability.'). As a result, I find that there is a material question of fact as to whether Plaintiffs had a reasonable opportunity to select between at least two levels of insurance coverage.
In denying carrier's motion, the Court offered interesting advice to moving and storage companies as follows:
'The court is cognizant of the problematic implications of denying Defendant's summary judgment motion. Above all else, by considering extrinsic evidence to determine whether the 'reasonable opportunity' requirement has been satisfied means that bills of lading issued to non-commercial shippers are subject to collateral attack by the shipper, who needs nothing more than his own testimony to survive summary judgment. Even with a relatively clear bill of lading, a carrier may have to go through the expense of federal court litigation-including a trial-in order to establish that its liability was effectively limited in a bill of lading. In a case such as this, where agency issues are presented, the expense of litigation only increases, despite the fact that the parties appear to agree that this is only a $30,000 dispute. However, given the current state of the case law on the subject, until the Second Circuit or the Supreme Court narrows or eliminates the 'reasonable opportunity' requirement, carriers may often have to endure litigation expenses that consume most of their benefit of the liability limitation bargain. In the interim, a carrier would be well advised to have a shipper sign a statement that (1) explains the different coverage options (including available coverage options and corresponding prices) and (2) specifically requires the shipper to select a level of coverage. Such a statement should be signed by the same person who signs or otherwise receives the bill of lading and should be signed at the time the bill of lading is issued, at some time prior to the move.'

Transportation Loss Prevention and Security Association, Inc.

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Ed will be more than happy to assist you. Thank you in advance for your support of the Transportation Loss Prevention and Security Association and I look forward to meeting you in San Diego.

William D. Bierman, Esq.
Executive Director, TLP & SA

Loss Prevention Basics

By: Edward M. Loughman, TLP & SA

Preventing any loss in the transportation industry is one of the best ways to positively affect your P & L. I have a friend who was an FBI agent, specializing in transportation (hi-jacking, theft, etc.) who told me they, the FBI, use what they called the KISS System that is the Keep It Simple Stupid System. He explained his manner of investigating losses by telling me about the jigsaw puzzle, which was round and ALL red pieces (the sun). He said if you are missing one piece you cannot see the whole picture. You do not know if there is a plane or a bomb in that piece or not.

When we were investigating a loss, I told him we can eliminate this person and that person, because they would not steal anything. He said, "I never met any thief I did not like. That is how they operate, they gain your trust and then, when you are not looking, they take what they want."

Today, most of us use video cameras in our yard and on the platform, BUT does someone monitor those cameras? How often? How closely? How intently? Who watches / monitors the monitor? If you think the camera is going to cure all of your theft problems - think again.

I once worked for a trucking company that had a very good 'in house' system. They had each dock foreman carry a Polaroid Camera with them throughout his/her tour. It stopped a lot of pilfering, let alone theft. It also kept the dock men from mis-loading cargo, both to the wrong terminal &/or consignee, and mis-loading to prevent damage in transit. You know - high & tight, and don't put heavy freight on top of lighter freight. I have always instructed our drivers to COUNT the cargo when they pick it up. I tell them to do this the same way they COUNT their money when the bank teller cashes their check. My theory is that is where most shortages happen. The person who offloads the pick up unit thinks, "I don't have to count it, the driver did that." The dock man who loads the shipment onto the outbound truck thinks, "I don't have to count that, the last dock man and the driver already did that." Etcetera, etcetera, etcetera! However, when the shipment is delivered to the consignee, the consignee COUNTS the cargo. Why? Because it is his/hers.

I tell both the drivers and the dock people to handle the cargo as if it was going to their house. Handle with care should NOT have to be printed on the cargo, it should always be handled with the same care you would give your own stuff.

Finally, I always tell the billing clerks that an error on their part could easily cost the company money. If the B/L calls for 9 pieces and the biller types in an 8, the delivery driver thinks one of those must be his. Missing a C.O.D. from the B/L onto the waybill could also cost the company, as they are responsible to collect the money on delivery. Typos are costly.

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A DIFFERENT POINT OF VIEW

on broker liability in light of Jones v. D'Souza

By: Henry E. Seaton, Esq. – Seaton & Husk, L.P. Vienna, VA

A string of C.H. Robinson cases starting in 2001 with a wrongful death lawsuit brought in Illinois, and including Schramm v. Foster, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004), and now Jones v. D'Souza, 2007 U.S. Dist. LEXIS 66993 (D. Va. 2007) have had a chilling effect on transportation brokerage. Applying state law, courts have allowed juries to consider Robinson's liability for the negligent acts or omissions of truck drivers hired by its carriers under "negligent hiring," "vicarious liability," and "master-servant" or *respondiat superior* theories.

Ignored, in part I believe because of C.H. Robinson's method of operation, is the statutory definition of a property broker, the preemptive scheme of federal regulation, and any understanding of the traditional role of the shipper and broker as a member of the traveling and shipping public.

By Federal Statute and Regulations only a motor carrier has a non-delegable duty to exercise dominion and control over the equipment and driver it employs, including owner-operators it "retains" as independent contractors. See 49 C.F.R. §382 through 396, 376 et al.

No similar duty is imposed upon a shipper or broker. A broker is defined as a party who "arranges for transportation for compensation" and is not "a motor carrier." A clear distinction is brought between an instrumentality of transportation which has a direct and non-delegable obligation for safety, and a property broker which does not.

Although "economic regulation" was stripped from the statutes from 1980 through 1995, interstate trucking remained a highly federally regulated public utility from a safety point of view. The Federal Motor Carriers Safety Administration, as a successor to the ICC, assumed without amendment, safety oversight over the operation of commercial motor vehicles and those statutes and regulations including enforcement thereof has been extended through to the states under the MCSAP program.

The liability of a shipper or a broker or the negligent acts or omissions of a carrier they hire, accordingly should be prescribed and defined in accordance with their federal duties and obligations under the statutes and not by the inapplicable vagaries of state law.

Applying state law analogies, the Courts in the C.H. Robinson cases missed the role of the broker in the transportation context. The broker does its duty when it retains an authorized carrier. See 49 C.F.R. 371. To be authorized, a carrier in turn must have authority which is granted and maintained only to an entity determined fit by the Federal Motor Carriers Safety Administration. To be fit, a carrier must (1) have insurance in sufficient amounts to protect the traveling public and (2) to have not been judged unsatisfactory by the Federal Motor Carrier Safety Administration. The Agency in turn employs a sophisticated system for determining and placing out-of-service carriers which it determines by roadside inspections and safety audits to be out of compliance.

As an entity arranging for transportation, a broker is not a service provider and the doctrine of *respondiat superior* does not and should not apply. Having made reasonable inquiry to determine that a carrier remains licensed, insured and authorized, a broker should not be required to second guess the FMCSA's determination of fitness.

Correctly seen, a property broker acts like a real estate broker or stock broker, owing to the principals a duty of due diligence but in the absence of its own negligence, is not vicariously liable for the acts or omissions of either party or for the negligent performance by the service provider of a contract service. A stockbroker who sells corporate stock is not required to inspect the corporate governance of listed companies before making recommendations. Similarly, a travel agent is not responsible to passengers for misplaced luggage or flight interruption by the airlines whose tickets they sell.

If, in a regulated industry like trucking the Federal Government is going to establish a comprehensive system for telling the public who is safe to operate, then shippers and brokers alike should be allowed to rely upon the Government's determination, and unless they assume broader duties, contribute to the accident in some way other than making common use of the proffered service, they should not be subject to liability under inapplicable state law theories.

By last count, there were well over 500,000 carriers determined by the FMCSA to be safe to operate in interstate commerce. No standard other than the Federal standard can or should be applicable when determining the suitability of a service provider by the shipping public, or the broker, its agent.

The broker does its duty when it makes a diligent effort to ensure the actual service provider is licensed and authorized by the FMCSA to provide services as a for-hire carrier. The Courts need to understand this, even as the trial lawyers try to obscure the issues and the broker's role.

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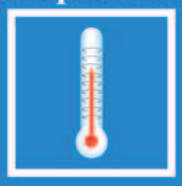

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