In Transit

Transportation Loss Prevention & Security Association

February, 2012

In This Issue...

Transportation Loss Prevention and Security Association

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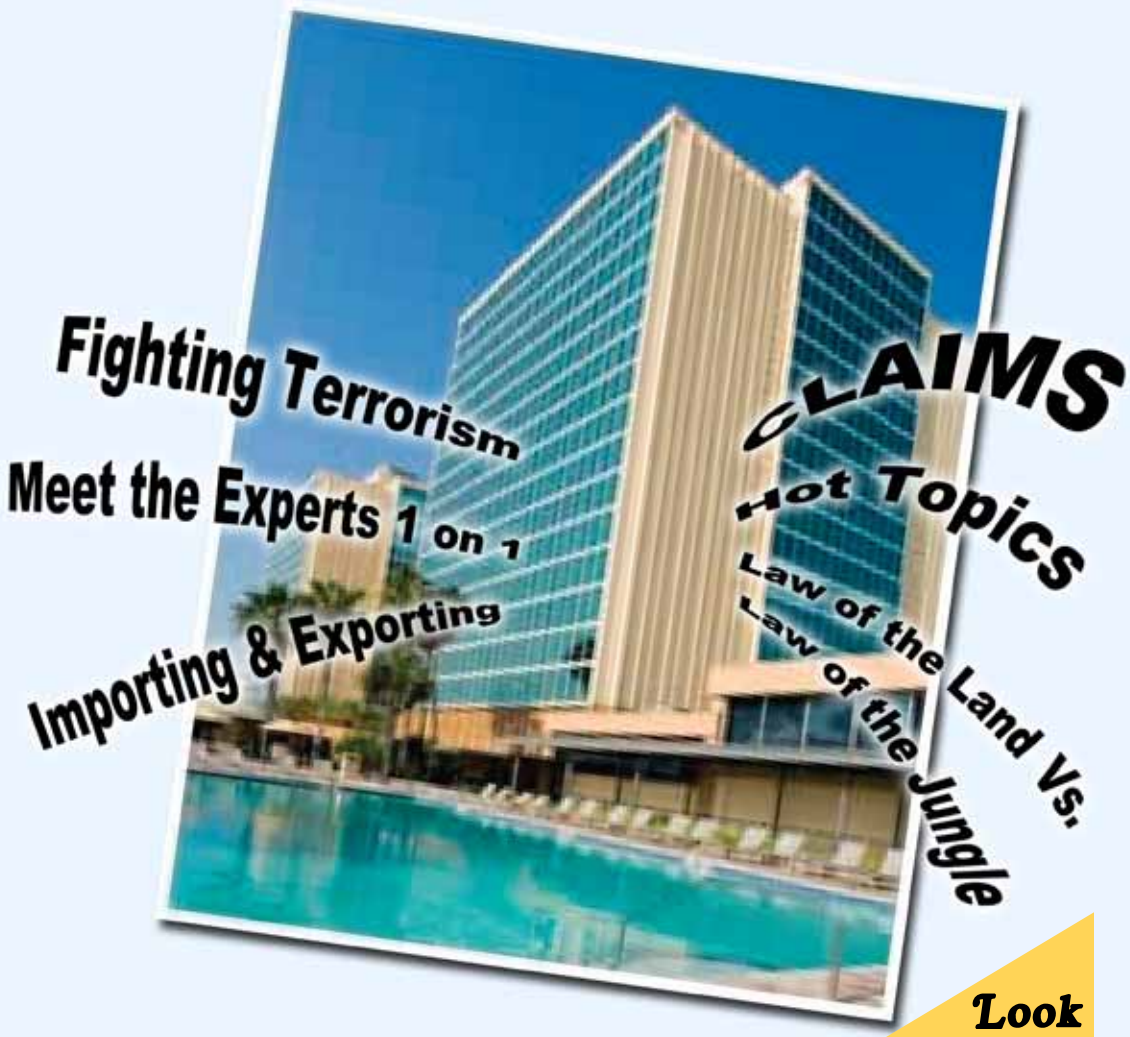

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Check out our NEW upcoming April, 2012 Conference

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TLP & SA welcomes the following new members

H.N. Cunningham III - H.N. Cunningham and Associates, LLP - Dallas, TX

Kimberley K. Stein, Esq. - Sunteck Transport Group - Jacksonville, FL

TLP&SA GOES TO WASHINGTON

On Wednesday February 15, 2012, our Executive Director, Bill Bierman walked the halls of Congress meeting with legislators to promote issues important to TLP & SA. As you are aware, the Transportation Bill is being hotly contested in Washington. Votes and meetings were in progress as we were speaking to individual legislators.

On the day before we attended a special meeting hosted by the Small Business Administration where Anne Ferro, Administrator of the Federal Motor Carrier Safety Administration (FMCSA) presented the Administration's current stand on Compliance Safety Accountability (CSA). In conjunction with the Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT) group we made a forceful argument against the FMCSA initiative demonstrating how their methodology was flawed.

We presented evidence from the Wells Fargo Study and the Morgan Stanley report as well as the Agency's own Advisory Committee indicating there was no correlation between CSA numbers and crash statistics.

Finally we demonstrated the publicizing of these flawed CSA numbers adversely affected shippers, carriers and brokers alike and called upon the FMCSA to go through Rulemaking so we would have an opportunity to formally challenge CSA and its methodology. We also called upon the FMCSA to honor the Settlement of the lawsuit between it and several small trucking associations wherein the FMCSA agreed the CSA numbers where for internal use only and the FMCSA was the only authorized Agency to make a determination as to whether motor carriers were safe to operate.

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DO YOU HEAR US NOW?

In our continuing effort to educate the transportation industry as to the detrimental effect of CSA and its flawed methodology, Transport Topics printed our following Letter to the Editor in their January 30, 2012 edition.

By: **Wiliam D. Bierman, Esq. Executive Director, TLP & SA**

For years a growing number of trucking industry representatives have been attempting to convince the Federal Motor Carrier Safety Administration that CSA 2010 or the Compliance, Safety, Accountability program is fatally flawed. Publicizing these flawed statistics creates confusion in transportation markets; improperly demonizes carriers; and usurps FMCSA's mandate to be the Agency that determines safety fitness.

There has been little response from FMCSA except to wave the "safety" flag even though the industry continues to run more miles with less accidents. When the Agency was sued by three representative trade associations in the U.S. Court of Appeals seeking to postpone publication of percentile rankings and deferring the entire system pending formal Rulemaking, the Agency entered into a settlement agreement. Among other things the Agency agreed to a formal Disclaimer indicating the public should not draw conclusions about a carrier's overall safety condition - simply based on the; data displayed in the system. This Disclaimer reconfirmed only FMCSA can determine carrier fitness and unless a carrier received an UNSATISFACTORY rating or was put out of service, it was authorized to operate.

Nevertheless despite the Settlement, representatives of FMCSA have been traveling around the country advising shippers and brokers to use flawed CSA methodology to qualify carriers. FMCSA continues to ignore evidence disputing the reliability of CSA. Recently a Wells Fargo Study concluded there was no meaningful statistical relationship between a carrier's actual accident incidence and the BASIC scores for Unsafe Driving, Fatigued Driving or Driver Fitness. More startling was the fact Wells Fargo found only 12% of the 758,682 carriers in the FMCSA database had enough inspections to be included in any safety event group.

As if this were not enough to give the Agency "pause, the FMCSA's own advisory committee now suggests the Agency collect more data to ensure its safety measurement system is based on science and not on the intuition or opinions of experts. The committee questions whether CSA statistics are accurate predictors of crash risk or are merely unsubstantiated guesses.

We call on the FMCSA to suspend any public display of these flawed CSA percentile numbers and go back to the drawing board to create a system which will pass muster under formal Rulemaking. We also call on the FMCSA to formally acknowledge that only the Agency can qualify carriers, and that shippers and brokers must be able to rely solely on the Agency itself. Moreover, any methodology approved after Rulemaking should only be used by FMCSA as an internal guide to qualify carriers.

After all the evidence is weighed, there is only one conclusion: CSA
in its present form is not a trustworthy tool for either the FMCSA or the public at large to use in qualifying carriers. FMCSA CAN YOU HEAR US NOW?

Small Firms Can Fight Cargo Theft

By Ray McElfish
and **Jeffrey Lynn**
Attorneys
McElfish Law Firm

Cargo thefts are at an all-time high, but so are innovative new surveillance, tracking and security products their makers claim can prevent or reduce thefts or hijacking and help locate stolen freight — for a price.

Unfortunately, most of the new products are too expensive for small- to medium-sized trucking companies, which are more inclined to invest their limited technology dollars in software for dispatch, cost-tracking and maintenance.

However, there are many ways smaller companies can substantially reduce theft simply by adjusting screening processes and modifying travel behavior. The following tips can help:

Always hire drivers in face-to-face interviews. Take photos for your records, and make copies of drivers' government-issued identification. Ensure that the driver completes the entire application and that the application itself is detailed and includes:

- Driver's full name.
- Current address.
- Date of birth.
- Social Security number.
- Driver's license number and state where it was issued.
- Whether the driver's license ever has been suspended.

At the interview, drivers should be asked to present:

- Valid Class A commercial driver license.
- Social Security card.
- Verifiable employment record for the past three years, including phone numbers.
- Proof of U.S. citizenship or the right to work in the United States.

Don't skimp on background checks; perform both criminal and credit checks. Wait until the full clearance is complete before hiring anyone.

Ensure that your background check includes felony convictions within the past 10 years as well as parole status, wants and warrants, and any reports of theft or misuse of funds or property in connection with employment.

Also verify whether the driver has ever violated out-of-service orders or used a vehicle in the commission of a felony.

Comply with the U.S. Department of Transportation Compliance, Safety, Accountability program requirements regarding preemployment screening, particularly with regard to drug testing. Check with previous employers, and, if possible, determine whether the driver has ever failed a drug test.

Do background checks on other employees as well. Unfortunately, many cargo thefts are committed by insiders — or with their help. Employees such as dispatchers, security guards and accounting employees who know delivery schedule loopholes or weaknesses in the supply chain have been known to conspire with drivers to hide cargo or send armed robbers to truck routes and rest stops. Because of this, employees with access to this information should be subject to the same background checks as drivers.

Keep terminals safe. Fence the entire physical premises of company parking lots. Note any unusual behavior near your facility that could mean you are being watched. Be particularly on the alert for:

- Occupied cars parked nearby.
- Individuals taking still photos or video.
- Individuals examining your facility and/or taking notes.

Storage areas should have locks on all windows and doors. Restrict access to loading areas. Have visitors show a photo ID before they can enter your facility. Issue badges to employees and visitors. Repair malfunctioning security devices immediately.

Don't display information on the outside of a truck that might give thieves too much detail about what's inside.

Carefully control bills of lading, which specify what each truck will be carrying, when it will depart from the facility, and the serial number of the trailer in which the cargo is being shipped. Always load valuable cargo toward the front of the trailer.

Keep the calendar in mind when planning logistics. Most thefts occur over weekends, so avoid making a Friday pickup that's scheduled for Monday delivery if it means the load will spend Saturday and Sunday in an unsecured location. If this is unavoidable, at least make sure your policy has "terminal coverage," which protects the load under your policy when it is in a terminal. But check the requirements, because most policies specify that the trailer must be attached to a covered power unit and be "in due course of transit" to be covered.

Most cargo thefts occur within 200 miles of a load's origin, so if hours of service and routing necessities allow, instruct drivers to travel at least 200 miles before stopping and/or to travel at least four hours before the first stop, shutting off the engine immediately upon arrival.

With your insurer's assistance, check routes for locations to be avoided because of high potential for theft and armed robbery. Provide drivers with a list or map of preapproved, secure locations to stop.

Require drivers to contact dispatch when disembarking and embarking and provide their location, reason for being there and the intended length of stay. Have security protocols in place for each location.

In addition to the precautions already mentioned, advise drivers while on the road to:

- Keep tractor windows rolled up until the truck is on the open road.
- Never pick up hitchhikers.
- Call for assistance if they see motorists in trouble — don't personally stop to help them.
- Lock the cab and roll up the windows when driving in slow-moving traffic.
- Park in crowds and only at reputable truck stops.
- Avoid being predictable — don't stop at the same rest areas during each trip.
- When possible, back the trailer to a wall at rest stops.
- Choose well-lit lots with functioning security cameras and alarm systems.
- Always carry a 24-hour emergency phone number.

Above all, tell drivers to use common sense when it comes to protecting your cargo — and their job.

The McElfish Law Firm, which has offices in West Hollywood, Calif., has a core practice of insurance defense and transportation law.

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Recent Court Cases

as analyzed by the Conference of Freight Counsel

Marian Weilert Sauvey, Esq. , Chairperson and Vic Henry, Esq., Vice-Chairperson

Limitations of Liability

1. Amlin Corporate Insurance N.V. and CG Power Systems Canada, Inc. v. Union Pacific Railroad Company, 2011 U.S. Dist. Lexis 7161 (D. Neb. 2011)

Background: The case arose from events surrounding the railway shipment by CG of a large electrical transformer shipped by railcar under two separate contracts. CG contracted with two other parties (not included in the lawsuit) to ship the transformer from Canada to Fort Worth, Texas. CG also contracted with Union Pacific to ship the transformer from Fort Worth to McCoy, Texas. Both parties filed for summary judgment with defendant also filing for leave to file a first amended answer.

Issues: Did Union Pacific properly limit its liability to $25,000 pursuant to its contract with CG?

Opinion: CG argued that Union Pacific never offered an alternative liability rate as required by the Carmack Amendment, Federal Common Law and/or Nebraska law. The Court concluded that irrespective of what law applied, CG was properly provided an alternative liability choice in Union Pacific's Price Authority (which referenced Carmack provisions). CG claimed that this provision did not apply because the move originated in Canada and not the United States. However, the Court pointed out that Union Pacific's contract only involved an intra-Texas shipment. Therefore, relying on principles of Nebraska law regarding contract interpretation, the Court held that because the contract between the parties was not ambiguous, Union Pacific was entitled to enforce the liability limitation. In addition, the Court granted Union Pacific's request to file an amended answer (to include a counter-claim) as nothing indicated undue delay, bad faith, or that CG would be unduly prejudiced by allowing the amendment.

2. Ernest Demel v. American Airlines, Inc. and American Airlines Baggage Service, 2011 U.S. Dist. Lexis 13776 (S.D.N.Y. 2011)

Background: Plaintiff brought this action pro se seeking to recover the value of a lost backpack containing video footage for three work-related projects. Defendants (together *American*) moved for summary judgment asking the Court to dismiss the complaint on the ground that American Airlines' Conditions of Carriage precluded any and all liability for the categories of property claimed in this case. In addition, American requested summary judgment limiting its liability.

Issues: Could American exculpate itself for all liability for certain items? If not, was its liability limitation enforceable?

Opinion: (1) The DFDS bill of lading was not a through bill of lading and,The Court determined that American's provision disclaiming liability for, among other things, "unique and irreplaceable" items, was an exculpatory provision that was unenforceable pursuant to a long line of federal common law. The Court declined to follow the Fifth Circuit's lead in treating an exculpatory provision as a liability limiting provision that could be enforced if the limiting provisions in the contract were sufficiently plain and conspicuous. Thus, American's motion for summary judgment dismissing the complaint was denied. However, the Court did acknowledge that an air carrier may limit its liability for lost baggage and referenced both the "reasonable communicativeness" test and the "released valuation doctrine" as methods of determining if an air carrier acted properly in this regard. In this case, because it was unclear whether the plaintiff was provided a ticket jacket that contained the limitation provisions, the Court denied American's motion to limit its liability. It was not enough that the passenger could have asked for a ticket jacket or accessed American's liability limitation provisions on its website.

3. Edso Exporting, LP v. Atlantic Container Line AB, 10 Civ. 5867 (S.D.N.Y. 2011)

Background: An unpackaged crane was shipped from Baltimore, Maryland to Tripoli, Libya and damaged in transit. The Bill of Lading did not declare the crane's value. The steamship carrier argued its liability with limited to $500 under COGSA. Without a "package" the carrier's liability would be $500 per "customary freight unit."

The Bill of Lading described the crane as "1 UNIT(S)" and listed the "Basic Freight" as $7,320. The Bill of Lading did not describe the method of calculating the freight charge. The crane's total volume was stated in the Bill of Lading and in a "Quote Confirmation." The "Confirmation" contained the parenthetical "(Rated at $60 c/m)." The Confirmation listed the total volume of the crane as "122.09 CBM."

Continued on page 9

Issues: Should the "customary freight unit" be considered as (1) the "1 UNIT(S)" stated in the Bill of Lading or (2) each cubic meter based on $60 multiplied by 122 cubic meters which equals the $7,320 freight charge.

Decision: The Court applied the Second Circuit's definition of a COGSA "customary freight unit" as the "actual freight unit used by the parties to calculate freight for the shipment." *FMC Corp. v. S.S. MARJORIE LYKES,* 851 F.2d 78 (2d Cir. 1988) [each unboxed fire engine rated on a flat lump sum charge]. The Court noted that the Bill of Lading did not state the method of calculating the freight, but did give the volume of the crane (122.09 cubic meters). Rounding off the volume to 122 cubic meters and multiplying it by $60 produces the $7,320 freight charge. Although the Bill of Lading described the shipment as "1 UNIT(S)", the Court rejected that notation as a basis for finding a single customary freight unit and commented, "… Mathematics do not lie. You cannot get to the freight of $7,320 by multiplying one by any number.

Therefore, the Court concluded that the customary freight unit used by the parties was each cubic meter of cargo volume, not the unpackaged crane "UNIT." After the Consent Judgment was filed by the parties, the defendant carrier appealed to the Second Circuit Court of Appeals.

4. Nipponkoa Insurance v. Atlas Van Lines, 2011 U.S. Dist. LEXIS 5615 (S.D. In. January 19, 2011)

Background: This is a fairly straightforward cargo loss, in that an Atlas truck overturned while carrying a shipment of Toshiba medical equipment from California to a trade show in Chicago. Toshiba had been doing business for many years with Comtrans, an Atlas agent, and ACS, a broker owned by Comtrans. Comtrans handled all of Toshiba's exhibit shipment business and would take care of making sure all item for a trade show, wherever they were coming from, made it to the show on time. In all the years of their relationship, Toshiba had never declared additional valuation on shipments of product to trade shows. Indeed, even after the accident involved in this litigation, Toshiba did not declare any additional valuation on the same products going to the same show in subsequent years. The accident load was picked up by Comtrans on a local bill of lading and taken to its warehouse. It was picked up by Atlas about ten days later and shipped to Chicago on an Atlas bill of lading.

At the time of this shipment there was a transportation contract between ACS and Atlas that formed the basis for charges and terms of loads booked by Comtrans. This contract provided that shipments were released at the rate of 60 cents per pound and acknowledged that other limits were available for an additional cost. The Atlas tariff incorporated into the contract and the bill of lading also provided for a released rate of 60 cents per pound unless a different amount was declared and an additional fee paid. Atlas would bill ACS for its services. ACS would then, in turn, bill the customer an amount that included the Atlas charge and the Comtrans charge and any other charges related to the load. The customer would pay ACS, which in turn would pay Atlas. No additional valuation was declared by Toshiba when the load was picked up by Comtrans. No additional valuation was declared by the Comtrans personnel when the load was picked up by Atlas.

Following the accident, Nipponkoa paid Toshiba $1,050,000 for its loss and sued in subrogation. Atlas filed a motion for partial summary judgment based on the liability limitation in the ACS contract and the law that a carrier is entitled to rely on the limitation in the contract with the entity that tendered the freight to it. Plaintiff argued that the ACS contract was not binding on it because Toshiba did not know it existed and did not agree to it in writing.

Issues: Whether the liability limitation in the ACS contract limited Atlas' liability to 60 cents per pound.

Opinion: In spite of testimony from Comtrans and Atlas they the ACS contract applied to this load, the court found that there was a question of fact that precluded summary judgment. Of greater concern, however, was the ruling that Toshiba had to agree, in writing, with Comtrans/ACS that the latter could limit Toshiba's liability down the line before a limitation was effective. This is completely contrary to the holdings of *Kirby, Werner Enterprise* and, most importantly, *Great Northern Railway,* each of which holds that shippers are bound by downstream limitations, with no requirement that the shipper agree in writing with an intermediary that the intermediary can enter into such limitations. A motion to reconsider has been filed and, in another surprise, has been set for a hearing in August. This is a surprise because the parties were told at mediation that the court would probably just deny the motion and hear all the arguments at trial. Yet unresolved in the case are the issues of limitations contained in the bill of lading and issues regarding damages (Nipponkoa paid Toshiba $292,000 for an "upgrade" to one of it pieces of equipment and did not sue for Toshiba's $200,000 deductible, yet still believes that it can recover these amount at trial).

Preemption

5. Audrey Cadwallader v. Allied Van Lines, Inc., 2011 U.S. Dist. Lexis 46125 (D. Conn. 2011)

Background: Plaintiff sued Allied in state court for damages allegedly resulting from Allied's negligent transportation of Plaintiff's antique furniture. Allied removed to federal court and moved to dismiss.

Issues: Was the Plaintiff's state law claim subject to the preemptive scope of the Carmack Amendment?

Opinion: Although the Plaintiff's claim could have been brought in either state of federal court, she never sued under Carmack, only for negligence. Thus, the negligence claim was preempted and Allied's motion was granted.

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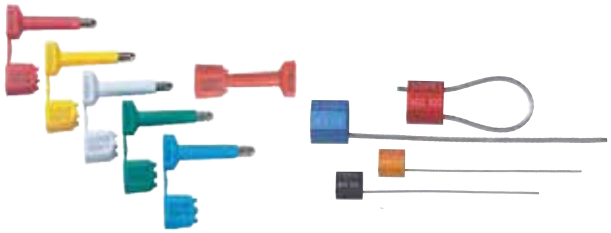

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6. Emma Berholtz v. Zhang et al., Superior Court of California, San Diego County (3/15/2001)

Background: [Note: not evident from decision.] Atlas Van Lines picked up a household goods shipment that contained a large unassembled yard fountain from storage in Ohio for transportation to Los Angeles. Upon arrival in Los Angeles, the local agent, Alexander's, had scheduled a third party to come assemble the fountain the day after delivery, but the homeowner was anxious to have the fountain assembled and the delivery crew put the fountain together with the pieces that they had (some pieces for the fountain were missing or not available) and placed it where the homeowner requested. (There may have been some difficulties here as the crew spoke Spanish and the homeowner some version of Chinese.) One or two days later, the 14 year old neighbor, Emma Berholtz, is in the backyard watching some other neighbor children playing. Somehow the fountain is knocked over, at which point, allegedly in connection with pushing another child out of the way, it falls on Emma and breaks her foot. A lawsuit is filed on behalf of Emma (whose father is an attorney) against the homeowners. Alexander's and its driver (Snow) are added to the suit through a third party claim by the homeowner and are then sued directly by the original plaintiff. Relying on cases such as *Strike v. Atlas Van Lines, Inc.* (which held that physical injury claims are preempted by Carmack) and Carmack preemption for claims against disclosed agents, motions for summary judgment were filed on behalf of Alexander's and Snow.

Issues: Are the plaintiff's and the homeowner's claims against Alexander's and Snow preempted by Carmack as a result of the fact that they arose out of the transportation of the fountain, which included reassembling it at delivery? Are Alexander's and Snow protected by Carmack as disclosed agents of Atlas?

Opinion: After initially obtaining the judge's interest in this defense, the court came back and found that Carmack did not preempt the plaintiff's physical injury claim as she was a non-party to the bill of lading. In addition, the court found that the homeowner's claim for indemnity was not preempted. The court also found triable issues with respect to the disclosed agency argument and denied the motions for summary judgment.

7. Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Commission, 634 F.3d 206; 2011 U.S. App. LEXIS 2645 (2d Cir. 2011)

Background: A small, private, non-federally licensed airport wanted to cut down trees it deemed to be obstructions to air navigation as defined in the Code of Federal Regulations. The airport is located on protected wetlands for which Connecticut law requires a tree removal permit. The airport sought declaratory relief, arguing that the Airline Deregulation Act ("ADA") and the doctrine of implied field preemption bar enforcement of the Connecticut law.

Issues: Does ADA express preemption, or implied field preemption, apply to Connecticut's tree removal regulation?

Opinion: The Second Circuit Court of Appeals rejected the airport's argument that the ADA expressly preempts the state's regulation because the ADA does not specifically apply to state environmental or land use laws. With respect to implied field preemption, the Court stated the relevant test as follows: (1) Does federal law occupy the field of air safety? (2) If so, does the state's permit requirement intrude upon that field? On the first question, the Court concurred with other Circuits (including the Ninth Circuit's recent ADA preemption ruling in US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 2010 U.S. App. LEXIS 24799 (9th Cir. 2010) that Congress does intend to completely occupy the field of aviation safety and preempt state regulation in that field. The Court based its conclusion on Congress's "intent to centralize air safety authority and the ***comprehensiveness of regulations*** pursuant to that authority" (emphasis added). On the second question, the Court reasoned, however, that there is no federal interest in airport tree removal. Thus, the state's permitting process does not sufficiently interfere with the federal regulation of aviation safety to invoke preemption.

8. L.G. Electronics Mobilecom U.S.A. Inc. et al. v. J.B. Hunt Transport, Inc. et al., Case No. 10cv2536 (S.D. Ca. 2011)

Background: J.B. Hunt and plaintiffs entered into a transportation services agreement (the *TSA*) for the provision of transportation services for plaintiff's inventory. The TSA provided for disputes to be submitted to arbitration in San Diego, California. A shipment of mobile handsets worth $2.6 million was stolen while being transported from Illinois to Pennsylvania. Plaintiffs sued for 1) breach of the TSA; 2) negligence; and 3) violation of the Carmack Amendment. This proceeding involved Hunt's motion to compel arbitration under the Federal Arbitration Act. The plaintiffs, citing to 14706(d)(1) (which allows suits to be brought under Carmack in specified courts) claimed that the Carmack Amendment preempted the application of the Federal Arbitration Act to its claims.

Issues: Does the Carmack Amendment preempt the application of the Federal Arbitration Act and, as a result, the arbitration agreement in the TSA?

Opinion: No. The court found that there was nothing in the Carmack Amendment that invalidated shipper/carrier agreements to arbitrate in contracts. Note: they did not cite to 14101(b) for this position, but found only that nothing in the Carmack Amendment or the authorities cited by plaintiffs supported this argument.

9. Mason and Dixon Intermodal, Inc. v. Lapmaster International LLC, Hartford Insurance Co. v. ITG Transportation v. W.E.S.T. Forwarding Service, 2010 U.S. App. LEXIS 26946 (9th Cir. Jan. 18, 2011)

Background: This case involves not only one but two accidents involving oversized machines, each of which was run into the same bridge in Oakland while being transported by Mason and Dixon Intermodal, Inc. (*Carrier*) from the port to Fremont, California on two successive days, resulting in damages to the machines. The transportation had been arranged by ITG Transportation, a broker (*Broker*). The shipper and its insurer sued the Carrier for damages under Carmack and the Broker for negligence under state law. Carrier sued the Broker for negligence and contribution, claiming that the Broker had not advised Carrier that the goods were oversized,

which resulted in the accident. Broker, which had a limitation of liability in its agreement with the shipper, settled with the shipper and its insurer and filed a motion to dismiss the case against it on the basis that it had entered into a good faith settlement under California law. This motion was granted, barring Carrier from recovering from Broker. This matter involves the Carrier's appeal of the dismissal on the basis that the Carmack Amendment preempted the California settlement statute and that Carrier was not a joint tortfeasor with the Broker as the Carrier had strict liability under Carmack and, as a result, was entitled to indemnity from the Broker.

Issues: Did the Carmack Amendment preempt the good faith settlement provisions in California law? Were the Carrier and Broker joint tortfeasors such that settlement of the claim against the Broker foreclosed the Carrier's claim against the Broker?

Opinion: The preemptive affect of the Carmack Amendment did not apply because the purpose of Carmack preemption was to establish a carrier's predictable maximum liability. The state settlement statute did not appreciably affect the shipper's grounds for or recovery against the Carrier and did not increase the Carrier's liability. The application of diverse state settlement laws did not affect the Carrier's ability to set rates based on predictable liability for damages to goods. Even though only the Carrier was liable under the Carmack Amendment, the court found that both the Carrier and the Broker owed a duty to the shipper with respect to the transportation of the machines. The court further found that the settlement was made in good faith and met the requirements of the law.

10. Non-Typical, Inc. and Hanover Insurance v. Transgobal Logistics and Schneider Logistics Intl., 2011 U.S. Dist. LEXIS 50597 (E.D.Wi. May 10, 2011)

Background: Non-Typical arranged with SLI to transport 10,800 high value cameras from China to De Pere, Wisconsin (home of the summer training camp of the World Champion Green Bay Packers). The cameras were valued at $1.8 million and were insured by Hanover. SLI did not provide any transportation services and was never in possession of the cameras. They were shipped under a bill of lading issued by RS Logistics and Hanjin Shipping. They were picked up in Elwood IL by Transglobal and then the load disappeared. Non-Typical sued, claiming that it had "retained" SLI to provide services and told it to pick carriers that would properly secure high value loads. It stated that it might have a Carmack claim, but did not actually assert one against SLI. SLI moved to dismiss for failure to state a claim because it was not subject to Carmack.

Issues: Was there preemption of the plaintiff's claims by Carmack?

Opinion: The court ruled that Carmack did not apply to the claim against SLI because it was only a broker and not a carrier or freight forwarder in this case. Since Carmack did not apply, the state law causes of action had to be considered. The court allowed the plaintiff to proceed with a negligence and a breach of contract claim, bit did dismiss a good faith and fair dealing and estoppel claim.

11. Melinda Frey v. Bekins Van Lines, Inc. and Triple Crown Mafucci Storage et. al.

Background: The above case is pending in the U.S. District Court, Eastern District of New York, 09-cv-5430. Melinda Frey, Ruiz Mercedes, and Francine Parziale are the plaintiffs, on behalf of themselves and all others similarly situated (*class plaintiffs*). The plaintiffs had their household goods transported by Triple Crown, a Bekins's Agent, and two of the three shipments were under Bekins's authority and one under Triple Crown's own interstate authority.

The complaint alleges that defendants had a uniform practice of quoting shipping services to class plaintiffs' at a much lower price than defendants charged them. Plaintiffs allege violations of 49 U.S.C. 13707 and 13708, breach of contract, N.Y. Gen. Business Law 349-350 (deceptive representation), unjust enrichment, fraud, negligence, violation of good faith and dealing, and violations of 49 CFR §375.215 and §375 .519 regarding honest freight bills and weight tickets.

Defendants have filed a motion for judgment on the pleadings, which is in the briefing stage, alleging that ICCTA preempts all of plaintiffs' claims pursuant to 49 U.S.C. §14501 which applies to interstate transportation. All of the shipments in the instant case were interstate. In the motion, defendants also contend that the language of the ICCTA mirrors the language in the Airline Deregulation Act ("ADA") and is intended to function the same with respect to its preemptive effects. Accordingly, defendants argue that plaintiffs' state law claims should be dismissed.

Plaintiff Parziale settled her claim with Triple Crown directly after terminating her counsel. However, plaintiffs refuse to voluntarily dismiss Parziale's claims because defendants refuse to pay plaintiff's counsel attorneys fees pursuant to 49 U.S.C. §14704. Plaintiffs contend that they have shown "some success" on the merits through discovery to entitle them to attorneys' fees at this point in time. However, plaintiffs have not cited any decisions under this Section that have awarded such fees. The plaintiffs' motion in opposition to defendant's motion to dismiss plaintiff Parziale and to recover attorney's fees is pending.

At the Orlando, Florida CFC, Item 46, we discussed the court dismissal of plaintiff's breach of contact cause of action. However, the court denied defendants motion to dismiss plaintiffs' state law claims as not being preempted by Carmack and that field preemption was not available. This was clearly an incorrect decision.

Plaintiffs have until August to certify "the class". Numerous depositions have been taken and more will be taken to establish a "class".

Issues: Did ICCTA preempt claims under state law relating to estimates, freight bills, weight tickets, breach of contract, deceptive representation, unjust enrichment, fraud, negligence, and violation of good faith and fair dealing for interstate shipments of household goods? Are attorneys' fees available under 49 U.S.C. 14704 with respect to these claims? Is class action status available?

Request: This case is still pending, per the above. Comments from the members on this troublesome case will be appreciated.

12. City of Girard, Ohio v. The Youngstown Belt Railway Company, 11th District Court of Appeals (Trumball County Ohio) and Court of Common Pleas (Trumall County Ohio) May, 2011

Background: The City of Girard, Ohio attempted to use its powers of eminent domain to acquire 42 acres of vacant property that the railroad intended to make into a landfill for construction and

demolition debris. There are two decisions on this matter: The railroad asserted preemption pursuant to ICCTA and the trial court said that it thought since the land was going to be used as a landfill that it was not sure whether or not it had jurisdiction and ordered the parties to apply to the STB for a ruling.

Issues: Was the city of Girard preempted by ICCTA from using eminent domain to obtain property owned by a railroad and used for staging and storage?

Opinion: In the initial decision (Judgment) by the 11th District Court of Appeals (Trumball County Ohio), the Appellate court found that the trial court had dodged its responsibility to determine whether or not it had jurisdiction. The appellate court therefore sent the matter back to the Trial court to determine its jurisdiction. The second opinion is the subsequent opinion of the Trial Court. The Trial court found that the deposition and certification of railroad witnesses of the use of the property for staging and storage on an annual basis and that therefore it was used for railroad purposes, that the land had not been sold by the railroad to any other party for use as a landfill at this point and therefore Girard Ohio could not use its power of eminent domain to obtain the property since that state law was preempted by federal law.

13. Elam v. The Kansas City Southern Railway Company and Ronald L. Michael, 635 F.3d 796; 2011 U.S. App. LEXIS 5100 (5th Cir. 2011)

Background: Mrs. Elam was driving in Corinth, Mississippi when she ran her car into the side of a Kansas City Southern train that was performing switching operations a crossing. She and her husband sued the railroad and the train's engineer, also a Mississippi resident, in state court in Mississippi for negligence per se under the Mississippi anti-blocking statute (which limited the amount of time a train could occupy a crossing) and for negligence. The railroad removed the case to federal court asserting diversity jurisdiction, on the grounds that the engineer was improperly sued, and federal question jurisdiction on the basis that ICCTA preempted both the plaintiffs' negligence per se and negligence claims. Plaintiffs filed a motion to remand on the basis of lack of jurisdiction, including an argument that the STB had primary jurisdiction over the negligence per se claim. The district court denied the motion to remand both the negligence per se and negligence claims finding that, while it did not have diversity jurisdiction, federal question jurisdiction existed. It then dismissed the entire case and directed that it be filed with the STB.

Issues: Was removal proper? Was the Mississippi anti-blocking statute preempted by ICCTA? Did the STB have exclusive or primary jurisdiction over the negligence per se claim? Was the state law negligence claim preempted by ICCTA?

Opinion: The court first found that an exception to the well-pleaded complaint rule would apply if any of the plaintiffs' claims were preempted by federal law. It then performed an extensive analysis of ICCTA and the preemptive effect of it on state laws affecting railroads and found that the negligence per se claim was preempted by ICCTA as the Mississippi anti-blocking statute served to economically regulate the railroad's switching operations. As a result, it was a form of state economic regulation of the railroad preempted by ICCTA, causing the district court to have jurisdiction over that claim and the dismissal of the claim to be proper. The court went on to hold that the doctrine of primary jurisdiction assumes that the federal court has jurisdiction as well and did not require referral to the STB. Finally, it found that the state law simple negligence claim was not preempted by ICCTA as it did not involve any of the areas of regulation that had been preempted and sent the case back to the district court. [The district court subsequently remanded the remaining portion of the case, which now included only a state law negligence claim.]

Jurisdiction, Removal, Forum Non Conveniens, Venue

14. Joshua Acevedo v. Federal Express Corporation, 2011 U.S. Dist. LEXIS 41812 (D.N.J. April 18, 2011)

Background: Plaintiff, through his parents, sued Fed Ex in New Jersey state court for fraudulent misrepresentation, detrimental reliance, breach of guaranty and warranty, false representation, willful, wanton and reckless conduct and consumer fraud for failing to timely deliver a package to the U.S. Court of Claims that contained his petition for compensation under the National Vaccine Compensation Program, causing him to miss his filing period for compensation under this program. Fed Ex removed to federal court based on a federal question under federal common law. Plaintiff moved to remand.

Issues: Was removal of the case proper based upon the application of federal common law to the claims against the air carrier?

Opinion: Relying upon cases that hold that the federal interest for shipments by air carrier is the same as the one that underlies the Carmack Amendment for ground carriers and others holding that federal common law governs the loss of goods by an air carrier, the court found that removal was proper.

15. French Gourmet, Inc. v. FFE Transportation Services, Inc., 2011 W.L. 1230212 (S.D. Tex.)

Background: French Gourmet entered into a contract with FFE to transport two shipments of French Gourmet's goods from Los Angeles to Orlando. The shipments were moved pursuant to French Gourmet's specifications for the shipments. The cargo arrived damaged. French Gourmet sued FFE in Houston federal court for the total sum of $22,000, alleging damage to one shipment in excess of $8,000,

and another shipment in excess of $13,000. FFE moved to dismiss the case for lack of subject matter jurisdiction since the minimum amount in controversy for federal jurisdiction was not satisfied.

Issues: If Plaintiff sues for damages on two interstate bills of lading, and one of the bills of lading involves less than $10,000, while the other involves more than $10,000, does the court have subject matter jurisdiction under 28 U.S.C. §1337?

Opinion: The court cited Section 1337 which requires that: "the matter in controversy for each bill of lading exceed $10,000…." The court held that since one of the two bills of lading at issue involved a damage claim of less than $10,000, the court had no jurisdiction, even if the other bill of lading in the lawsuit alleges damages in excess of $10,000. The motion to dismiss the case was granted.

16. Lexington Insurance Company and Champion Transportation Services, Inc. vs. Georgia Freightmaster, Inc. and Dairy Farmers of America, Inc., Case No. 6:10-cv-147-Orl-22KRS Case No. 6:10-cv-278-Orl-22DAB (M.D.Fl. March 31, 2010)

Background: This case involved a Frito-Lay shipment that originated at a Dairy Farmers of America ("DFA") facility in Texas destined for a Frito-Lay facility in Florida. Although not entirely clear from the pleadings, it appears that Frito-Lay's logistics provider was Excel Transportation Services. Excel engaged Champion as the actual carrier. Champion brokered the load to Georgia Freightmaster. When the shipment arrived in Florida, the pallets of Frito-Lay queso dip were scattered around inside the trailer. Frito-Lay rejected the load and filed a claim for approximately $55,000. Georgia Freightmaster denied the claim, but Champion's insurer, Lexington, paid the claim in full. In return for the payment, Frito-Lay assigned all of its rights arising out of the incident to Lexington and Champion.

Lexington and Champion filed suit in Florida State Court against the actual carrier, Georgia Freightmaster, and origin shipper, DFA. Two causes of action were alleged against the shipper DFA: (1) a negligence count alleging that DFA owed the Champion (not to Georgia Freightmaster or Frito-Lay) a duty of reasonable care to properly load the shipment, and (2) an equitable subrogation count based on the Lexington/Champion payment to Frito-Lay.

DFA did not want to be in state court. Because of the amount in controversy, DFA could not remove under diversity. DFA removed the case to Federal Court on the basis of the Carmack Amendment and supplemental jurisdiction. At the time DFA filed its Notice of Removal, it appeared that Georgia Freightmaster had not been served, and counsel for DFA was unable to determine who, if anyone, was representing Georgia Freightmaster, so DFA removed the case independently. When Georgia Freightmaster was subsequently served, it filed its own removal pleadings based on Carmack, thus creating the 2 Federal Court case numbers. Shortly thereafter, Chief United States District Judge for the Middle District of Florida, Anne C. Conway, on her own motion ordered the parties to file briefs on the question of whether the Carmack Amendment applied to the claims against DFA.

Issues: DFA argued that all of the issues in the case, including any duties owed by DFA to the carrier or its insurer, were controlled exclusively by the Carmack Amendment. DFA alternatively argued that it was uncontroverted that the claims against Georgia Freightmaster were governed exclusively by the Carmack Amendment; therefore the case was properly removed and the claims against DFA were subject to the Federal Court's supplemental jurisdiction under 28 U.S.C. §§1367 and 1441.

Opinion: Judge Conway ruled against DFA, finding that "Carmack preempts state law claims against carriers, not those against shippers." The Court also exercised its discretion, and declined to retain supplemental jurisdiction over the claims against DFA. The portion of the case against DFA was remanded to the Florida state court. The case against Georgia Freightmaster was retained in the Federal

17. Morrice Logistics, Ltd. v. Intransit, Inc., 2011 W.L. 1327397 (W.D. Tex.)

Background: This case involved a shipment of television sets from El Paso, Texas to Canada. The shipment was stolen in transit while in the possession of Solares Trucking. UTI, a logistics company, contracted with Morrice Transportation to arrange the shipment. Morrice Transportation forwarded the contract to Morrice Logistics, which hired Solares to transport the shipment. When Solares' trailer was stolen, UTI presented a claim to Solares, but Solares only had insurance coverage of $100,000, which was substantially less than the total loss. UTI presented a demand to Morrice, and who then filed a declaratory judgment action in state court in El Paso against UTI and Solares. In its action, Morrice alleged that the sole liability rested with Solares. Morrice also claimed that UTI owed over $99,000 for unpaid transportation charges on unrelated shipments.

Issues: UTI removed the case on diversity grounds. Morrice moved to remand, arguing that the "home forum" rule precluded proper removal.

Opinion: The issue addressed by the court was whether joinder of Solares as a defendant in the declaratory judgment action was improper joinder. The court held that Morrice's lawsuit sought a declaration that Solares was solely liable for the loss, and accordingly, Solares was properly joined. Since Solares was a Texas corporation, removal was improper, and the motion to remand was granted.

18. Joel Norton, et al. v. Fox Moving and Storage of Tennessee, LLC, et al., 2011 U.S. Dist. LEXIS 37536 (M.D. Tenn. 2011)

Background: Plaintiffs filed this *pro se* action in state court for breach of contract, unconscionable contract and fiduciary responsibility failure resulting in a loss of personal property. Defendants removed based upon federal question jurisdiction (28 U.S.C. § 1331) upon an allegation that the claims were controlled by the Carmack Amendment. Following removal, Defendants filed a motion to dismiss or, in the alternative, for a more definite statement.

The court granted Defendants' motion for definite statement and ordered Plaintiffs to file an amended complaint. According to the allegations in the amended complaint, Fox contracted to pick up Plaintiffs' belongings at a Mt. Juliet, Tennessee address and store them at a location in Nashville. The Defendants subsequently moved a portion of the belongings to a new location in Nashville without notice to Plaintiffs. At some point, the warehouse at the new location was flooded, allegedly resulting in the loss of a significant portion of Plaintiffs' belongings.

Issues: Did this Court have subject matter jurisdiction over this case?

Decision and Result: Relying upon the facts alleged in the amended complaint and upon the analysis in *Burkett v. Fox Moving and Storage of Tennessee, LLC, 2010 U.S. Dist. Lexis 132818 (M.D. Tenn. 2010),* the Court concluded that because the contract involved a purely intrastate transportation issue, Carmack did not apply. As such, the Magistrate recommended that Plaintiffs' motion to remand be granted.

19. Stabler v. Pack & Load Services and Florida Van Lines, 2011 U.S. Dist. Lexis 7718 (S.D. Ala. Jan. 25, 2011)

Background: Plaintiff hired Pack & Load to pack her belongings and load them into a POD. She alleged that they did so carelessly, using inadequate identification, overloading the POD, rendering the goods inaccessible and moving the wrong items to New Orleans. She filed a complaint against Pack & Load, then an amended complaint adding Florida, alleging state law claims of breach of contract, negligent supervision, wanton supervision, negligence and wantonness. Though no federal cause of action was pled, Florida removed to federal court. The plaintiff then amended her complaint again to add a Carmack claim. The court, sua sponte, took up the matter of subject matter jurisdiction.

Issues: Was this case properly removed to Federal Court?

Opinion: The Court noted that Carmack would completely preempt the state law claims, if it applied to this case, and that there is federal jurisdiction when Carmack is involved, even when the complaint asserts no facially federal claim, but it noted that the complaint did not allege loss or damage to goods arising from the interstate transportation of those goods. Shipping the wrong goods to New Orleans is not losing or damaging the goods. The Court noted that it asked Florida to address the subject matter jurisdiction issue, but that it did not do so. While there might be reasons to remove, the Court would not make the arguments for Florida. It did not matter that the plaintiff subsequently amended the complaint to add a Carmack claim; jurisdiction has to exist at the time of removal, not later. Florida's attempt to argue diversity of citizenship was also unavailing because it did not show complete diversity-it did not provide evidence of Pack & Load's citizenship, even though Pack & Load had settled, it was still part of the case until actually dismissed, something that had yet to happen. The first amended complaint did not allege damages in excess of $75,000. Even though the second amended complaint with the Carmack claim alleged a $100,000 loss, that allegation did not exist at the time of the removal. The Court acknowledged that Florida could try a second removal following remand because of the Carmack claim, but it remanded the case anyway.

Freight Charges

20. Cassidy's Transfer & Storage Limited v. 1443736 Ontario Inc. Operating as Canada One Sourcing and the Attorney General of Canada, 2011 ONSC 2871 (CanLII) Ontario Superior Court

Background: The plaintiff carrier transported several million dollars of socks from North Carolina to Canadian Forces bases in Montreal and Edmonton. Invoices for freight charges exceeding $50,000 went unpaid by the shipper, Canada One Sourcing ["Canada One"] who went into bankruptcy. Canada One had entered into a contract with the Canadian government to supply the socks and in this capacity it had procured the carriage services in question. The freight costs were included in the price of the product which was paid by the government after the various consignees confirmed the safe delivery of the product at destination. The majority of the bills of lading were marked 'freight prepaid'.

Issues: What was the effect of the 'freight prepaid' language? Did this amount to a waiver of some sort by the carrier preventing it from seeking payment from the consignees?

Opinion: S. 2 of the Canadian Bills of Lading Act provides:

> *Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with the consignee. [Emphasis added]*

The Court ruled that on the facts the 'freight prepaid' language did not amount to a waiver of the carrier's 'protection' on s. 2. The Court affirmed that this section provides a presumption that a consignee can be held liable to pay freight charges, which can be rebutted by the consignee proving both the existence of some arrangement by the carrier whereby the shipper alone would be held responsible for the charges and that the carrier had waived the protection of s. 2. This waiver may be express or implied and may come about if on the facts a consignee reasonably interprets and relies on 'freight prepaid' language as meaning that in fact the carrier had been paid for the freight. The Government of Canada was ordered to pay the unpaid freight charges.

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21. Gaines Motor lines, Inc. et al., v. Klaussner Furniture Industries, Inc., Salem Logistics Traffic Services LLC, and Salem Logistics, Inc., 2011 U.S. Dist. Lexis (M.D.N.C. 2011)

Background: Plaintiff motor carriers transported furniture from Klaussner's furniture factory in North Carolina to various cities across the United States. Prior to the time period at issue in this case, Klaussner had contracted directly with plaintiffs and paid them directly. Beginning in August of 2007 and extending until January 2009, Klaussner contracted with Salem Logistics, Inc. to take over Klaussner's transportation business. Plaintiffs brought this action to recover the costs of transporting shipments of Klaussner furniture during the time period that Salem was handling Klaussner's transportation business. This matter came before the Court on: (1) the summary judgment motion filed by Klaussner; (2) the motion for partial summary judgment as to liability filed by Plaintiffs; and (3) the motion to strike filed by Klaussner.

Issues:

- Would the non-recourse clauses contained in the bills of lading for each shipment prevent the plaintiffs from recovering freight charges?
- Could Plaintiffs avoid the effect of such clauses due to the "prepaid" notation on the bills of lading or the course of dealing between the parties prior to Salem becoming involved?
- Was Klaussner liable for Salem under agency theories?
- Was Salem liable to Plaintiffs (as third-party beneficiaries) for breach of contract between Klaussner and Salem?

Opinion: The Plaintiffs relied upon Jones Co. v. Teledyne, Inc., 732 F. Supp. 490 (D. Del. 1990) to support their position that a bill of lading marked both "prepaid" and "non-recourse" binds the shipper to pay for the line haul freight charges. In that case, the applicable tariff required the shipper to guarantee payment of the shipping charges if the third party failed to do so and prohibited a third-party billing situation even if the non-recourse provision was signed. However, because Plaintiffs did not contend that a tariff similar to the one in Jones applied in this case (as well as other factual distinctions), the Court found this argument unpersuasive. In addition, there was evidence establishing that plaintiffs had been advised by Klaussner prior to making the disputed shipments that Salem would be a third-party payer. In fact, the most recent course of dealing showed that Plaintiffs sent invoices to and were paid by Salem, not Klaussner. The Court also rejected Plaintiffs' contention that Salem was acting as an agent of Klaussner and that the contract between Klaussner and Salem was executed for the direct benefit of the Plaintiffs. Accordingly, Klaussner's motion for summary judgment was granted, Plaintiffs' motion for partial summary judgment was denied and Klaussner's motion to strike was dismissed as moot.

22. Minsa Corporation v. Almac Systems Transport, Inc., et al., 5:09-CV-275-C (N.S.Tex. 6/10/2011)

Background: This is a ruling on over 50 different motions and filings in a broker/ carrier/secured party payment case filed as an interpleader action by Minsa, which also deposited $347K into court. Minsa produced grain products used to make food products. It hired Bravos Logistics, a broker, to arrange for the transportation of its goods to its customers. Bravos used a number of carriers to do so, received the bills from them to which it added its brokerage commission and billed Minsa. Minsa paid Bravos for some of the bills, but Bravos did not pay the carriers, which are now seeking payment from Minsa. At some point, Bravos ceased doing business and essentially disappeared. While it was still in business, Bravos had entered into a factoring or cash flow agreement with the First National Bank of Bronte (Bronte), which filed a UCC-1 with respect to its interests. Bronte was acquired by the First National Bank of Sterling City Texas (FNB), which entered into a separate agreement with Bravos to either purchase Bravos' interest in certain invoices or to obtain a security interest in invoices that Bravos had billed to Minsa. FNB claimed ownership or secured status in the invoices that Bravos billed to Minsa and the funds Minsa had deposited. The carriers also claimed the funds under a constructive trust theory, challenged FNB's secured status in the entire amounts of the invoices (versus Bravos' portion of them) and, in the alternative, claimed that if FNB owned the invoices, it was obligated to pay them. Minsa just wanted to know who to pay to avoid double payments. Everyone wanted attorneys' fees.

Issues: Were the carriers entitled to be paid for their charges by the shipper or the bank that had acquired the broker's interest in the invoices? Did the shipper protect itself from paying both the

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carriers and the bank through its interpleader action? Were attorneys' fees available?

Opinion: The court found that federal case law and regulations required that the carriers be paid by either the shipper or, if FNB owned the invoices, by it and granted the carrier's motions for summary judgment with respect to such payments, there being sufficient funds to pay those amounts deposited into court. The court further found that the amount representing Bravos' fees was due to FNB. The court, however, refused to find that this eliminated all of Minsa's, the shipper's, potential liability and left for trial the issue of whether or not Minsa would also have to pay FNB the full amount of the invoices if FNB owned those invoices. Finally, the court denied everyone's motions for attorneys' fees, but, in a subsequent ruling, left this issue open for another day.

Carrier/Broker/Freight Forwarder Issues

23. AIG Europe, N.V. v. UPS Supply Chain Solutions, Inc., 2011 U.S. Dist. Lexis 14530 (S.D.N.Y. 2011)

Background: In this subrogation action, AIG asserted contract, bailment and tort claims against UPS arising out of damage to an x-ray machine during shipment from the Netherlands to Texas. UPS moved for summary judgment in regard to the tort claim and for partial summary judgment as to liability, as it argued that pursuant to a contract between the shipper, Philips Medical Systems Nederland, B.V. (*Philips*) and UPS, its liability was limited to $5 per pound. AIG cross-moved for summary judgment, and argued that there was no enforceable agreement between Philips and UPS as to liability, and in any event any such limitation would be unenforceable under the Carmack Amendment.

Issues: Did the Philips' Request for quote (*RFQ*), and Emery Air Freight's (*Emery*) response constitute a binding agreement? Was UPS acting as a carrier or a broker?

Note: Emery later became Menlo World Wide Logistics, which in turn was purchased by UPS.

Opinion: Even though Philips' RFG did contain a reference to its current coverage of $5 a pound, the court determined that nothing in the RFQ suggested that Philips was offering to be bound by that limitation. The Court added that while Emery's response indicated a willingness to perform subject to such coverage, it also made clear that further negotiation would be necessary before an agreement could be reached. Ultimately, the Court denied both parties motions in regard to liability, as it concluded that there were genuine issues of material fact as to whether an enforceable agreement had been entered into. The court was also unable to determine whether UPS' role in the shipment was as a carrier or as a broker. As such, AIG's cross-motion for summary judgment in this regard was also denied, as the applicability of Carmack and the material deviation doctrine could not be determined as a matter of law. Finally, UPS' motion for summary judgment as to the tort claim (arguing it was time-barred) went unopposed and was granted.

24. Harang v. Delta Moving, 2011 W.L. 1103650 (S.D. Tex.)

Background: This case involves a household goods shipment from Mobile, Alabama to Houston, Texas. Delta issued a binding estimate for the move. When Delta arrived to pick up the goods, the shipper tendered substantial additional goods. When Delta raised the price on the shipment, Plaintiff refused to pay for the shipment, and Delta put the goods in storage. Plaintiff sued Delta in state court, alleging state and common law claims. After Defendant removed, Plaintiff amended to allege only state Deceptive Trade Practices claims and moved to remand.

Issues: The issue in the case was whether Delta was a broker or a carrier for purposes of Plaintiff's Deceptive Trade Practices claims.

Opinion: Plaintiff argued Delta was a broker based on the Defendant's FMCSA registration as a household goods broker. The court found that because Plaintiff tendered the household goods to Delta for interstate transportation, Delta was acting as a motor carrier under Carmack. The court dismissed the Deceptive Trade Practice claims and granted Plaintiff leave to amend and state a Carmack claim.

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25. Susan D. Sperl, Individually and as Executor of the Estate of Joseph G. Sperl, v. C.H. Robinson Worldwide, Inc., 946 N.E.2d (App. Ill. 2011)

Background: Plaintiff, individually and as executor and administrator, filed suit against CHR (among others) for wrongful death and personal injuries sustained due to a van operator's (DeAn Henry) negligent operation of a tractor-trailer. At trial, the jury concluded that CHR was vicariously liable for Ms. Henry's actions based on agency principles. On appeal, CHR argued that the evidence failed to establish an agency relationship, and the trial court erred in refusing to allocate fault with Henry and the motor carrier she was employed by/contracted with, Toad L. Dragonfly Express (*Dragonfly*).

Issues: Was CHR acting as a motor carrier or as a broker in this instance? Did an agency relationship exist between CHR and Henry?

Decision and Result: Despite the fact that CHR and Dragonfly had entered into a contract carrier agreement, this shipment was not dispatched by Dragonfly. Rather, Henry contacted CHR directly and requested a load, as Dragonfly allowed Henry to use its carrier authority to book and deliver shipments on her own (and she kept all profits under these circumstances). CHR sent Dragonfly a load confirmation sheet (*LCS*) that included instructions for the driver to call CHR for dispatch. The LCS also included other "Driver Special Instructions," including fines for late delivery or failing to call CHR dispatch for various reasons within specified time frames. As such, Henry testified that throughout the trip, she was in constant contact with CHR. She also testified that had she successfully made delivery, CHR would have directly deposited her payment into her personal account. The Appellate Court determined that the weight of the evidence supported the jury's finding that CHR controlled the manner of Henry's work performance (and presumably that CHR was acting as a motor carrier). The Court also gave significance to the fact that the nature of CHR's business was directly related to Henry's services. Other factors that supported the jury's verdict included CHR controlling the manner of payment and providing the materials (potatoes) for delivery (even though Henry owned the vehicle). Finally, the Court determined that the finding of an agency relationship eliminated the possibility of comparing conduct for the purposes of apportioning liability. Judgment affirmed.

Note: The Court stated that v "CHR's special instructions included the potential for multiple fines and forced Henry to violate federal regulations in order to avoid them." One has to wonder how much this conclusion swayed the Court's reasoning.

Damages

26. Crompton Greaves, Ltd. v. Shippers Stevedoring Company, 2011 U.S. Dist. LEXIS 23584 (SD Tex. March 9, 2011)

Background: This case arises from the shipment of a power transformer from India to Tuscon, Arizona. Plaintiff, the manufacturer, hired National Shipping Company of Saudi Arabia (*NSCSA*), which issued a bill of lading containing a Himalaya clause for the transformer that showed delivery in Houston. The Plaintiff separately hired Alomex, a freight forwarder, to arrange for the transportation from Houston to Tuscon. Alomex hired Shippers Stevedoring (*Stevedoring*), which provides stevedoring services in Houston, Texas, to transfer the transformer to the railroad, which moved the transformer to Tuscon under its bill of lading, which included a $25,000 limitation of liability and a nine month claim filing requirement. After the transformer was delivered in damaged condition, plaintiff sued Stevedoring, alleging that it was responsible for damage to the transformer on the basis of recordings from a shock-log device that recorded three shocks while the transformer was in Stevedoring's control. Stevedoring filed a third-party complaint against Union Pacific for indemnification and contribution, as a result of a fourth shock that occurred while the railroad was carrying the transformer from Houston to Tuscon. After the loss was discovered, the plaintiff and a non-party spent over $700K to transport the transformer for repairs and over $2 million to rebuild the transformer that had an alleged invoice value at the time of loss of approximate $1.3

Issues: There are multiple issues in this case, including: (1) Was Stevedoring entitled to rely on the Himalaya clause in the NSCSA bill of lading? (2) Was the plaintiff able to recover amounts in excess of the fair market value of the damaged transformer that were spent to repair it? (3) Did the nine month claim filing requirement apply to the contribution and indemnification claim by a non-party to the bill of lading? (4) Did the liability limitation in the bill of lading apply to the contribution and indemnification claim limiting the railroad's liability?

Opinion: (1) The court found that Stevedoring was not entitled to rely on the Himalya clause in the NSCSA bill of lading because it had been retained by Alomex to handle the domestic portion of the shipment, not through NSCSA. (2) After a lengthy discussion of the law on mitigation of damages in Texas, the court found that the law in Texas was not clear as to whether a party who reasonably but unsuccessfully attempted repairs in an effort to mitigate damages was entitled to an amount in excess of the fair market value of the damaged goods. (3) The time period contained in the railroad bill of lading for filing a claim did not apply to a third-party indemnification and contribution claim. (4) The liability limitation in the bill of lading did apply to that claim.

Miscellaneous

27. State Sales Taxes—New York and New Jersey Tax Department Materials

Background: Many states assess sales and use taxes on warehouse storage of personal property. Household goods motor carrier associations in some states have challenged taxes on interstate storage-in-transit (SIT) services under tariffs and other transportation agreements with shippers.

Issues: Are state sales taxes on SIT services barred by 49 U.S.C. §14501(c)(1) that preempts state laws relating to motor carrier "price, route or service"?

Opinion: New York and New Jersey take different positions on whether sales and use taxes on interstate SIT services are barred by FAAAA and Section 14501(c)(1) preemption of state laws relating to carrier rates, routes and services. New York maintains there is no federal preemption of sales taxes on SIT services because such taxes are not the kind of economic regulation targeted by the FAAA. Take a more nuanced approach, New Jersey also denies that FAAA preemption applies to sales taxes, yet agrees not to tax storage during the contractually agreed interstate SIT period, but further contends that after SIT expires the "full period" of storage is subject to sales taxes retroactively.

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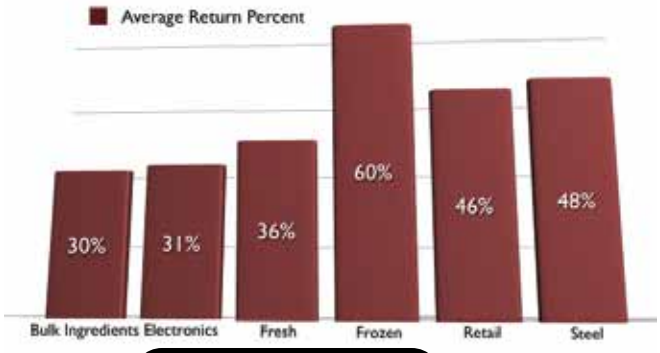

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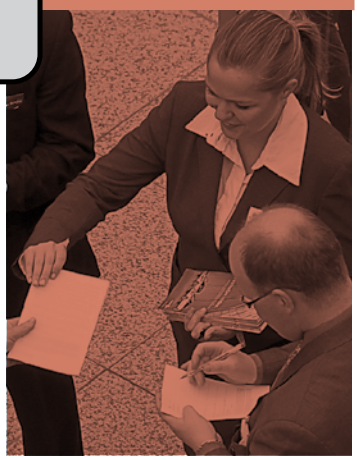

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