In Transit

Transportation Loss Prevention & Security Association

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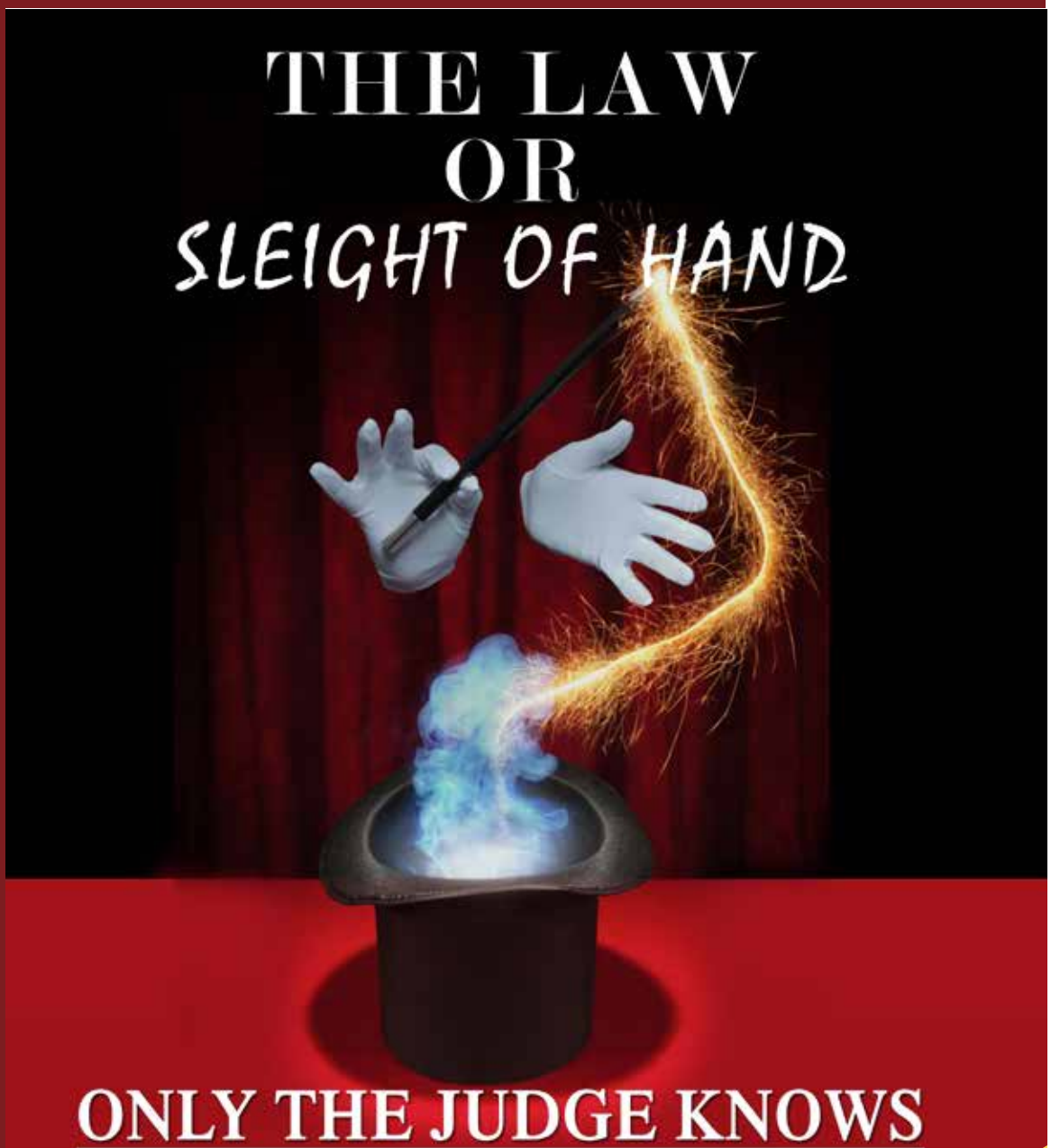
In This Issue...



Transportation
Loss Prevention and
Security Association

155 Polifly Road
Hackensack, NJ 07601

201-343-5001
201-343-5181 FAX

William Bierman
Executive Director

wbierman@nakblaw.com

See Centerfold for Carrier's Claim Survey

CAN YOU PREDICT WHICH HAND THE DECISION IS IN?

By: William D. Bierman - Executive Director

"In fiction: we find the predictable boring.
In real life: we find the unpredictable terrifying."
- Mokokoma Mokhonoana

In the legal profession we like to give our clients some measure of predictability especially if the law appears basically settled. Therefore it is terrifying when a court renders a decision outside the scope of predictability. So it was with the recent Fourth Circuit Court of Appeals split decision in ABB Inc v CSX Transportation , 721 F. 3d 135 (2013).

While some of the facts of the case were unique, the existing law would have seemed clear. The facts are as follows:

An electronic transformer worth $550,000 was damaged in transit from Missouri to Pennsylvania. The parties did not dispute liability but contested the amount of damages. CSX had a limitation of liability. Two documents controlled the analysis: ABB's BOL and CSX's Price List. The ABB BOL, prepared by ABB's traffic manager, stated that the product value was $1,384,000, although the declared value section was left blank, apparently due to a feature of the computer program used to prepare the BOL. The BOL stated that where the rate is dependent on value, shipper must state it specifically in writing in the declared value section. It also stated the services are to be subject to the terms and conditions of the Uniform Domestic Straight Bill of Lading as specified in the Uniform Freight Classifications, and that it is subject to the "Classifications and Lawfully filed tariffs in effect on the date" of the BOL. CSX's Price List stated liability is limited to $25,000, and full liability coverage is only available by calling the sales representative for a specific quote. ABB's traffic manager testified that he could never obtain CSX's Price List in advance and could not find it on their website.

The District Court held that the parties limited liability to $25,000 in the bill of lading. The parties entered into a consent judgment, reserving ABB's right to appeal.

The Fourth Circuit concluded CSX is liable for the full value of the shipment under 49 U.S.C. § 11706, and the parties did not modify the level of liability by a written agreement permitted under Carmack.

What becomes perplexing is the court's observation as follows:

We also recognize that ABB could have prevented many of the problems that occurred in this case not only by properly negotiating the shipping rate, but also by revising its standardized bill of lading to exclude outdated references to "tariffs" and "classifications" that were part of the pre-1995 regulatory scheme.

These two bewildering comments were seized upon in the dissent where Judge Agee schools the majority on the fact that post-deregulation "tariffs" are still in existence and are a commonly used document in the transportation of goods. Moreover, the dissent points out as the Eleventh Circuit stated in Sassy Doll & Werner, the Court's sympathy should "not go to the drafter of a bill of lading who blames another party for the results that flow from defects in that document". Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc., 331 F. 3d 834, 841 (11th Cir. 2003). Werner Enters. v. Westwind Mar. Int'l, Inc., 554 F. 3d 1319 (11th Cir. 2009).

While the dissent comes to the correct conclusion that the Bill of Lading incorporated the CSX Price List and its limitation of liability and fully complies with the Carmack Amendment as a "written agreement between the shipper and the carrier," with regard to the concept of tariffs the court could have easily referred to the Carmack Amendment 49 USC ¶ 14706 (c) (1)(B) wherein the statute states:

(B) CARRIER NOTIFICATION.—If the motor carrier is not required to file its **tariff** with the Board, it shall provide under section 13710(a)(1) to the shipper, **on request of the shipper**, a written or electronic copy of the classification, rules, rate, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, **classification, rules, or practices.** (emphasis supplied)

This section of the statute was changed after Congress initiated deregulation in the shipping industry and in 1994 drastically limited the Interstate Commerce Commission's role in regulating interstate shipments and, in particular, eliminated the requirement that tariffs or classifications be filed with the Commission pursuant to The Trucking Industry Regulatory Reform Act of 1994 (TIRRA). In response to shipper arguments that they were no longer bound by tariffs and classifications as those documents no longer had to be filed with the Commission, Congress enacted this new provision requiring that carriers make available to the public, "on request," the terms of any tariff, classification, or similar schedule governing interstate freight shipments.

Shippers had vociferously clamored that the carrier should have to provide classifications, tariffs and the like to the shippers on every shipment as a matter of course. Nevertheless, Congress determined it was better practice to put the burden on the shipper to request shipping information from the carrier. If the carrier failed to produce the requested documents, the shipper was not bound. On the other hand if the shipper did not request those documents, the shipper was bound whether or not the shipper was aware of their contents. Furthermore, as indicated in the very important House Conference Report 104-422 (1995) the intention was to replicate as closely as possible the practical situation which occurred prior to the enactment of TIRRA which allowed carriers to limit their liability based on tariffs and classification as well as based on other documents incorporated by reference.**

With a divided court in ABB and a divergence in the Circuits, a Petition for Certification from the Supreme Court seemed likely to be granted. Unfortunately, the Supreme Court denied Certification without opinion. So it is left for us to continue to explain to the court in every case in explicit detail how and why carriers may limit their liability and incorporate documents by reference.

Had the majority in the ABB case listened to the dissent or had the majority reviewed the House Conference Report as well as the current statute, or had the Supreme Court resolved the problem completely, the legal community would have received what all attorneys seek.....predictability. As it stands now we have terrifying unpredictability as one cannot predict which hand the decision is in.

****For an excellent review of this issue in more detail:**

See:

WESLEY S. CHUSED, **THE EVOLUTION OF MOTOR CARRIER LIABILITY UNDER CARMACK AMENDMENT INTO THE 21ST CENTURY,** TRANSPORTATION LAW JOURNAL, VOLUME 36, NUMBER 2, SUMMER 2009,177.

TAKE TWO "MAY BE" ADULTERATED ASPIRIN AND CALL YOUR LAWYER IN THE MORNING!

By: Thomas C. Martin, Esq.
Nowell Amoroso Klein Bierman, P.A.
155 Polifly Road
Hackensack, NJ 07601
(201) 343-5001
tmartin@nakblaw.com

This article explores, the FDA "may have" been adulterated standard against the Carmack "actual loss or injury" standard and ways to try to avoid the issue in the first place.

Picture this!

You are a lawyer in a Courtroom advocating for your client. Your client is a motor carrier facing a lawsuit for millions of dollars in a cargo damage case. The freight is a truckload of generic aspirin, which the plaintiff insurance company asserts may have been adulterated under FDA regulations and statutes. There is no proof the freight was actually damaged. Among other things, your client is taking the position there can be no liability because there was no actual damage to the freight.

It is at this point the Judge stops the oral argument of counsel. The Judge, with all the trappings of the Court, peers over the colossal bench and says, "Counsel, would you let your mother take this aspirin?"

What do you say?
Of course, there is no correct answer to this question.
Answer "no," and you lost the case.
Answer, "yes" and you are a bad son or daughter and, on top of that the

Judge will make sure you lose the case.
The only solution is to avoid the situation in the first place.
How does a carrier go about doing that?

Among other things, it would appear adjusting limits of liability in your tariff (or in a negotiated contract subject to the tariff) to reflect a bargained-for allocated risk among the parties would be the most cost-effective solution when a Plaintiff claims loss due to the FDA "may have" been adulterated standard in the face of the Carmack "actual loss or injury" standard.

Most carriers have a released rate or a limitation of liability based on value of the freight. Of course, if the shipper chooses not to declare the value, then the released rate

establishes a set rate agreed-upon by the parties. Other components going into a released rate is the weight of the cargo and the type of commodity being transported, as well as a variety of other factors. The limitation of liability or released rate is also normally capped at a per truckload level.

For example, one common type of released rate in a tariff may include language as follows:

> Goods are released at a value of [for example] $0.25/lb. up to a maximum of [for example] $250,000.00 per truckload.

Add or subtract as many zeroes as you like to this example to make it relevant for your purposes. Words in the tariff to this effect have been in place for decades.

The issue presented under the FDA "may have" been adulterated standard is what happens when you have no proof of "*actual* loss or injury" to the freight as required by Carmack.

For example, under Food and Drug Administration Regulations and statutes, specifically, 21 U.S.C. § 342(a)(4):

> A food shall be deemed to be adulterated:
>
> if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it ***may have*** been rendered injurious to health.

On the other hand, under Carmack, the "*actual* loss or injury to the property caused by [a carrier]" is recoverable. 49 U.S.C. § 14706 (a)(1).

This is the proof necessary under the Carmack Amendment to the Interstate Commerce Act. 49 U.S.C. § 14706. If the shipper has no proof of "actual loss or injury" the carrier should win.

Right?

Wrong if you are talking about the FDA cases and the amorphous "may have" been adulterated standard.

Think about it. Anything "may have" been adulterated. In a sense, the FDA Regulations sharply conflict with and re-write Carmack.

But we can avoid the matter entirely, at least on an economic basis.

Looking at the Tariff (or contract for that matter), there is no reason why a carrier cannot bargain with a shipper to focus the limitation.

For example,

> Goods are released at a value of [for example] $0.25/lb. up to a maximum of [for example] $250,000.00 per truckload *except for goods that the shipper claims or asserts may have been adulterated under any statute or FDA Regulation, including but not limited to 21 U.S.C. § 342and/or 21 CFR § 211.204, or any other similar statute or FDA Regulation regarding the condition of freight subject thereto, in which case, the released rate is [for example] $0.10/lb. with a maximum truckload liability of [for example] $25,000.00.*

Of course, the actual numbers may have to be augmented to fit your specific needs. The limitation may also affect the carrier's freight rate. But that is what planning is all about. Addressing and anticipating risk and allocating that risk between 2 or more parties. Under a tariff limitation, as a shipper, you are, at least arguably, under less of a burden to prove "actual loss or injury" as per Carmack because the FDA Regulations say only "may have" been adulterated.

While the FDA regulations show a significant departure and shift away from the normal Carmack regime in favor of a shipper, there is no reason why the Carrier cannot allocate that risk and account for it in its tariff with a lower released rate or truckload imitation.

Based on a risk allocation, a limitation capped when a claimant asserts a claim as "may have" been adulterated under the FDA Regulations may be the right answer to the question from a purely economic standpoint.

Which brings us back to the Judge peering down at you from over the bench.

The real answer to the question posed at the beginning of the article is neither yes or no.

The real answer is none of the above.

One could argue the "may have" been adulterated question really should relate to the allocation of risk in the deal *between the shipper and the consignee*.

The FDA Regulation and statutes govern whether either the shipper or the consignee can put the aspirin in this example back into the stream of commerce and/or whether it can be salvaged at all or needs to be destroyed.

But an argument can be made that issue should not bear on the motor carrier.

After all, liability of a carrier is governed by Carmack, as it has been for over 100 years for one simple reason, it works. The FDA "may have" been adulterated standard is in direct conflict with Carmack's proof of "actual injury or loss" standard. This begs the question as to what level of proof of "may have" been adulterated meets the "actual

injury or loss" standard. Is one scuff on one box enough? What about creasing to a box where the contents are inside multiple layers of boxes that are all uncreased?

These proof issues can be costly in terms of experts and testing which may destroy the freight in any event. Either way, it will cost the carrier counsel fees and costs just to win or, conceivably, lose. This is a true Catch – 22, which is defined as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." Heller, Joseph (1961), *Catch-22*. New York: Simon and Schuster. Merriam-Webster.com. http://www.merriam-webster.com/dictionary/catch%2022.

Because it is impossible to predict what the Court may do in any given case, one practical solution to the problem is to plan ahead and address it in your tariff or contract as the case may be.

Law aside, if a Judge is going to ask that question, it means the case is over anyway because the Judge may be caught up in a misguided notion of "equities" instead of focusing on Carmack's "actual loss or injury" standard governing a carrier as opposed to the FDA "may have" been adulterated standard.

The case law is all over the map and is very fact specific. Some courts have found the carrier liable. Others found the carrier was not liable. Still other courts found the existence of questions of fact mandating a full blown trial.

A short list of some of the more recent cases bears this out. Aurora Organic Dairy Corp. v. Western Dairy Transport,2013 WL 5636671 (W.D. Mo. 2013)(finding question of fact whether milk was contaminated); SunOpta Global Organic Ingredients, Inc. v. C.H. Robinson Worldwide, Inc., 2011 WL 1532063 (E.D. Wash. 2011)(applying negligence standard to freight broker on allegations of contaminated apple juice concentrate); Preferred Shippers, Inc. v. Triple T Transport, Inc., 2008 WL 2556941 (S.D. Oh. 2008)(involving inspection of freight and applying Carmack "actual loss or injury" standard); Land O' Lakes, Inc. v. Superior Service Transp. of Wisconsin, Inc., 500 F. Supp. 2d 1150 (E.D. Wis. 2007)(applying Carmack actual damage standard to allegedly contaminated butter). This not an exhaustive list of cases as there are many, many others in this area.

Of course, defending claims asserting the freight "may have" been adulterated under FDA Regulations and statute can be a costly proposition. There is no guaranty a Court will apply the law as written as opposed to getting caught up in a shipper's argument about the nature of the freight and whether you would let your mother consume the subject product.

Normally, most such cases of "*may* have" been adulterated goods have no proof of "actual injury or loss" and as such should be dismissed as they relate to the carrier.

If there is actual proof the freight "*is* . . . adulterated," through testing or the like, then the carrier is dealing with an otherwise normal Carmack Amendment case. The issue is one of proof of "actual loss or injury" in the "*may* have" been adulterated cases.

The FDA Regulation and statute are designed to keep certain foods and drugs from being salvaged and thus re-introduced into the stream of commerce and consumed.

Naturally, the shipper asserts it does not have to prove anything other then the exceedingly low "*may* have" been adulterated standard.

At the same time, the shipper also still wants to use Carmack's liability regime against the carrier, only without proof of "actual loss or injury."

This is wrong and it turns the carefully balanced proof standard of Carmack on its head.

The shipper wants it both ways. The shipper, or more commonly its insurance carrier, which charged premiums and thus spread the risk among the policy holders in any event, wants to get paid full value without having to bother with salvage under the FDA Regulations.

One additional tool to utilize in defense of these types of cases is the tariff provision (or contract as the case may be) referred to at the beginning of this article. A tariff with a low limitation of liability tailored to the claim made under the FDA "may have" been adulterated standard can remove a Plaintiff's economic incentive to litigate if the damages are capped at, for example, $25,000.00 per truckload, or less, as the case may be.

This preplanning removes a powerful economic incentive shipper's lawyers try to exploit and leverage – the risk the carrier could be liable for potentially millions of dollars without proving any of the normal Carmack "actual injury or loss" standards.

The trade off is between a lower released rate in the tariff for claims involving the lower proof standard of "may have" been adulterated. A tariff change (or contract) along the lines set out above strikes a fair balance. In this way, a carrier and a shipper may be able to agree on ways of dealing with a problem before it burgeons into a potentially unmanageable situation or litigation that could impact the ability to conduct business with the same shipper in the future.

Regarding testing, perhaps the tariff or contract could specify that in the event of testing, if there is no adulteration, then the shipper pays for the testing and the carrier does not pay the claim. On the other hand, if testing confirms there was adulteration of the product, then, in that case, the carrier pays for the testing and pays the claim. In this sense, if you can plan ahead and allocate the risk, there is no need to "cry over spilled milk" later on.

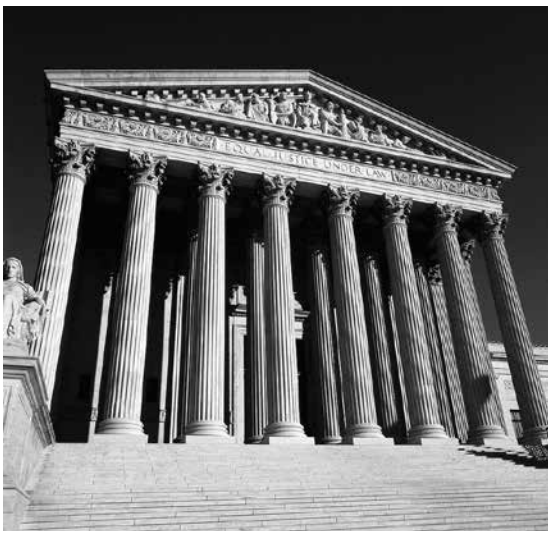
If enough carriers adopt similar tariff provisions or contract language, it can serve to raise the bar, change industry and possibly put an end to the uncertainty of the "may have" been adulterated claims made with no proof.

If all of this is giving you a headache, try some "may" or "may not" have been adulterated aspirin but do not give it to you mother or you will lose the case even if she survives. Nevertheless, I think it is safe to assume no Judge would ask if you would allow your mother-in-law to consume the "may have" been adulterated aspirin – but that is another story.

Recent Court Cases

as analyzed by the Conference of Freight Counsel

Vic Henry, Esq. , Chairperson and Ken Bryant, Esq., Vice-Chairperson



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1. BBC Chartering & Logistic GmbH & Co. KG v. Gulf Stream Marine, Inc., 2013 WL 1415106 (S.D.Tex. 2013). BBC entered into a Booking Note to provide ocean carriage of a Crane from Houston to Chile on BBC's vessel. The shipper, MariTrans, hired Anderson Trucking to deliver the Crane to Gulf Stream's Manchester Terminal for loading onto BBC's vessel. Because of an impending hurricane, BBC's vessel did not arrive at the Port of Houston when scheduled. The extreme flooding caused by Hurricane Ike damaged the Crane. The consignee and insurer of the Crane filed an arbitration proceeding in Chile against BBC and Maritrans. BBC settled the claim in Chile for $150,000.00. BBC then filed this lawsuit seeking indemnity from Gulf Stream. BBC did not assert a claim for damage to the Crane, only a claim for indemnity for the arbitration settlement. Gulf Stream sought summary judgment on its affirmative defense that the damage to the Crane was the result of an "Act of God" and summary judgment that the COGSA statute of limitations and per package limitation apply. BBC sought summary judgment on its indemnity claim.

Issues: Whether the act of God defense applied, whether COGSA applied and whether BBC provided sufficient notice of the arbitration proceeding to prevail on its indemnity claim.

Holding: To prevail on its act of God defense, Gulf Stream must show "that (1) the loss was due directly and exclusively to an act of nature and without human intervention, and (2) no amount of foresight or care which could have been reasonably required could have prevented the injury. The court held that a material fact issue remained on the amount of Gulf Stream's foresight or care. Because BBC maintained, and the court accepted, that BBC was not asserting a cargo claim, but rather only an indemnity claim, the court denied Gulf Stream's motion on COGSA. The court also found a fact issue on BBC's claim that it provided adequate notice of the arbitration, and consequently denied BBC's motion.

2. Catlin Insurance v. China Southern Airlines, 2013 US Dist Lexis 36544, 2013 WL 1112245 (N.D. Ill). The shipper hired the air carrier to transport 980 pigs from Illinois to China. In turn, the air carrier engaged another carrier to transport the porcine cargo. The pigs were transported pursuant to an air waybill that said the transport of the pigs was governed by the Montreal Convention. The carrier provided the subcontracting carrier with a "Declaration of Indemnity" relieving the subcontracting carrier from liability for death, injury or illness of the pigs in transit. The carrier further indemnified the subcontracting carrier for any expense incurred in connection with the transport of the pigs. The shipper did not know anything about the indemnity agreement. 180 pigs perished during the flight. The shipper's subrogating insurer sued the carrier. The shipper's claim was framed in part as breach of contract for providing the subcontracting carrier a blanket immunity without the shipper's knowledge or consent.

Issue: Can the shipper's breach of contract claim against the carrier proceed?

Holding: The carrier had no authorization to issue a "Declaration of Indemnity" on behalf of the shipper. The Montreal Convention does not preempt this breach of contract claim. However, the carrier can still raise the Montreal Convention as an affirmative defense to this lawsuit. The carrier's motion to dismiss the breach of contract claim is denied. The lawsuit will proceed.

Comment: The judge indicated that the Declaration of Indemnity would be invalid on the merits, because the treaty renders null and void any contract provision that relieves a carrier of liability. Thus, a likely outcome of this case could be that even if the carrier committed a breach of contract by issuing the Declaration of Indemnity, the Declaration of Indemnity is null and void anyway, and the carrier will have capped liability towards Shipper as per the air waybill. Another issue (not mentioned in this decision) is the question of who bears the expense associated with removing the pig carcasses and arranging for the disposal of pigs.

3. Clevo v. Hecny Transportation, 2013 US App. Lexis 8511, 2013 WL 1777030 (9th Cir.). Shipper sold computer parts to Consignee. Shipper engaged Carrier to transport the goods via ocean. Shipper wanted to be sure that Consignee paid for the goods. Shipper and Consignee agreed that Consignee must present the original bills of lading to Carrier before Carrier would release the goods to Consignee. Shipper took measures to protect its right to payment and to formalize Carrier's role in this process. Shipper sent Carrier a document called a "Guarantee Letter," which in essence said: "You will not release any shipment to Consignee until (1) you have received the original bills of lading from Consignee, and (2) you have received my written fax permission. You will compensate me for any damage if you break this rule." Carrier signed the Guarantee Letter. At destination, Carrier released the goods to Consignee even though Carrier did not receive the original bills of lading from Consignee, nor did Carrier receive Shipper's permission slip. Consignee never paid Shipper, and Consignee filed for bankruptcy. Thirteen months later, relying on the Guarantee, Shipper sued Carrier for the purchase price of the goods ($2 million).

Issue #1: Is Carrier bound by the Guarantee?
Held #1: Yes. This document was binding.

Issue #2: Is Shipper's lawsuit time-barred?
Held #2: Yes. This was a case of misdelivery. Carrier's error in releasing the goods to Consignee without first obtaining the original bills of lading and without obtaining

Shipper's permission is a misdelivery. The ocean bill of lading had a one year statute of limitations for misdelivery. The bill of lading had a Himalaya clause and it flowed down to the carrier in question. Shipper did not file the lawsuit until 13 months had elapsed. Shipper's lawsuit was too late. Case dismissed.

4. Liberty Mutual v. The Boldt Co., 2013 U.S. Dist. LEXIS 22723, 2013 WL 632254 (N.D. Ga. 2013). The defendant was a rigger hired by a paper towel manufacturing company to block and brace a wrapper machine on trailers for transport from Wisconsin to Georgia. The machine was disassembled and loaded onto two trailers. The parts loaded into one trailer were chocked. The parts loaded in the second trailer were secured by pallets. The rigger was paid $2,100 for its efforts to "move and load and secure properly [the machine] in two trailers". Thirty miles from the final destination in Georgia, the driver slammed on his brakes to avoid an oncoming car, resulting in damage to the parts which had been chocked. The cargo in the second trailer arrived undamaged. Because the shipper intended to sell the paper towels to Wal-Mart, and the order was past due, the shipper elected to purchase a new wrapper machine rather than repair the damaged wrapper for approximately $300,000.

Issue: Was the rigger liable?

Holding: The trial court denied the rigger's motion for summary judgment on the grounds that a genuine issue of material fact existed as to whether the parts were properly secured on the trailer. The court found as reasonable the plaintiff's expert witness testimony that the superior method of securing the parts was with pallets rather than chocking. Furthermore, the court determined that it would deny the motion for summary judgment as to damages but reserved the issue of the foreseeability of damages with regard to the purchase of a new wrapper.

Comment: Does Carmack apply to claims against a transportation rigger?

5. Union Pacific R.R. Co. v. Beemac Trucking, LLC, et al., 2013 U.S. Dist. LEXIS 32248, 2013 WL 886754 (D. Neb. 2013). UP and Beemac entered into a "Motor Carrier Transportation Agreement" (the "MCTA"), under which Beemac agreed to provide "motor carrier transportation services" for UP. The MCTA prescribed bill of lading contents and delivery requirements. In 2010, UP needed one of its grapple trucks moved from Kansas to Louisiana. Beemac submitted the winning bid, but did not have a truck available to carry the shipment. Beemac posted the job and received a response from a Landstar agent, and arranged to have Landstar handle the shipment. Pursuant to a carrier-broker agreement, Landstar agreed it would assume common carrier (i.e. Carmack) liability for actual loss, damage or injury to freight. Landstar picked up the grapple truck in Kansas. The truck was driven up ramps onto Landstar's trailer. Landstar's driver filled out a bill of lading that indicated the property was received in apparent good order. When Landstar's driver, Edling, arrived at the delivery site, someone showed up and helped him unload the grapple truck. After the man helped Edling unload the grapple truck, Edling left the truck's keys on its dipstick per prior dealings between the parties. At approximately 2:00 a.m., a UP train collided with the grapple truck, which was parked on the railroad tracks, and the truck was destroyed. UP contends the value of the truck was $268,689.33. UP sued Beemac and Landstar for negligence, contractual indemnity against Beemac, common law indemnity, breach of contract against Beemac and a claim under the Carmack Amendment. The parties filed cross motions for summary judgment.

Issues: Did Defendants violate the delivery terms, and did UP waive the delivery requirements? Can UP recover consequential damages? Did UP fail to provide adequate notice of the loss? Can UP recover attorney's fees? Are UP's state law claims preempted?

Holdings: Material questions of fact precluded summary judgment on whether a valid delivery of the grapple truck was effected; and assuming a valid delivery was effected, the extent of the "actual loss or injury" caused to the grapple truck as well as whether UP may recover any amount of damages for train delays and its FELA liability resulting from the train colliding with the grapple truck. The uncontroverted evidence in the record showed that UP provided the Defendants with sufficient notice of its Carmack Claim. UP's state law claims were preempted by the Carmack Amendment.
There is an interesting subsequent decision on expert witness testimony and motions in limine in this case, reported at Union Pacific R. Co. v. Beemac Trucking, LLC, 2013 WL 1821020 (D.Neb. 2013).

II. Limitation Period and Notice

6. Lexington Express Ins. Co. et al., v. Daybreak Express, Inc., 393 S.W.3d 242, 56 Tex. Sup. Ct. J. 233, 2013 Tex. LEXIS 68 (Tex. 2013). Shippers hired Daybreak Express to transport computer equipment from New Jersey to Texas. When the shipment arrived, the consignee claimed damage to the equipment. The consignee, Burr, contended that the damage totaled in excess of $166,000. Daybreak offered to pay less than $6,000. Burr then asserted a claim against the shipper, Supor, whose insurer, Lexington, paid Burr $87,500. As subrogee, Lexington sued Daybreak for breach of an alleged settlement agreement, not for damaging Burr's equipment. Specifically, Lexington alleged that Daybreak's adjuster had agreed to settle the claim in the amount of $166,655. Daybreak removed the case, alleging complete preemption under Carmack and the Hoskins decision. The court remanded the case, noting that Lexington brought no claims for damages to the goods. After remand, however, Lexington added a claim for damage to the goods. Daybreak raised the defense of limitations because more than four years had passed since Daybreak's rejection of Burr's claim. Lexington contended that all of the claims related back to the original filing under Texas law. The Court of Appeals, holding that the Texas relation-back statute applies to a Carmack

claim, held that the cargo damage and breach of settlement claims were based on wholly different transactions, one centering on the transport of Burr's equipment and the other on the existence of a settlement agreement. Accordingly, there was no relation-back and the Carmack claim was barred.

Issue: The Texas Supreme Court withdrew its decision reported in our January 2013 agenda and addressed whether the cargo damage claim and the breach of settlement claim both arose out of the same occurrence.

Holding: The cargo-damage claim and the breach-of-settlement claim both arose out of the same occurrence: Daybreak's shipment of Burr's computer equipment. The settlement was an effort to reach agreement on the damages recoverable under the Carmack Amendment. Although Lexington might recover on the breach-of-settlement claim without proving the amount of damage to the equipment, that damage was the basis for the settlement agreement. However, the claims arose out of the same occurrence and involved the same property damage. Accordingly, Lexington's cargo damage claim was not barred by limitations.

7. United Arab Shipping Co. v. Transworld Logistics Group, Inc., 2013 WL 845386 (N.J.Super.A.D.). The shipper engaged the carrier to transport autos and auto parts to Iraq in containers via ocean. (Actually, the Shipper was an NVOCC, because the NVOCC appeared as the shipper on the bill of lading.) The ocean carrier issued 23 bills of lading - one bill of lading for each container. The containers were unloaded in August 2008. The shipper determined that twelve containers were missing. Because of irregularities in the delivery process and in the paperwork, it was not clear where the missing containers were located. Some containers may have been detained by Iraqi Customs, and others may have wound up in the hands of an imposter consignee. In August 2010, the ocean carrier sued the shipper for $105,000 (the unpaid shipping charges). The carrier claimed that it delivered the goods and it deserved to be paid. The carrier responded that any irregularities in the shipping were beyond its control. The shipper counterclaimed for $1 million - the purported full value of the lost cargo and the lost containers. The counterclaim was styled as gross negligence, misrepresentation, breach of warranty, and indemnification.

Held: The shipper's counterclaim against the ocean carrier is governed by COGSA, which provides shipper's exclusive remedy. The statute of limitations is 1 year from the date of delivery. Thus, the limitations period expired, and the shipper's counterclaim against the ocean carrier for loss of cargo was filed after expiration of the limitations period. Regardless of the limitations issue, the ocean carrier's liability is capped at $500 per package or customary freight unit pursuant to COGSA. The court allowed the ocean carrier's suit seeking to recover shipping charges to proceed, commenting that if the carrier proves its entitlement to freight charges, then the shipper may be entitled to a defense of "recoupment," entitling the shipper to deduct from the shipping charges the amount of $500 per missing container. In other words, although limitations bars the shipper from asserting an affirmative claim for the cargo loss, under a "recoupment" defense, shipper might nonetheless deduct a capped amount from the transportation charges from the transportation charges that shipper may be required to pay carrier.

III. Limitation of Liability

8. Danner v. International Freight Systems, 2012 US Dist Lexis 1233, 2013 WL 78101, 90 Fed. R. Evid. Serv. 411 (D. Md). There were several shippers (a family) and multiple carriers, but for simplicity sake this summary will refer to shipper and carrier in the singular. Facts: Shipper had gone on a hunting trip to South Africa. Shipper killed several trophy quality male lions. The skins and skulls went by air from South Africa to Seattle, and then into Carrier's bonded warehouse. The skins were meant to be picked up for ground handling, but at some point in this process there was a mistake, and the items were lost. They were later found in a warehouse. The skins and skulls suffered irreparable damage due to moisture and bacteria. Shipper sued Carrier for $98,000, arguing that the trip and the trophies were unique, and requesting the Carrier to reimburse Shipper for the cost of the lion trophy fees assessed by the South African Government, airfare to South Africa, the amounts paid to guides and staff for 10 days, and the cost of dipping and packing of the skins and skulls. Carrier contended that its liability was capped by the Montreal Convention at 19 Special Drawing Rights per kilo, which worked out to $3,000 based on the weight of the skins and skulls. Shipper responded that the evidence indicated that the skins and skulls were lost in transit and languished in a warehouse for months, and the bacteria and moisture penetrated the skills and skull during time that the trophies were not being carried by air, and the treaty does not apply. The Carrier responded that the air waybill stated that the liability limits apply when the cargo is in the charge of the carrier or the carrier's agent. The warehouse was the Carrier's agent's warehouse. Thus, accepting for argument sake that the damage occurred during warehousing, the liability cap still applies. Article 18 of the Montreal Convention establishes a rebuttable presumption to this effect. The case was tried to the Court, without a jury. Held: The court held that the Carrier's liability was capped under the Montreal Convention.

9. OOO "Garant-S" v. Empire United Lines Co., Inc., 2013 US Dist Lexis 46329, 2013 WL 1338822 (E.D.N.Y., Mar. 29, 2013). The shipper tendered two BMW cars to the carrier (actually, an NVOCC) for transport to Finland. While the cars were in the carrier's storage facility, not yet loaded on a vessel, thieves broke in and stole the cars. The shipper suspected the carrier's employees of being complicit in the thefts. The shipper sued the carrier for breach of contract, conversion, wrongful taking, negligence and fraud. The carrier asserted that its liability was capped at $500 per vehicle under COGSA. The shipper responded that since the cars were not yet loaded onto the vessel, the bill of lading did not apply, and the carrier was liable for full value.

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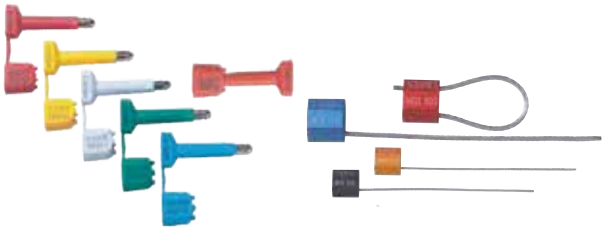

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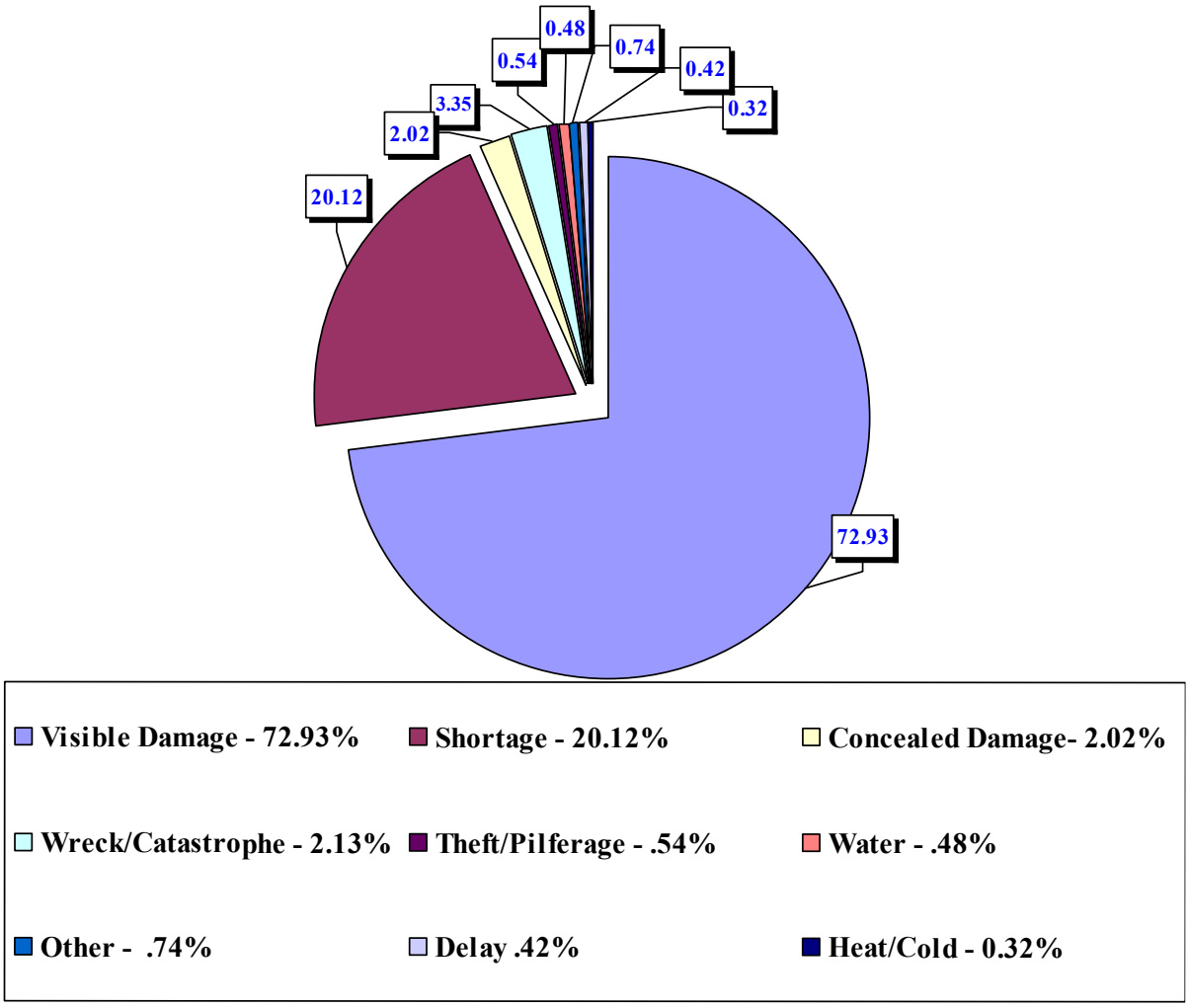

TLP & SA MOTOR CARRIER CLAIMS SURVEY – 2013

CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	20.12 %	11.98 %
Theft / Pilferage	.84 %	.06 %
Visible Damage	72.93 %	62.45 %
Concealed Damage	2.02 %	2.88 %
Wreck / Catastrophe	2.13 %	.22 %
Delay	.42 %	.05 %
Water	.48 %	.09 %
Heat / Cold	.32 %	.04 %
Other	.74 %	.83 %
	100 %	78.60 %

Total numbers of claims paid Vs. number of claims filed.	75.40 %
Total dollars paid Vs. total dollars filed.	44.79 %
Net dollars paid Vs. total dollars filed.	37.25 %
% of claims filed to total number of shipments made.	.51 %
Total company claim ratio.	.69 %
Percent of claims resolved in less than 30 days.	85 %
Percent of claims resolved 31-20 days.	12 %
Percent of claims resolved more than 120 days.	3 %

Issue: What was the carrier's liability?

Holding: The carrier's liability is capped at $500 per car, for a total of $1000. The court held that the bill of lading extended COGSA coverage beyond the time of loading and unloading. The bill of lading showed the place of receipt as the carrier's storage facility. The bill of lading incorporated COGSA and its $500 per package liability cap. The court also observed that the carrier and shipper had a long standing relationship, the standard bill of lading issued at the time of loading had a liability cap, and the shipper was aware of these terms. Thus, the standard terms applied, even though the actual bill of lading had not yet been issued. Finally, the court held that the allegation that Carrier's employees were complicit in the theft does not deprive the carrier of the COGSA liability cap.

10. Rohr, Inc. vs. UPS-Supply Chain Solutions, Inc., et al., 2013 U.S. Dist. LEXIS 50457, 2013 WL 1411898 (S.D. Cal. 2013). Rohr is a subsidiary of Goodrich. Rohr and UPS-SCS entered into two agreements, a Master Services Agreement (MSA) and a Customs Brokerage Services Agreement (CBSA). The MSA had two limitations of liability in favor of UPS-SCS. The CBSA provided UPS-SCS had no liability for damage to goods while in another's custody. UPS-SCS hired carriers to transport two oversized shipments. Both carriers struck overpasses with the cargo. The carrier for one of the shipments defaulted when sued. The carrier for the other shipment, Knight Transportation, filed a motion to enforce the limitation of liability provided by COGSA and the ocean bill of lading—arguing that the bill was a through bill. UPS-SCS also moved to enforce the limitations contained in the MSA and the CBSA.

Issues: Whether UPS-SCS and/or Knight were entitled to rely on the limitations of liability? Whether Rohr was entitled to summary judgment against UPS-SCS and Knight on the limitation of liability issues?

Holdings: Since the services provided by UPS-SCS in relation to the shipments were not described in any portion of the MSA, the MSA's limitations do not apply. However, the court held that if UPS-SCS can prove that it acted purely as a customs broker for Rohr, then the limitation in the CBSA will apply to UPS-SCS. The court treated Knight's motion as a motion to reconsider a prior decision denying relief to Knight. The court found that the new evidence presented by Knight did not warrant reconsideration. Rohr's motion was denied because fact issues precluded the court's summary determination of whether UPS-SCS was acting as a broker, carrier or freight forwarder.

11. Saacke North America, LLC v. Landstar Carrier Services, Inc., 2012 U.S. Dist. LEXIS 178739 (W.D.N.C., 2012). A trade show exhibiter/shipper hired a broker to move its trade show equipment from Chicago to North Carolina. The broker selected Landstar as the carrier to transport the shipper's goods. The sponsor of the trade show ("GES") required each exhibiter to agree to a bill of lading in order to move an exhibiter's goods from the trade show floor to the trade show shipping area. The GES bill of lading contained a limitation of liability of fifty cents per pound or $100 per package. The bill of lading also contained a blank excess declared value provision. Landstar picked up the freight in Illinois and delivered it to North Carolina. Upon delivery of the freight to North Carolina, the Landstar driver submitted a Landstar bill of lading to the shipper which a representative of the shipper signed at destination. The freight was short one pallet at a value of approximately $184,000.

Issue: Was Landstar entitled to rely on the limitation of liability?

Holding: On cross-motions for partial summary judgment, the trial court held that Landstar was not entitled to rely upon the limitation of liability in the GES bill of lading because the shipper did not have a reasonable opportunity to select a higher release rate. Furthermore, the court held that the Landstar bill of lading was inapplicable because it was not tendered to the shipper prior to the movement of the freight. The court also held that there was no agency relationship between the shipper and GES, the sponsor of the tradeshow, such that the shipper would be bound by the provisions of the GES bill of lading. Finally, the trial court held that Landstar's rules tariff did not apply. As a result, the trial court granted the shipper's motion for partial summary judgment and denied Landstar's motion for partial summary judgment and held that Landstar's liability was not limited.

IV. Preemption

12. Atlas Aerospace LLC v. Advanced Transportation, Inc., 2013 U.S. Dist. LEXIS 58378, 2013 WL 1767943 (D. Kan. 2013). Atlas alleged it contracted with Advanced Transportation to transport a machine from Canada to Kansas. Advanced hired DMG Canada to prepare the machine for shipping. Atlas hired Redmond to mount the machine on BRK's trailer. The machine was damaged upon arrival in Kansas. Atlas filed state law claims, and BRK filed a motion to dismiss which was previously granted dismissing non-Carmack claims against BRK. Advanced filed a motion to dismiss after Atlas amended its complaint. Advanced claimed that non-Carmack claims should be dismissed. Atlas argued that since Advanced was a broker in this transaction, claims against Advanced fall outside Carmack preemption.

Issue: Are Atlas' non-Carmack claims against Advanced preempted? Are Atlas' claims for lost profits too speculative?

Holding: The court denied Advanced's preemption arguments, both under Carmack and under Section 14501, holding that preemption does not apply to brokers under these facts and specifically rejecting the Ameriswiss decision. The court also held that Atlas had made sufficiently specific claims for lost profits to survive the minimal standard of pleading required at the motion to dismiss level.

13. DHL Express (USA), Inc. v. Falcon Express International, Inc., 2013 WL 561457 (Tex.App.-Houston [1st Dist.], 2013). At issue was an allegation by the reseller of DHL's packaging services that DHL failed to disclose that DHL intended to end its domestic package delivery service operations, which it did soon after it terminated the reseller agreement. The parties disputed the claim of rescission of the agreement based on fraudulent inducement. A trial court jury awarded the reseller compensatory damages of $1.7 million on the rescission theory and $3.2 million in punitive damages for a total award of $4.9 million.

Issue: Whether FAAAA preempts the claim of rescission.

Holding: The Texas Court of Appeals reversed the judgment of the trial court and ruled that the fraudulent inducement claim and the award of punitive damages were preempted by FAAAA because permitting the claims would allow Texas' state law to serve "as a means to guide and police the marketing practices of" an airline or motor carrier following the decisions of the United States Supreme Court in Wolens and Morales. The Court of Appeals analyzed the U.S. Supreme Court decisions as well as two Texas Supreme Court decisions which analyzed the preemptive effect of FAAAA over tort lawsuits against carriers.

14. Dynamic Transit Co. et al. vs. Trans Pacific Ventures, Inc., 291 P.3d 114; 2012 Nev. LEXIS 118; 128 Nev. Adv. Rep. 69 (Nev. 2012). Shipper purchased a luxury sports car for approximately $67,000 and contracted with Nex-Day Auto Transport, Inc. to deliver the car from Nevada to Washington. Nex-Day attempted to arrange for the transportation of the car with Dynamic Transit Company/ Knights Company ("Knights"). However, Nex-Day owed almost $10,000 to Knights on a prior movement. As a result, the Knights dispatcher altered the terms of the agreement to include a "pay-on-delivery" clause and to provide for transport in an unenclosed carrier. The Knights dispatcher then generated a bill of lading and arrangement of pick-up of the vehicle. However, Nex-Day never received a copy of the work order from Knights and faxed a "cancellation" to Knights. Undaunted, a Knights driver picked up the car and loaded it on an unenclosed trailer. Upon arriving in Washington, Knights demanded that Nex-Day tender payment for the unrelated past-due invoices before it would proceed with delivery to the shipper. After Nex-Day denied payment, the car was transported to a storage facility in Missouri. The shipper brought suit against Knights for conversion and fraud.

Issue: Whether Carmack preempts a claim of conversion for the benefit of the carrier.

Holding: The court denied the position of the carrier that the Carmack Amendment preempted the shipper's state law claims. Specifically, the court found that the carrier had converted the car for its own use, which constitutes a denial of the rights of the owner of the property. Thereafter, the trial court awarded judgment in favor of the shipper for $52,500 in compensatory damages and $300,000 in punitive damages. The Nevada Supreme Court affirmed the decision of the trial court.

15. Lozman v. City of Riviera Beach, FL, 568 U.S. ____ (2013) Plaintiff docked his floating home at the City of Riviera Beach Marina and used it as his primary residence. The city seized Plaintiff's home after he did not comply with new city regulations, and filed an admiralty claim in the U.S. District Court for the Southern District of Florida. The district court found that the residence was a "vessel" under 1 U.S.C. §3 for purposes of admiralty jurisdiction, and further found that the floating home had been trespassing on city property. The city put the floating home up for auction, bought it as the highest bidder, and destroyed it. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's holding. The Supreme Court granted certiorari on the question of whether the floating home was a "vessel" under the definition of 1 U.S.C. §3.

Issue: Whether the definition of "vessel" in 1 U.S.C. §3 includes, and thus grants federal maritime jurisdiction over, indefinitely-moored structures like Plaintiff's floating home.

Holding: In support of his case plaintiff relied heavily the definition of "transportation" in sources such as Webster's and Black's dictionaries, arguing that transportation was not the intended purpose of the structure. In opposition, the defendant city relied on a practical capability standard. In an opinion delivered by Justice Breyer, the Court held by a vote of 7-2 that such a floating structure does not constitute a "vessel," and thus does not fall within the scope of federal maritime law. The court reasoned that the definition of "transportation," the conveyance of persons or things from one place to another, must be applied in a practical way. As such, the Court found that a structure does not fall within the scope of the statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

16. OHL North America Transp. v. Chris Crossley's Trucking Adventures, 2013 WL 1684103 (D.Or.,2013). OHL was a freight forwarder and a transportation management company. OHL hired Crossley to transport chicken from Texas to Oregon. The shipment was damaged by improper temperature during shipment. OHL's subrogating insurer sued Crossley under Carmack, but also alleged breach of contract and negligence.

Issue: Should Crossely's motion to dismiss the breach of contract and negligence claims be granted based on Carmack preemption?

Holding: The court acknowledged that the breach of contract and negligence claims were preempted by Carmack, but nevertheless denied Crossely's motion to strike the non-Carmack claims because the breach of contract and negligence are not part of pre-empted state law claims, but simply alleged in support of the Carmack Amendment case. The court cited no authority for its ruling.

17. Pipe Freezing Services v. FedEx Ground, 2013 US Dist Lexis 9591, 2013 WL 276048, Fed. Carr. Cas. P 84,746 (S.D. Miss). Shipper Pipe Freezing Services engaged carrier FedEx Ground to transport specialized high-value cryogenic cold end pipes from Mississippi to Texas. The pipes were used in storage tanks to prevent freezing. Shipper alleged that one pipe was missing and filed a timely claim. The carrier denied the claim on the basis that the original shipping cartons, packing materials and contents were not made available for inspection, as required by the carrier's terms and conditions. The shipper sued the carrier for $19,000, the value of the missing pipe, plus damages for the carrier's purported fraudulent representations in connection with its handling of the claim. The carrier argued that the lawsuit was preempted by Carmack and the carrier's maximum liability was capped under the bill of lading. The carrier also argued that regardless, it denied the claim for legitimate reasons, and the shipper cannot twist denial of the claim into an alleged act of fraud and then sue for fraud. Such a tactic would be a back-door way of getting around Carmack. The carrier moved to dismiss.

Holding: Carmack preemption encompasses alleged negligence and misrepresentation that occurs in the course of a carrier's handling a claim for damages arising from an interstate shipment.

18. In re Sierra Club, Supreme Court—New York, Cause No. 2012-00810 (March 25, 2013). In this action brought in Steuben County, New York, the Sierra Club sought to stop the Wellsboro & Corning Railroad (a subsidiary of Rail America, now owned by Genesee and Wyoming) from shipping clean water which is being sold by the Village of Painted Post, New York and being shipped to SWEPI (Shell Oil's Natural Gas Subsidiary) for fracking in Pennsylvania. The Railroad brought a motion to dismiss the matter claiming preemption. The Sierra Club contended that the railroad had to obtain a state permit to operate the transloading facility it had built so that the 47 car trains of water could be loaded and moved on a daily basis. The Sierra Club also contended that even if there was federal preemption for the facility that the railroad would have to obtain permits from the Surface Transportation Board before it began its operations and in that proceeding obtain a National Environmental Policy Act (NEPA) review
. The Sierra club also contended that the Railroad had crossed two other railroads to get to the facility it built on another railroad with only a trackage rights agreement and permission from the other railroad and did not obtain permission to do so from the STB.

Issue: Is state regulation of the interstate movement of water used in fracking preempted.

Holding: The Court in its review found that the STB's jurisdiction over railroad facilities is exclusive and that no other regulatory body or court, state or federal, could opine on the issues. The Court added that NEPA review would not necessarily be required even if the STB had been asked its opinion on the new facility and that there was no law or regulation which required that the railroad go to the STB to invoke its jurisdiction to build the facility or to acquire trackage rights to cross other railroads. Finally when the Sierra club suggested that the Court remand the matter to the STB for its opinion, the Court refused saying that was a useless act since the Court had no right to change or modify the decision or the STB in the matter. The opinion includes some great cases from the brief in the matter supporting preemption regarding the building and operation of railroad facilities and railroad operations in general.

Unfortunately the Village of Painted Post did not fare as well as the railroad. The court found that it did not obtain certain required state permits to sell the water and this part of the decision is now on appeal. The Sierra Club also asked the New York State Judge opine on whether or not fracking should continue in Pennsylvania but the Judge declined to make a ruling.

V. Jurisdiction, Venue, and Removal

19. Accuity v. YRC, Inc., 2013 U.S. Dist. LEXIS 23073, 2013 WL 646218 (N.D. Ohio 2013). Plaintiff insured shipper, Carrier Services Group, Inc., which had hired YRC to transfer a computer server terminal from Colorado to Ohio. Plaintiff paid the damages to the cargo and subrogated against carrier for negligence, breach of contract and under Carmack. YRC removed the action under 28 U.S.C. §1337(a). Plaintiff filed a motion for remand on the basis of state court concurrent jurisdiction under the Carmack Amendment, arguing that the

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case does not have to be removed if it meets the jurisdictional amount. Defendant filed a motion to dismiss the breach of contract and negligence claims based on preemption under the Carmack Amendment.
Issue: Whether concurrent jurisdiction of Plaintiff's claims precludes removal.

Holding: No. The Court denied the Plaintiff's motion for remand and granted YRC's motion to dismiss the breach of contract and negligence claims.

20. Coutinho & Ferrostaal, Inc. v. STX Pan Ocean Co. Ltd., 2013 WL 1415107 (S.D.Tex. 2013). STX time-chartered the M/V AGIA to carry cargo from China to Houston. Ferrostaal alleges that its cargo was delivered in good condition, but was damaged when the M/V AGIA arrived in Houston. Ferrostaal sued STX alleging that a cargo of steel coils was damaged on the M/V AGIA during shipment. STX moved to dismiss based on the forum-selection clauses in bills of lading which provided for a South Korean forum. The analysis of the forum-selection clause was made more complicated because of a prior suit STX filed in the same court based on the same voyage of the M/V AGIA. The federal court dismissed the prior STX suit based on limitations and did not rule on venue. Ferrostaal argued in this case that STX was now judicially estopped from relying on the forum-selection clause.

Issues: Is the forum selection clause applicable, and is STX estopped from asserting it?

Holding: Even though STX is neither the owner nor the charterer of the vessel at issue, the Himalaya clause in the bill of lading makes the forum selection clause applicable to STX. Contractual privity is not required to extend a bill of lading's protections under a Himalaya clause. Thus, the forum selection clause applies and is enforceable. STX is not judicially estopped from asserting the venue provision.

21. Haratio Shipping Co., Ltd. v. Oceaneering Intern., Inc., 2013 WL 1816625 (S.D.Tex. 2013). Oceaneering sought to ship electrical cable and stainless steel tubing from Germany to Florida. Oceaneering entered into a Booking Note with Onego, a vessel charterer. Onego entered into a time charter with Haratio. Haratio owned, and Plaintiff Internship Navigation Co., Ltd. operated, the M/V ONEGO MISTRAL, the vessel used to ship Oceaneering's cargo. Onego issued bills of lading on behalf of the Master relating to the carriage. Oceaneering filed this suit after the cargo allegedly sustained damage during the voyage from Germany to Florida.

Issue: Whether venue is proper in Texas in light of the different forum selection clauses in the parties' documents.

Holding: The court addressed two forum selection clauses: a clause in the addendum to the Booking Note, which selects London for arbitration, or a clause in the Bills of Lading, which selects litigation in Cyprus. The court held that the prior agreement between the parties trumps the forum selection in the bill of lading, requiring arbitration in London.

22. Solent Freight Services, Ltd., Inc. v. Alberty, 2012 WL 6626009, 2012-2 Trade Cases P 78,190 (E.D.N.Y., 2012). This antitrust case involved a freight forwarder of hatching eggs and a claim against a competing freight forwarder. The plaintiff freight forwarder alleged violations of federal anti-trust law, defamation, tortious interference with business relations and civil conspiracy.

Issue: Did the plaintiff have standing to complain about an alleged agreement between the freight forwarder and a hatching eggs producer?

Holding: The court granted the defendant forwarder's motion to dismiss the federal anti-trust claims on the grounds that the plaintiff did not have standing to complain about an alleged agreement between the freight forwarder and a hatching eggs producer. As to the federal anti-trust claims, the court also held that the actions of the defendant competitor were not violations of the per se rule since the allegations of the amended complaint alleged a "vertical restraint" based upon the agreement between the competing freight forwarder and the hatching eggs producer. Further, the court held that the plaintiff's rule of reason claims should be dismissed because the restraint of trade in the hatching eggs market did not affect the freight forwarding industry in the particular market involving hatching eggs. The court pointed out that anti-trust laws "were enacted for the protection of competition, not competitors". The court also found that the plaintiff had not alleged a monopoly claim for the same reasons it found with regard to the rule of reason and the per se rule. The court refused to retain jurisdiction over the plaintiff's state law claims.

VI . Carrier-Broker-Third Party Issues

23. National Interstate Insurance Co. v. Champion Truck Lines, Inc., et al., 2013 WL 1952198 (D.N.J., Mar. 21, 2013). Davis was injured when he was struck by a chassis driven by Champion's employee. Champion was hired as a carrier by broker Northstar to transport a container. After Davis sued for damages arising from his injuries, National Interstate filed this case to determine coverage for Davis' claims.

Issue: Whether Northstar's insurer or Champion's insurer was primary insurer for Davis' claim.
Holding: The court ruled that Northstar did not "hire" the container that injured Davis because the driver of the tractor trailer was under the control of the entity which had paid the driver, Champion. The tractor was serviced by Champion, and the driver was never hired by broker Northstar. Accordingly, Champion's insurer was primary for purposes of Davis' claim.

24. Royal & Sun Alliance Ins., PLC v. Int'l Management Services Co., Inc., 703 F.3d 604, Fed. Carr. Cas. P 84,745 (2nd Cir. 2013). Royal & Sun Alliance sued UPS (the

logistics contractor), WDS (a motor carrier which was a UPS subsidiary), and Int'l Management Services ("IMS") (which provided the drivers) for damages resulting to its insured's (Ethicon) shipment of pharmaceuticals when the WDS truck, operated by an IMS driver, collided with a concrete barrier and caught fire. The resulting damages were stipulated at $750,000. On a motion for summary judgment, the United States District Court for the Southern District of New York found UPS liable in the amount of $250,000 pursuant to Ethicon's contract with UPS. The lower court also held that WDS was entitled to the limitation of liability protection under Ethicon's contract with UPS, as WDS was a wholly owned subsidiary of UPS, and the contract specified that the protections would extend to "designated affiliates". The lower court found that IMS was not entitled to the protection of a limitation of liability. After a bench trial, the court held in favor of RSA and entered verdict against IMS for $500,000 plus interest. IMS appealed.

Holding: The Second Circuit found that the limitation of liability in the contract between UPS and Ethicon's did not extend to a third party in the absence of a provision to that effect (e.g. "Himalaya Clause"), and in fact, Ethicon's contract with UPS stated that the liability of third-party carriers would be "governed by the applicable agreement with such carriers," while WDS's agreement with IMS did not contain any limitation of liability provisions. The Second Circuit also found that the limitation of liability did not apply under the federal common law of bailment, absent evidence that the parties agreed to such a limitation. Finally, the Second Circuit held that the District Court did not misapply a burden shifting scheme applicable to negligence actions under federal common law when it held that IMS had failed to present sufficient evidence to overcome the inference of liability resulting from RSA meeting its prima facie burden of proof per the two prong test for negligence of a bailee under federal common law.

25. Wise Recycling, LLC v. M2 Logistics, 2013 WL 1870424 (N.D.Tex.). Wise Recycling (Wise) used broker M2 Logistics (M2) to arrange for over 500 shipments of scrap metal over two years. Wise and M2 did not have a broker-shipper contract. Wise prepared a Bill of Lading naming itself as the shipper and incorrectly naming M2 as the "carrier." M2 hired a carrier to transport the cargo. Before completing the interstate delivery, the driver stopped his vehicle in a fenced and locked yard. Thieves broke into the yard and stole the tractor and trailer by driving it through the fence. The cargo was not recovered, and the motor carrier's insurance company denied the claim because the vehicle, which was recently purchased by the driver, was not scheduled on the motor carrier's policy. Wise sued the motor carrier under Carmack and negligent misrepresentation. Wise sued M2, as both a motor carrier and a broker, seeking damages and attorney's fees under Carmack, negligent retention, negligent misrepresentation regarding insurance, and breach of a contract. M2 removed the case and filed a Motion to Dismiss. M2 argued that although Carmack preempts state law claims against motor carriers, a broader interpretation of ICCTA shows that state law claims against transportation brokers should also be preempted.

Issue: Whether the state law claims of negligence, breach of contract, and a request for attorney's fees should be dismissed as to M2 as a broker and/or as a carrier due to federal preemption under FAAAA and ICCTA.

Holding: The Court held that Wise's allegation that M2 was a carrier was a "pure" Carmack claim and refused to dismiss Wise's Carmack claims. The Court held that Wise's claims of negligence and breach of contract against M2 as a carrier were preempted by Carmack. The Court also addressed preemption under FAAAA, holding that Wise's negligence claims against M2 as a "broker" were preempted by 49 U.S.C. § 14501. However, the Court did not dismiss Wise's breach of contract claim against M2 as a broker. Finally, the Court withheld ruling on the issue of attorney's fees until a dispositive resolution is obtained.

VII. Damages & Costs

26. W.W. Rowland Trucking Co., Inc. v. CRC Insurance Services, Inc. et al., CA: 4:12-91 (S.D. Tex. 2013). Trucking company sued its insurer for wrongfully failing to cover theft of a truck. Insurer argued that it had no obligation to pay since the insured warranted that its terminal would be one-hundred-percent fenced. The insured contended that the breached warranty did not cause the loss, and therefore nullifies the exclusion.

Issue: Did the trucking company's failure to fence its lot preclude coverage?

Holding: The court held that, pursuant to Texas law, an insurance contract on personal property is not voided by a warranty violation unless it causes or contributes to the loss. Since the insurer could not demonstrate that the gaps in the insured's fence caused the loss, the court found in favor of coverage.

27. Rush Industries, Inc. v. MWP Contractors, LLC, 2012 US Dist. Lexis 170758, 2012 WL 6010059 (M.D.N.C. Nov. 2012). Rush purchased a saw for $13,000. The saw was beyond its expected useful life at the time Rush purchased it. Rush hired MWP to move the saw to Georgia. Unbeknownst to Rush, MWP contracted with Brann's Transport Service to move the saw. During transit, connectors and cables on the saw's computer were damaged. When the saw arrived and was set up, the saw did not operate. Rush sued MWP and Brann's for the damages. At trial, Rush met its burden of proving delivery to the carrier in good condition. However, Rush was not able to meet its prima facie burden of proof on damage to the computer components of the saw, other than the patent damage to the connectors and cables. Latent damage to the computer components was not proven, and Rush was only able to recover $118 for the cost of replacing cables and connectors. MWP counterclaimed for unpaid freight charges and recovered $6,388.59 from Rush.


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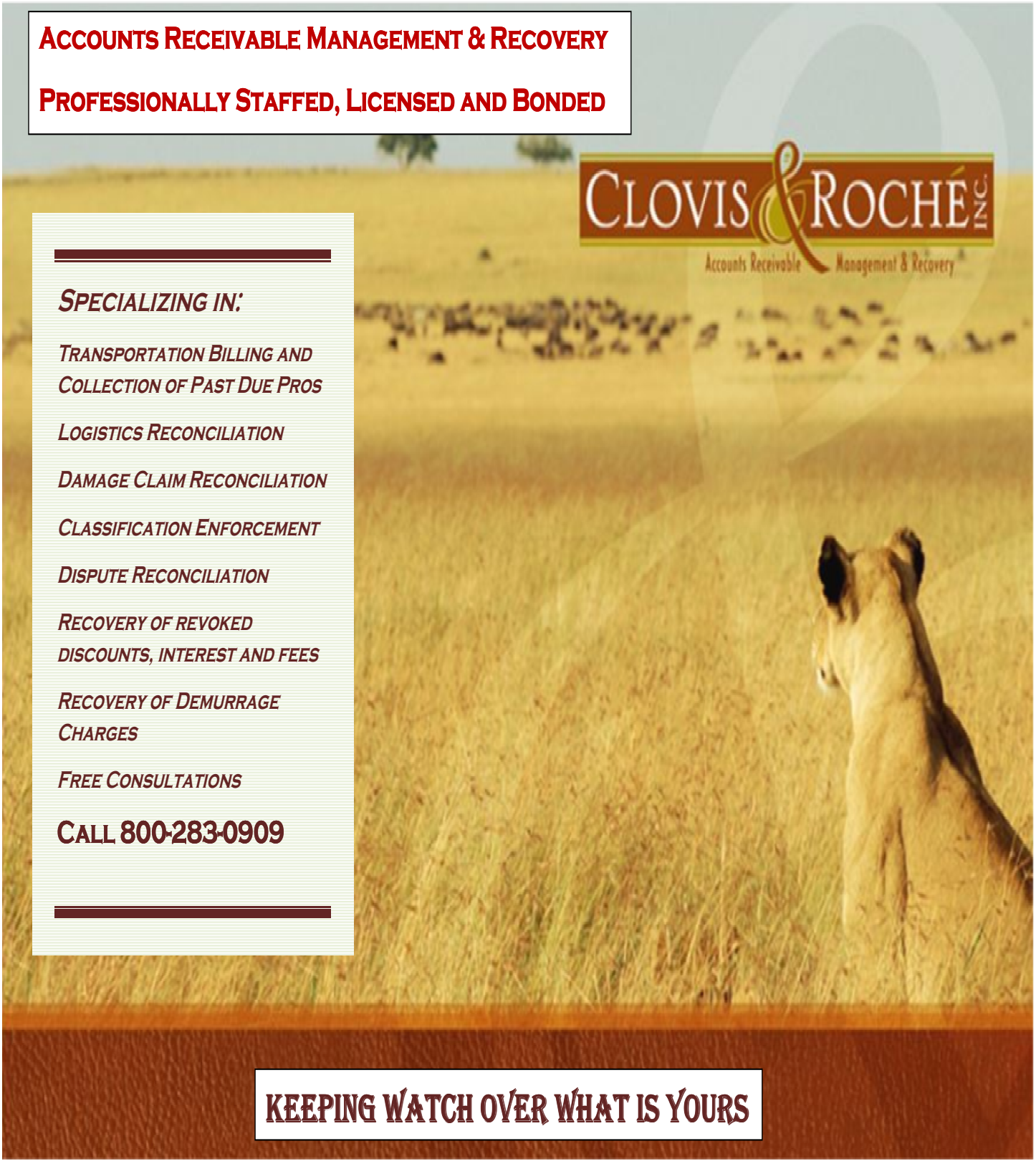
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Lorraine Amerikanos, CCP, **MRO Buyer / Claim Specialist with Milestone AV Technologies has agreed to fill the vacant position of ProClaim Editor-In-Charge. ProClaim was last published in the Spring of 2012 after Editor Marcus Hickey, CCP left the industry to pursue other interests.**
We are very pleased to have someone with the expertise and knowledge that Lori has to assume this position.

Lori is looking to Members, Educators, Attorneys and Vendors for news worthy articles and submissions for her first edition to be published in November. Now is your chance to write an article on a topic you deal with every day. So put your notes together and send them off to Lori. CCP's wishing to earn contining education credits to maintain their Certification and those desiring to apply for the exam but have not earned enough points, now is your chance as CCPAC credits are awarded to those who submit articles that are published.
Email Lori at lori.amerikanos@milestone.com

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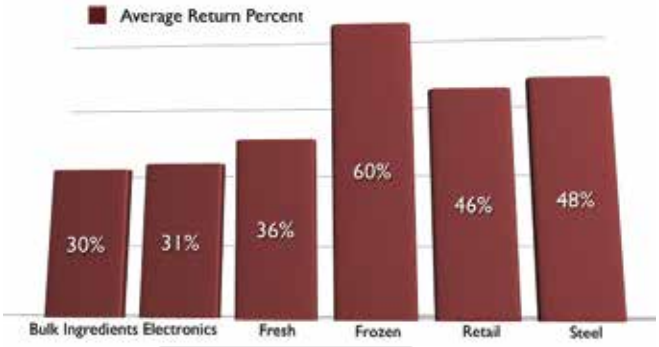

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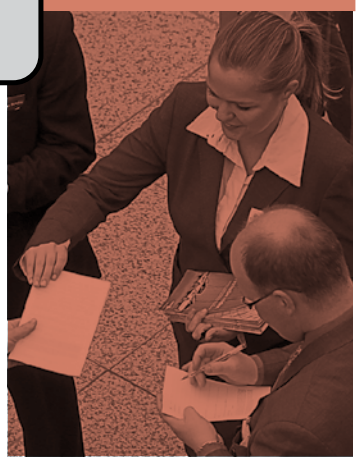

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wbierman@nakblaw.com

Chairperson
Jeffrey D. Jordan
Central Freight Lines
5601 W. Waco Dr,
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Y R W C
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University Park, FL 34201
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Daniel.saviola@yrcw.com

Associate Exec. Director
Edward M. Loughman, HCCP
TLP & SA
5 B Yorktowne Pkwy.
Whiting, NJ 08759
Tel (732) 350-3776
Cell (732) 703-0515
Eloughman@tlpsa.org

Roderick Fracassi, Esq.
Con-Way Inc.
2211 Old Earhart Rd.
Ann Arbor, MI 48105
Tel (734) 757-1633
Fax (734) 757-1150
Fracassi.rod@con-way.com

Daniel Hill
ABF Freight Systems
P.O. Box 10048
Fort Smith, AR 72903-0048
Tel (479) 785-6343
Fax (479) 785-8800
dhill@abf.com

Karen M. McCoury, CCP
Marten Transport
129 Marten St.
Mondovi, WI 54755
Tel (800) 395-3000 Est. 2415
Fax (80) 461-0372
KMS@marten.com

John O'Dell, CCP
CCPAC
P.O. Box 550922
Jacksonville, FL 32255-0922
Tel (904) 322-383
Fax (94) 287-9843
jodell@ccpac.com

Martha Payne, Esq.
Benesch Friedlander Coplan & Aronoff
103 Coronado Shores
Lincoln City, OR 97367
Tel (541) 764-2859
Fax (216) 363-4588
payne@beneschlaw.com

John Tabor
All States Supply Chain LLC
182 Lawrence Dr.
Paramus, NJ 07652
Tel (201) 294-6866
jtabor@allstatesupplychain.com

William Taylor, Esq.
Hanson Bridgett, LLP
980 9th St.
Sacramento, CA 95814
Tel (916) 442-3333
Fax (916) 442-2348
wtaylor@hansonbridgett.com

Vickie Visser
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