

In Transit



Transportation Loss Prevention & Security Association

Spring 2007

In This Issue...

How About That Conference? 2

Antitrust Immunity.... 4

Scope of Non-Trucking Coverage 5

Recent Court Cases 7

Hall of Fame Exhibitors & Conference Photos 10

Carrier Claims Survey & Chart 18-19

Application for Membership *Back Cover*

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STB Voids Anti-Trust Immunity For Rate Bureaus *See page 3*



Look Inside!

**See Page 18 for
Carrier Claims
Survey and Chart**

How About That Conference?

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

All through the year both TLP&SA and TLC worry about our Annual Conference. What subjects will our members want? Can we get speakers with the appropriate expertise? Will the speakers show up? Will it snow in Florida? We continue to gnash our teeth throughout the entire Conference. Just visualize some of our Board gnashing their teeth. It is not a pretty sight.

So it is with a great deal of pride that we look back at this year's Conference; A forceful and patriotic Luncheon speech by Sheriff Ed Dean which drew a standing ovation; video of a "take down" featuring aerial surveillance, a police chase, music worthy of Miami Vice, and, in person, the very officers who made it happen wearing guns on their hips; observations from well known pundits representing Traffic World and

Logistics Management; lawyers with unprecedented expertise in every area of transportation law; the president of one of the foremost carriers in the country; and much, much more. If you were not there, shame on you, you missed a sensational Conference.

Add to all this Exhibitors galore with wonderful products and giveaways to stuff in your luggage and bring home to the family. There was wonderful food, candy for your sweet tooth and a pool in the back yard. Who could ask for anything more?

On Sunday evening, we had a memorial celebration for Bill Augello. Touched with humor and sadness, Bill's wife Betty heard Bill's peers talk about his career and laud Bill's contributions to

the industry. TLP&SA contributed \$2,500.00 to a scholarship fund in Bill's name at the University of Arizona and TIA matched it with their own gift in the same amount. Betty Augello tearfully observed that these two gifts pushed the fund over the top and enabled the scholarship fund to be initiated by the University. We think that Bill would have approved of this Conference and we know he was there in spirit.

We are already planning next year's Conference. I can almost hear gnashing of teeth already. But with your support and good will, next year's Conference will even outdo the great Conference in Orlando. Join us in San Diego and prove us right.

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Antitrust Immunity Is Going, Going... **GONE!**

By: Gordon McAuley -
Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP – San Francisco, CA

*“The best of prophets of the
future is the past.”*

-Lord Byron's Journal [1821]

On May 7, 2007 the Surface Transportation Board of the U.S. Department of Transportation (STB) published its decision, STB-656, which may have sounded the final death knell for the last remaining vestiges of antitrust immunity for collective rate making in the trucking and household goods moving industries. The STB, in a thoughtful and detailed 28-page decision, reviewed the historical background for the initial implementation of federal regulation of interstate rail transportation; the extension of that regulation to motor carriers and household goods carriers; the grounds for granting antitrust immunity to the industry; and the reasons, in its view, why neither the industry, nor its customers, need the familiar but troubling features of that anachronistic protection. This report will briefly look at the regulated past of the interstate transportation industry, describe the issues determined by the STB, and venture a view into the near future which will lack the limited antitrust immunity that existed until the May 7 decision in STB-656.

*“Power tends to corrupt and absolute
power corrupts absolutely.”*

- Lord Acton [1887]

The Reasons for the Regulated Past: Before the advent of the railroads, interstate and interterritorial transportation in the U.S. was accomplished by horse and oxen. Oat-powered beasts of burden hoofed across the plains, foothills, and mountains to transport the necessities (including alcohol, ribbons, and the Good Book) to the ever-expanding Western territories. The trek was long, dangerous, and hauling capacity was limited by the one-horse power engine of each horse. Then the railroads entered the transportation picture. The railroads had a monopoly on efficient long-haul transportation, and enjoyed load capacities which were staggeringly large compared to our oat-mealed plodders. Monopolies, however useful, also breed inefficiencies and are subject to market abuse. It did not take long for big shippers, including oil companies, to begin manipulating the railroads into sweetheart deals, and cut-throat competitive practices which left small shippers and farmers in dire

straights. Some railroads, pickled with power, engaged in pricing and marketing practices that can only be regarded as shameful. The railroads were one of the earliest monopolies, aka Trusts, which are industrial or business combinations which are able to control a market, absorb or eliminate competition, and fix prices. The railroads were the first monopoly to generate antitrust legislation: the Interstate Commerce Act of 1887. The Act brought federal regulation and restraints to the railroads, and created the first federal regulatory agency, the Interstate Commerce Commission (ICC).

The railroads managed to survive, and even thrive, in the early days of regulated carriage. But the rise of motor carriers as a competitive force eventually brought the railroads to Congress with a plea to place the motor carrier industry under the regulated restraints of the Interstate Commerce Commission. The pricing freedoms, ease of entry, and lack of regulations gave motor carriers a significant competitive advantage over the railroads. The resulting Motor Carrier Act of 1935 placed the railroads and motor carriers into equally-binding regulatory constraints. While the new regulations provided pricing stability for the motor carriers, they also saddled the industry with significantly inefficient rules which limited what the cargo carriers could haul, the routes they could take, and even the customers they could serve. The new rules also were a substantial barrier to entry for new motor carriers who had to obtain a certificate of public convenience and necessity to get approval to operate. However, under the Act of 1935 motor carriers were allowed to set their own line-haul rates, provided those rates were submitted in tariffs to the Interstate Commerce Commission for approval. Shippers and competitors were allowed to challenge proposed new rates by an action filed with the ICC. But once approved, a filed tariff rate was legally binding on carrier and shipper alike: carriers had to charge and collect the rates listed in their tariffs. They could not discriminate among shippers by discounting the rates, or by giving disguised rebates in the form of paying inflated cargo loss or damage claims.

*“Hey Rocky, watch me pull a rate
bureau out of my hat.”*

Bullwinkle J. Moose

The antitrust regulation of motor carriers took a turn toward the bizarre in 1948 through passage of the Reed-Bullwinkle Act. After a raft of antitrust investigations and scandals, Congress gave motor carriers the right to collectively set rates for filing with the ICC, and immunized those collective activities from prosecution under the antitrust laws. Ironically, the ICC was born to combat collusive, collective practices which would now be encouraged by that agency. Rate bureaus would now collate or determine prices and standard practices from industry members, and file those standard terms and conditions in tariffs with the ICC. One of the few requirements was that the rates be “reasonable.” During the decades following 1948 most motor carriers belonged to rate-filing bureaus, and charged the un-discounted class rates set by the bureaus. It was a good time to be a trucker.

Erosion of Regulation: A movement toward deregulation and reliance on free market forces began in the 1970s during President Ford's administration. The aviation industry was the first mode to experience deregulation with the passage of the Airline Deregulation Act of 1978. With the new pro-competition philosophical backing of President Carter, Congress then began a systematic dismantling of the regulated structure of interstate rail and motor carriage. The Staggers Rail Act of 1980, and the Motor Carrier Act of the same year, slashed regulations and granted both modes the freedom to succeed or fail without the protective safety net of regulation beneath them. Barriers to entry into the market were eliminated, resulting in a flood of new motor carriers: seemingly anyone with a brother-in-law and a pickup truck was advertising himself as an interstate motor carrier. Individual carriers were encouraged to file separate tariffs with even lower freight rates. After passage of the Motor Carrier Act of 1980, only two major elements of the regulated regime remained: the obligation to file tariffs with the ICC, and the antitrust immunity offered to bureaus to collectively establish prices contained in filed tariffs. The former requirement was substantially eliminated by the Trucking Industry Regulatory Reform Act of 1994 (TIRRA) and the Interstate Commerce Commission



Termination Act of 1995 (ICCTA). After the passage of ICCTA, most carriers did not have to file their tariffs with a government agency, but they still had to publish and maintain their tariffs for presentation to shippers upon request. Most carriers relied upon rate bureaus to publish those tariffs. The government, through the new Surface Transportation Board, was required to review every five years the antitrust immunity of rate bureaus to confirm that the immunity still served the public interest. During the most recent review, the final coup d'état for antitrust immunity for rate bureaus was administered by the May 7 STB-656 decision.

What STB-656 determined: Motor carriers long have been free to publish tariffs independently; most did not. They used rate bureaus to determine the rates, terms, and conditions that bureau members would charge and enforce. Until TIRRA and ICCTA passed, it was illegal for a carrier to charge, or a shipper to pay, a rate other than that contained in the carrier's filed tariff. After ICCTA, discounting from published tariffs became commonplace. Motor carriers and shippers would use the bureau tariff rates as a starting point for price negotiations. One rate bureau, the National Motor Freight Traffic Association published the National Motor Freight Classification which set less-than truckload industry standards for describing the shipping characteristics of cargo, including weight, dimensions, and even damage liability limitations for certain products. Regional rate bureaus would then use those class rates to set pricing standards for its LTL carrier members.

"But that trick never works!"
Rocket J. Squirrel

The STB determined that the public no longer is served by granting the bureaus continuing antitrust immunity for their collective rate making and pricing practices. It found that the shipping public has "a significant interest in having the competitive market set the rates for all shippers, without the restraint on competition that collectively set, antitrust-immunized class rates can produce." (STB-656 at page 10.) The STB noted a special interest in protecting the disadvantaged shipper: those lacking a geographically friendly location or volume to negotiate prices significantly lower than those published by the rate bureaus. Perhaps most significantly, the STB did not prevent all collective practices by the rate and classification bureaus: it merely eliminated antitrust immunity for those activities. If those collective activities can be accomplished without violating the antitrust laws, they may continue. Among the collective activities listed by the STB as beneficial to the public are freight classifications; through rates, joint rates and divisions through partnership and contractor/sub-contractor arrangements; mileage guides; and, certain collectively determined rules. However, STB approval of the current National Motor Freight Classification, and the published tariffs of eleven regional rate bureaus has been withdrawn. The Household Goods Carriers Bureau Committee also lost its STB approval.

"I have seen the future, and it works."
Henry Sayers [1919]

What happens now? No one can say with certainty what will result from the STB-656 decision. Industry leaders are mulling over the possible ramifications of the decision, and readers will find widely-varied forecasts for the immediate future of rate bureaus that must obey the federal anti-trust rules. Nonetheless, the STB recognized the benefits that collective classifications bring to the market. The industry must determine which benefits from collective practices will continue, albeit under the glare of the antitrust laws. The STB suggested that some activities now conducted by the industry might be acceptable if performed by independent, third party vendors. Perhaps new industries will arise to provide pricing information to shippers. Existing third and fourth party logistics companies might already provide some of this market information. A thriving business in tariff publishing might also be anticipated as individual carriers look to avoid the taint of collective rate publication.

It is certain that the transportation community will survive this bump. It has more than a quarter century of free market operations under its collective belt. Antitrust lawyers may now join the carrier's teams of trusted advisors, but trucks will still roll, and shippers will still be looking for the best deal available.

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Scope of Non-Trucking Coverage Shrinks Again*

By: Robert D Moseley, Esq -
Leatherwood, Walker, Todd & Mann, P.C.

The Fourth Circuit recently issued an unpublished opinion narrowing the scope of circumstances in which non-trucking coverage applies. In *Republic Western Ins. Co. v. Williams*, 06-1045, 06-1046 (4th Cir. 2006). The appellate court in Richmond, which is assigned to oversee appeals from several of the southeastern states, including SC, was faced with the following factual scenario: An owner-operator was driving his leased tractor from a parking lot near his home on the way to the terminal of his employer when he was involved in an accident. The owner-operator had non-trucking coverage, and the motor carrier to whom he was leased had liability coverage. The suit was essentially a fight between the insurance companies issuing the non-trucking and liability coverages to determine which company would be responsible for the accident.

Factually, the owner-operator was allowed by the motor carrier to drive his leased vehicle home at night. The lease contained typical lease provisions required by FMCSA regulations. He had not received his first dispatch of the day from the intermodal drayage operation to which he was leased. The motor carrier did not control or direct his travel from his home to the terminal. Following the investigation of the accident, the motor carrier classified the accident as DOT recordable (which the Court found important, as the accident would not have been recordable had the driver been on his own time).

The non-trucking policy contained an exclusion for the use of the vehicle when used to carry property in any business. The Court held that the use of the vehicle in driving to the terminal

meant that the vehicle was "in route" to carry property. Therefore, the exclusion applied and the non-trucking policy did not apply.

The Court found the motor carrier's liability policy applied because the leased truck was a hired auto, and because of the exclusive possession and control language in the lease (required by the regulations), the vehicle was being used with the permission of the motor carrier.

The courts have been narrowing the scope of non-trucking (or bobtail coverage, as it is sometimes called), such that the only thing it covers now is getting an oil change on Saturday, etc. The scope of a contractor's dispatch is a factual dispute and depends on the individual case. Normally, the coming and going from the terminal to the driver's houses is not within the dispatch, but obviously the court disagreed here.

Motor carriers would like to see more of their claims included with the non-trucking coverage as the non-trucking coverage is normally purchased by the owner-operator and does not directly affect the experience or loss ratios of the motor carrier. Liability claims, on the other hand, directly affect renewals and insurance rates, and therefore, the bottom line.

What can be learned from this decision?

(1) Under this rationale, the driver's trip home would not be "in route" to carry property, and therefore, the non-trucking should apply. Under this logic, the trip to the terminal is not covered and the trip home is, creating a lack of consistency in the coverage which

is clearly not consistent with the traditional "under dispatch" analysis. The better rule would be that he was not "in route" to carry property until he left the terminal after being assigned his first load.

- (2) Trucking companies, especially local operations, may be less inclined to allow drivers to drive the leased vehicles home for the night and require them to drive personal vehicles to and from the terminal.
- (3) Trucking companies may wish to consider issuing policies that drivers are not "in route" or "under dispatch" until such time as they have received a specific pickup or delivery order.
- (4) This is an unpublished decision, and therefore, under court rules, its precedent only applies to the parties to the case. However, courts routinely rely on the logic of unpublished decisions, even though the decisions are not binding.
- (5) Trucking companies should revise post-accident procedures to ensure that an accident is not unnecessarily included as recordable, when the driver was not under dispatch.

This case stands for another wave in the erosion of the scope of the non-trucking policy. Motor Carriers utilizing owner-operators would be well advised to examine this case carefully.

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Recent Court Cases

as analyzed by the Conference of Freight Counsel

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

A. Carrier Liability

1. Richards v. Delta Air Lines, Inc., 453F.3d 525 (D. C. Cir. 2006).

The D.C. Circuit affirmed a decision dismissing a class action complaint against Delta Air Lines. Plaintiffs alleged that Delta's practice of paying claims for lost luggage, whereby Delta paid only \$20 per kilogram pursuant to the Warsaw Convention was improper because Delta failed to record the weight of the luggage on each passenger's ticket. Plaintiffs claimed this was a violation of the Warsaw Convention and that they were entitled to relief as a class in the form of the difference between the amount paid by Delta and the amount of the plaintiff's actual claims. The Appeals Court affirmed the District Court's dismissal which was based on interpretation and application of Fed.R.Civ.P.23.

2. Elich-Krumplet v. United Parcel Service, Inc., 2006 N.Y. Misc. LEXIS 2311 (N.Y. 2006).

Plaintiff shipped certain artwork via UPS from Illinois to New York through one of UPS's authorized shopping outlets. The bill of lading provided that UPS' liability would not exceed \$100 unless a value was declared, and plaintiff did not declare a value. The package never reached its destination, and UPS claimed that it was lost in transit or that the contents of the package were missing upon arrival and never recovered. Plaintiff sued UPS for the full value of the artwork and alleged that it was converted by UPS. Plaintiff moved for summary judgment on the ground that UPS allegedly had spoliated the evidence essential to the case or, alternatively, for an adverse presumption at trial based on the doctrine of "material deviation." UPS also moved for summary judgment that its liability was limited to \$100. The Court de-

nied both motions. First, the Court determined the plaintiff did have standing to file the action against UPS under the Carmack Amendment, as it was the undisclosed principal of its agent, the freight forwarder or, in this case, the UPS authorized shopping outlet. On the issue of whether UPS' \$100 limitation would be enforceable, the Court noted that the plaintiff alleged an intentional conversion of the artwork and ruled that there was a question of fact on this issue but that if plaintiff were to show that UPS intentionally or willfully discarded the shipment, that would trump the \$100 limitation. The Court also denied plaintiff's motion for summary judgment that UPS spoliated crucial evidence, pointing out that the loss of the artwork was the ultimate issue in the case. Finally, the Court denied plaintiff's request for an adverse presumption based on the doctrine of "material deviation," ruling that that doctrine was typically applied in admiralty cases but not in Carmack Amendment cases.

3. Diane's Trucking, LLC. v. Holmes QST, Inc., 2006 U.S. Dist. LEXIS 52054 (E.D. Mich. 2006).

Plaintiff Diane's Trucking, ("Load One") contracted with Sovereign Sales to distribute perfume products throughout the United States. Defendant, Holmes QST, Inc. ("Holmes") contracted with Load One to transport freight for Load One and its customers. Holmes agreed to defend and indemnify Load One for any damage to freight in the possession or control of Holmes, to maintain \$100,000 of cargo insurance, and to assume complete liability, regardless of fault, for any loss or damage to any goods while in possession or control of its agents and/or representatives. Holmes, in turn, had a lease with Defendant Robert E. Foster, d/b/a TAB Transportation (Foster) for Foster to physically carry goods for Holmes; Foster was also an employee of Holmes.

Load One tendered Sovereign freight to Holm-

es; the paperwork was signed by Foster as agent of Holmes. The goods were denoted as "toilet preps-full value." A substantial portion of the goods were stolen. Load One made a claim to Holmes for the full value of the loss; it subsequently paid its customer Sovereign \$71,745 and received an assignment of rights. Load One sued Holmes, who in turn cross-claimed against Foster. Load One's complaint alleged breach of contract and express indemnification against Holmes and negligence and indemnification pursuant to 49 U.S.C. 14706 against all Defendants. Holmes then filed a Motion for Summary Judgment. Holmes denied it was a common carrier and alleged that it could only be liable if Load One proved Holmes was negligent. The Court held this argument regarding alleged carrier status was without merit.

Holmes' motion was also based on its contention that Load One's claims were barred because it intentionally misdescribed the cargo. The BOL was prepared by Sovereign, not any of the parties. Testimony indicated that classification "toilet preps" was standard in the fragrance industry and that the products were not perfumes but watered down versions of perfumery product. Testimony also indicated the classification was used because there was an assortment of different goods, none of which were actual perfumes. Holmes disputed this explanation. It in part relied upon 49 U.S.C. 80116 which provides criminal penalties for intentionally misdescribing cargo, however, Holmes provided no authority that this criminal statute barred civil suit and the Court rejected Holmes' argument.

Holmes also contended it would not have accepted the cargo had it known its true value because its insurance was \$100,000 and the cargo was valued at over \$140,000. The Court noted that Holmes never requested an explanation of either the exact nature or the specific value of the cargo, Foster's testimony that Holmes' charges were not based upon the type of goods but upon the distance traveled, that he did not normally know the contents of cargo unless it involved hazardous materials, and that he did not know



if he had ever previously shipped merchandise worth more than \$100,000 because he does not inquire as to the contents. The Court found Holmes failed to show that either Load One or Sovereign had a duty to provide any more detail on the BOL than what was provided and failed to show that the description “toilet preps-full value” was an inaccurate manner of describing the cargo.

Holmes also argued that the alleged intentional misdescription violated 49 C.F.R. 1035, Appendix B, Section 5, which deals with articles of extraordinary value. 49 C.F.R. 34 states requirements for BOLs and the Court found the regulation did not bar Load One’s claim because Holmes was not being charged with liability for articles of extraordinary value as the damages requested fell well within policy limits. The Court held that it could not find as a matter of law that \$71,745 potential liability constituted extraordinary value when insurance would have paid up to \$100,000.

The Court further discussed the alleged misdescription. It noted that even if inaccurate, Holmes had not shown alleged misdescription contributed to the eventual loss. The Court also noted a genuine issue as to whether there was a misdescription given expert testimony that more than one classification may have been proper. There was also testimony that “toilet preps” was accurate because the shipment was a lesser grade of fragrances, as well as testimony that Holmes and Foster had hauled similar loads for Plaintiff prior to this load. The Court noted that NMFC 100-AE for toilet preps referenced related classifications, including one which covered “cosmetics and more specifically described elsewhere”, which description appeared to apply to this cargo.

Lastly, the Court addressed Holmes’ contention that Foster was solely liable and that it could not be held responsible for the actions of Foster and his employees or agents. The Court followed Michigan precedents that the transport company would be liable pursuant to respondeat superior in respect to Foster. Following another 6th Circuit district court opinion, the Court also found vicarious liability because of the existence of the lease relationship between Holmes and Foster, finding Holmes estopped from denying responsibility for the cargo loss. This was an interesting use of the lease liability doctrine which is usually applied in the personal injury contest. The Court ultimately concluded that Holmes was liable for any negligence of the part of Foster and denied summary judgment to Holmes against Foster.

B. Limitation Period

4. Buckley v. North American Van Lines, Inc., 2006 U.S. Dist. LEXIS 47538 (W.D. N.C. 2006).

The household goods shipper sued household goods carrier for damages to a shipment from New Mexico to North Carolina. Following the damage, shipper retained an attorney who wrote the carrier indicating that the preliminary losses appeared to be in excess of \$75,000. The carrier argued that it did not receive a claim satisfying the regulations within the nine-month limitation period. The Court held that the attorney’s letter was a sufficient claim and was filed within nine months of the delivery. The Court stated that the regulations under 49 C.F.R. § 1005.2(b) do not require specific details of the damage. Because shipper complied with the nine-month period, the motion for summary judgment was denied. Please note that elsewhere in the Fourth Circuit, such vague references to the amount of damages have been held not to constitute a proper claim. [But see *McLaughlin Transportation Systems, Inc. v. Rubenstein*, 390 F. Supp. 2d 50 (D. Mass.) for an exactly opposite holding on similar claim facts.]

5. One Step Up v. J.B. Hunt Transportation Services, Inc., 2006 U.S. Dist. LEXIS 85439 (S.D. N. Y. 2006).

Three shipments of clothing were transported by motor carriage in interstate commerce for delivery to Wal-Mart. Wal-Mart hired Transplace, a shipping logistics company, to arrange for the transportation and Transplace hired J.B. Hunt, the motor carrier. Shortages were noted upon delivery by Wal-Mart, who took exceptions on the bills of lading. Plaintiff did not file claims with J.B. Hunt, but Transplace and Wal-Mart filed claims for the three shipments. Two of the claims were withdrawn and the other claim was rejected by J.B. Hunt based upon a clear seal record. J.B. Hunt moved for summary judgment against plaintiff based on the time-bar defense and plaintiff cross-moved for summary judgment, alleging estoppel and that it proved a prima facie case.

The district court granted J.B. Hunt’s Motion for Summary Judgment and denied Plaintiff’s

Cross-Motions for Summary Judgment. Plaintiff attempted to circumvent its failure to file claims within 9 months by arguing that J.B. Hunt should be estopped, under Pathway Bel-lows, because J.B. Hunt did not pay, decline or make a firm compromise settlement offer within 120 days of receipt of the claims pursuant to 49 C.F.R. § 1005.5 (sic) However, the district court rejected that argument, holding that J.B. Hunt’s failure to fulfill its obligations under 49 C.F.R. § 1005.5 did not result in plaintiff being misled as to the need to file a claim within 9 months, and that plaintiff was outside of the scope of entities whom the C.F.R.s were designed to protect.

6. Tillman v. Bulkmatic Transport Co. 2006 U.S. Dist. LEXIS 47062 (N.D. Ill. 2006).

Although this case involved a private cause of action by an owner/operator against an interstate motor carrier for alleged violations of the FMC-SA’s leasing regulations and did not involve any cargo loss/damage issues, it may be useful in that the Court recognized that Congress enacted legislation providing for a default statute of limitations of four years whenever a limitations period is not specifically provided within a particular statute. See 28 U.S.C. § 1658. Useful where short form B/Ls are silent on suit limitations period.

C. Limitation of Liability

7. Technical Prospects LLC v. Atlas Van Lines, Inc. 2006 U.S. Dist. LEXIS 55964 (D. Wis. 2006).

Plaintiff Technical Prospects shipped certain medical equipment from Wisconsin to Texas, leaving blank the declared value section of the bill of lading, although plaintiff’s customer indicated that he wanted to “insure” the equipment for \$85,000. The shipment was damaged in transit and Technical Prospects sued Atlas for the full \$85,000. Atlas moved for summary judgment to have its liability limited to 60¢ per pound, or \$5,448, based on the bill of lading. In denying Atlas’ motion, the Court cited that Atlas’ claim representative had made a representation to Technical Prospects that Technical Prospects “did secure valuation coverage...in the amount of \$85,000.” The Court further noted that Atlas invoiced Technical Prospects \$382.50



for an “insurance certificate” and that during discovery Atlas produced a document entitled “Transit Coverage: Evidence of Insurance.” Although Atlas argued the parole evidence rule prohibited the receipt of the parties’ agreement to insure the shipment for \$85,000, in light of the unambiguous language in the bill of lading, the Court ruled that a question of fact existed as to whether the parties made a mutual mistake in reducing their oral agreement to writing. In light of that evidence, the Court denied Atlas’ motion for summary judgment.

7. Continental Insurance Company v. Federal Express Corporation, 454 F.3d 951 (9th Cir. 2006).

Plaintiff’s insured, on March 31 and April 15, 1999, used FedEx to transport packages of electronic equipment from Hong Kong to Pasadena, CA. Four packages never arrived. Continental paid for the loss and filed a subrogation lawsuit against FedEx in California state court alleging causes of action under the Warsaw Convention and several state law causes of action. The lawsuit initially concerned air waybills nos. 3045 and 3137. FedEx removed the case from state to federal court and filed a motion for partial summary judgment claiming its liability was limited under the Warsaw Convention, as amended by the Hague Protocol of 1955 or the Montreal Protocol No. 4, which became effective in the United States on March 4, 1999. The original Warsaw Convention allowed a carrier to limit its liability only if the air waybill contained all the particulars set out in Article 8(a) to (i) and required the air bill to contain the weight of the goods. Montreal Protocol No. 4 abandoned the cargo documentation requirements of the Warsaw Convention entirely, permitting limitation of liability even in the absence of an air waybill. Before the District Court ruled on FedEx’s motion, Continental added two more waybills, nos. 3067 and 3056. Because the weight notations appeared on the first two air waybills, the District Court granted partial summary judgment to FedEx as those. FedEx’s second motion for partial summary judgment attacked waybills 3067 and 3056, but the District Court denied that motion on the basis that those two air waybills were technically deficient under the original Warsaw Convention because the sender’s copies omitted the cargo’s weight. The Ninth Circuit held that the District Court abused its discretion in applying the law of the case doctrine to the latter two air waybills. The Circuit Court reviewed the history of the Warsaw Convention and the

adoption by the United States of the Montreal Protocol No. 4 which was ratified by the United States Senate on March 4, 1999 and concluded that the ratification of the Montreal Protocol No. 4 brought the Hague Protocol into full force and effect in the United States as of March 4, 1999 and that the District Court erred by applying the original Warsaw Convention.

8. Emerson Electric Supply Company v. Estes Express Corporation, Inc., 451 F.3d 179 (3rd Cir. 2006)

Carrier received a shipment of four electrical switch gears for transportation from shipper. The bill of lading identified the freight as Class 77.5. The declared value section was left blank. After shipper signed the bill of lading, the driver affixed a pro sticker which stated that the Estes tariff applied. The tariff contained a provision with a released rate of ten cents per pound. The tariff further provided that Class 77.5 shipments were limited to a maximum value of \$7.90 per pound if the goods were crated. The shipment was damaged, and the shipper filed a claim for \$140,000. In response, carrier accepted the claim in the amount of ten cents per pound, or a total of \$1,020.

In beginning its analysis, the Court went through a detailed examination of the history of the Carmack Amendment, including recent legislative changes. The Court also cited the four-part Hughes v. United Van Lines case which requires the carrier to do the following in order to enforce a released rate: (1) maintain a tariff within prescribed guidelines of the Interstate Commerce Commission; (2) obtain the shipper’s agreement as to its choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment.

The crux of this case involved requirement Number 3. The carrier contended that carriers are no longer required to offer a shipper two or more levels of liability following the passage of the Interstate Commerce Commission Termination Act (ICCTA). The carrier’s argument was based on the deletion of § 10730(b) (2), indicating Congressional intent to dispense with the requirement of offering different levels of liability. The Court held that Congress would have used clearer language if that was what it intended to have done. The Court also resorted

to the Eleventh Circuit’s opinion in Sassy Doll Collections, Inc. v. Watkins Motor Lines, Inc. In the alternative, carrier contended that the presence of the declared value box satisfied the choice requirement. Because the tariff did not provide an option to declare a higher value with a corresponding level of liability, the declared value box did not meet that requirement. Carrier also argued that two levels of liability were offered because the packaging of the shipment, in itself, could lead to an increased release rate. The Court held that this incidental effect did not amount to a meaningful choice. Accordingly, the summary judgment in favor of the shipper was affirmed.

9. Sanden International, USA, Inc. and Nissay Dowa General Ins. Co. v. Union Pacific Railroad Company, CV 056147 (AIG), (C.D. Calif. 2006) (tentative ruling only).

Plaintiff had sought recovery of \$187,079.08 from UP after a UP train derailment compromised lading within three containers of various auto parts purchased by Sanden. UP moved for summary judgment, arguing that plaintiff had failed to timely file a claim with the railroad for cargo damage, had failed to timely file suit with the railroad, and in suing the railroad had violated its covenant not to sue any subcontractor of the ocean carrier. The Court issued this tentative ruling which was never formally issued because just moments prior to the hearing, and after reading the attached tentative ruling, plaintiffs’ counsel accepted the then outstanding \$50,000 Rule 68 Offer of Judgment made earlier by UP. The tentative ruling is significant, however, because there were only two other cases (one of which was unpublished) wherein the covenant not to sue a subcontractor was upheld in an ocean carrier’s bill of lading. The traditional argument against enforcement of such clauses has been that they violate the prohibition within COGSA and the Carmack Amendment against the carrier exculpating itself from liability. This tentative ruling indicates that courts are willing to enforce such clauses. The ruling also indicates that notwithstanding the fact that the Ninth Circuit is a “substantial compliance” circuit for filing claims, a claim filing time bar can be successfully prosecuted even where there is a written claim within the time frame if it does not contain an estimate or statement of the amount of damages and does not purport to hold the carrier liable for the losses. Finally, the tentative

Continued on page 15



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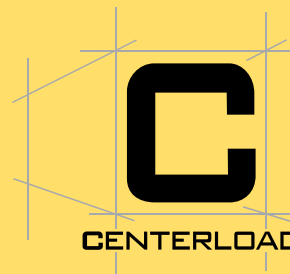
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From page 9

ruling also involves a nod to *Sompo*, elsewhere on this Agenda, but distinguishes itself from *Sompo* as being a case in which the plaintiffs admitted that the Carmack Amendment does not apply.

10. Altadis USA Inc. v. Sea Star Line, LLC, 458 F3d 288 (11th Cir. 2006).

The shipper purchases a shipment of cigars from a company in Puerto Rico. The shipment was said to contain 2,478 cartons of cigars and 20 cigar bands. This was placed in an ocean container and booked with the Sea Star Line for shipment to Jacksonville, Florida. The ultimate destination of the shipment was Tampa, Florida, and the ocean carrier issued a thru bill of lading. The container was stolen during the Jacksonville to Tampa land movement.

Shipper sued ocean and motor carriers in state court. The defendants moved to Federal Court and filed motions for summary judgment based on the statute of limitations provided by COGSA. Shipper acknowledged that the one year statute of limitations applied to the ocean carrier but claim the motor carrier was subject to the two year statute of limitations under the Carmack Amendment.

The Court held that the COGSA limitation applied because the *Swift Textiles v. Watkins Motor Lines* case required that a separate bill of lading be issued. The Court based its opinion of the 2004 Kirby case decided by the United States Supreme Court. Therefore, in the absence of a separate domestic bill of lading for the inland leg, the one year statute of limitations of COGSA applies to the shipment and not the Carmack limitation. Interestingly, the ocean carrier's claim for contribution and indemnity against the motor carrier was dismissed and affirmed on appeal. Because the ocean carrier had no liability to the third party, there was no basis to seek indemnification.

See *Sompo v. Union Pacific*, for a decision which reaches the opposite conclusion regarding the application of COGSA.

11. Audio Visual Services Corp. v. Felter International Inc., U.S. Dist. LEXIS 57737 (S.D. Tex. 2006).

Shipper shipped electronic equipment from Dallas, TX to Toronto, CA for a trade show. The equipment was damaged when the motor carrier's truck was involved in an accident in Texas. The sole issue in the case was the limitation of liability. The Court cited the *Hughes v. United Van Lines* case for the four-part test. The carrier produced evidence that the shipper was aware of a \$2.00 per pound industry standard, but the Court held that whether Audio Visual had reasonable notice of the liability limitation and the opportunity to obtain the information necessary to make its choice was a factual decision to be determined at trial. Therefore, the summary judgment motions of both parties were denied. [Prior decision in June 2006 Agenda.]

12. Zolo Technologies, Inc. v. Roadway Express, Inc., 2006 WL 2092072; 2005 U.S. Dist. LEXIS 51173 (D. Colo. 2006).

Shipper Zolo Technologies requested a rate quote from Roadway to haul electronic equipment for a trade show from Kansas to Colorado. The shipment consisted primarily of two large crates weighing 350 and 450 pounds. Roadway submitted a series of quotes, all of which included a limited liability provision of \$25.00 per pound per package, subject to a cap of \$100,000 per shipment. Despite Zolo's admission that its employee read the liability provision on the rate quotes, the employee thought the rate quote to be for "full liability for \$100,000." Because Zolo purportedly wanted a total of \$125,000 in protection, it requested from Roadway an additional \$25,000 of liability coverage. Zolo claimed that it sent Roadway a one-page fax that repeated all of Zolo's requests for shipment, including the request for a rate quote that covered the \$125,000 of shipment. Roadway admits receiving a fax, but contended that it received it prior to sending Zolo the rate quotes containing Roadway's limitations of liability.

After Zolo verbally accepted Roadway's quote, Roadway sent Zolo a rate confirmation sheet which contained the same liability limiting provision that appeared on the rate quotes. Also, prior to shipping the goods, Roadway sent Zolo the Bill of Lading via email. Upon receiving the Bill of Lading, Zolo specifically checked to see that Roadway included the \$25,000 of extra liability coverage. Upon delivery in Colorado, Zolo signed for the shipped goods and noted damage to the contents of the 450 pound crate.

Zolo filed a complaint for the cargo damage in state court, which Roadway removed to federal court.

The Court's decision arises out of Roadway's Motion for Partial Summary Judgment, seeking to limit its liability to \$36,240 (450 lbs. x \$25/lb + \$25,000 in excess coverage). Finding genuine issues of fact regarding the agreed upon amount of Roadway's liability, the Court denied the Motion. Specifically, the Court found that no evidence existed that Plaintiff agreed in writing to limit Roadway's liability, as requested by *Hughes v. United Van Lines*, 829 F.2d 1407 (7th Cir.).

The Court rejected Roadway's argument that Zolo was bound to Roadway's tariff limitation as confirmed in the rate quote (which Zolo approved) and incorporated in the Bill of Lading (which Zolo approved). Roadway's tariff states that "the carrier's liability will not exceed \$25.00 per pound per package, subject to a maximum liability of \$100,000 per shipment, whichever is lower, unless the shipper has requested excess liability coverage." The Court found that Plaintiff's request for excess liability coverage of \$25,000 fell within the exception to the tariff's limitation of liability and therefore, negated the applicability of the first portion of the tariff (i.e., \$25 per pound with a \$100,000 cap).

The Court also rejected Roadway's argument that Zolo knew it agreed to the terms of the Bill of Lading, including Roadway's liability limitation, unilateral mistake as to the amount of its coverage is not enough to eviscerate Roadway's liability limitation. The Court found two main reasons why unilateral mistake did not apply: (1) the unsigned Bill of Lading was silent to the parties' agreed or declared amount; and (2) the Bill of Lading's reference to 49 U.S.C. § 14706 did not give Zolo sufficient notice of the tariffs to excuse Roadway's requirement to obtain Zolo's agreement in writing under *Hughes*.

Preemption

13. Graham v. Dunkley, 2006 WL 2596327; 2006 N.Y. LEXIS Misc. 2375 (N.Y. Sup.Ct. 2006).

New York state law preempts ICCTA on motor vehicle lessor liability, at least according to the New York Supreme Court, Queens County. The Transportation Equity Act of 2004, 49 U.S.C. §

30106(a) provides that a motor vehicle owner who rents or leases a vehicle "...shall not be liable under the law of any state...by reason of being the owner of the vehicle..." Plaintiff Sharon Graham was allegedly injured by the negligence of a driver of a rental vehicle owned by NILT, Inc. NILT moved to dismiss the action on the ground that ICCTA expressly preempts New York Vehicle and Traffic Law § 388 which provides that a vehicle owner is vicariously liable for the negligence of one using his vehicle with the owner's permission.

The court denied NILT's motion and held that (1) the New York court has concurrent jurisdiction with the U.S. courts over federal constitutional questions under the 10th Amendment and (2) Congress has no power under the "Commerce Clause" to nullify New York's substantive tort law within its borders. On the latter point, the court reasoned that New York's motor vehicle vicarious liability doctrine does not have a "substantive effect" on interstate commerce and there is no "rational basis" for federal regulation in that area. Thus, New York court held that Congress's enactment of Section 30106 is unconstitutional.

Freight Charges

14. Sears Roebuck and Co. v. National Logistics Corp., 2006 U.S. Dist. LEXIS 46278 (E.I. Ill. 2006).

This decision is related to the Oak Harbor Freight Lines, Inc. v. Sears Roebuck and Co., 420 F. Supp. 2d 1138 (W.D. Wa. 2006). In the present case, Sears sued National Logistics Corporation ("NLC") to recover \$3.6 million in overcharges that NLC had charged Sears between 1999 and 2004. NLC had been acting as Sears' broker in arranging for the transportation of bulk shipments of household appliances to Sears' warehouses and then from its warehouses to the purchasers. Although under the original (1989) Sears/NLC Agreement, NLC was to add transaction costs and monthly administrative charges to cover each motor carrier's freight bill, the freight bills themselves were never submitted directly to Sears. In 1999, when NLC discovered a \$4.7 million deficit in the account it used to pay the carriers, it began to automatically add an overcharge to each bill to Sears to make up the deficit. In this manner, NLC overcharged Sears \$3.6 million. Among the claims Sears alleged against NLC was a claim

for the violation of the Illinois Consumer Fraud and Deceptive Business Practice Act ("ICFA"). NLC moved to dismiss under Rule 12(b)(6), arguing that the ICFA applied only to "consumers" and not to the Sears/NLC relationship. The Court denied NLC's motion, ruling that Sears sued NLC in its capacity of acting as a conduit for obtaining the products it sells, not as a supplier of the products. Because Sears alleged that it purchased NLC's services for its own use, not for resale, Sears, therefore, was a "consumer" within the meaning of the ICFA and NLC's motion to dismiss was denied.

15. CSX Transportation Co. v. Novolog Bucks County, 2006 U.S. Dist. LEXIS 32917 (E.D. Penn. 2006).

CSX sued Novolog, a "private railroad port" facility, to collect \$260,304 in demurrage charges, and Novolog filed a counterclaim in the sum of \$52,899 alleging CSX breached a refund contract at Novolog's facility. The facts reflect that Novolog was hired by exporters to load or unload and export shipments of steel at its facility, and Novolog was typically named as the shipper of consignee on CSX's waybills. Due to an exceptional large volume of railcars between December 2002 and August 2003 many railcars were held beyond the two day free time prescribed by CSX's tariff. CSX sued, claiming Novolog was liable for the demurrage charges as shipper or consignee of record on the inbound and outbound shipments. In support of its motion, CSX offered hundreds of pages of waybills. Conversely, Novolog claimed that under a refund contract drafted by CSX, but not signed by CSX, Novolog was entitled to \$21 per switch of each CSX railcar. The Court denied CSX's motion for Summary Judgment. It rejected CSX's argument that Novolog was liable as the named consignee or shipper on CSX's waybills and ruled that while demurrage charges may be assessed against a shipper or consignee even where the detention occurs through no fault of the shipper, demurrage may not be assessed against the shipper or consignee in the limited circumstances where the delay is the fault of the carrier. The Court further ruled that since CSX did not assert a contractual relationship with Novolog from which demurrage liability may arise, it was foreclosed from summary judgment. Being listed by a third-party as consignee on a bill of lading alone is not enough to make a party liable for demurrage charges. The Court also rejected CSX's argument that an undisclosed

agent of a consignee principal is liable for demurrage charges where it is designated as the consignee on the bill of lading, noting that the Seventh Circuit specifically rejected that theory. The Court further rejected CSX's argument that Novolog was liable under 49 U.S.C. § 10743 because that statute relates only to the payment of rates for shipment of freight and not demurrage charges, which are distinct from transportation rates. The Court also rejected CSX's argument that Novolog should be liable for its demurrage charges because it was familiar with the rail industry's practice of imposing demurrage pages. "Knowledge of the tariff and/or the overbooking of its port for export and import is not sufficient to incur liability for the detention of those cars." The Court noted that if CSX could demonstrate a contractual relationship with Novolog, from which tariff liability might be based, it would have a cause of action or it could pursue the party with whom it did have a contractual relationship. As for Novolog's counterclaim, the Court denied Novolog's motion for summary judgment because there was no evidence to demonstrate that CSX accepted and signed the refund contract.

Freight Forwarder/Broker Liability

16. Oliver Products Company v. Foreway Management Services, Inc., 2006 U.S. Dist LEXIS 32968 (W.D. Mich. 2006).

Plaintiffs sued defendants Foreway Management Services, a broker, and Schneider National, a motor carrier, for damage to a shipment of medical grade Tyvek that was contaminated while being transported in a trailer filthy with printing toner. Plaintiff filed a breach of contract claim against Foreway, who then moved to dismiss on the grounds that the Carmack Amendment precluded broker liability for damage to goods in transit. The Court denied Foreway's motion on the basis that Carmack Amendment preemption applies only to motor carriers, not to transportation brokers. A broker may still be liable at common law for breach of contract or negligence claims regarding the selection of the carrier or the conveyance (to the carrier) of instructions as to the delivery of the goods.

17. TRG Holdings, LLC v. Leckner, 2006 U.S. LEXIS 70781 (E.D. Va. 2006).

Plaintiff hired a freight broker, defendant Leckner, to arrange for the transportation of a used Ferrari from California to Virginia. Leckner, in turn, hired third-party defendant, Competition Transport, to perform the actual transportation. Plaintiff subsequently sued Leckner for \$74,900 in alleged damage to the Ferrari in a claim under Virginia Consumer Protection Act. Leckner filed a third-party complaint against Competition Transport, Count 1 of which alleged state law claims for indemnification and contribution. The Court denied Leckner's motion to dismiss plaintiff's complaint on the grounds of Carmack Amendment preemption, ruling it is inapplicable to brokers. The Court, however, granted third-party defendant Competition's motion to dismiss the broker's indemnification and contribution claims on grounds of Carmack Amendment preemption, ruling that the indemnification provisions of 49 U.S.C. § 14706(b) are available in a claim among carriers but not as to brokers.

18. Tokio Marine & Fire Insurance Co., Ltd. V. Megatrux, Inc., 2006 Cal. App. Unpub. LEXIS 6964 (Calif.).

In this subrogation case plaintiff sued Megatrux, a freight transportation broker, and others as "motor common carriers, freight forwarders and bailees" for the loss of a trailer load of computer parts transported from California to Texas. Plaintiff alleged that Megatrux generally held itself out to be a carrier and a freight forwarder and that it allowed itself to be identified as the carrier on the bill of lading. The Court of Appeal affirmed that trial court's grant of Megatrux's motion for summary judgment which was based on the fact that it was a broker only, not a motor carrier, with respect to the shipment in question. The California Court of Appeal ruled that the fact that Megatrux allowed itself to be identified as the carrier on the bill of lading was insufficient to establish its status as a motor carrier and that Megatrux did not provide any motor carrier services. The case provides a good breakdown of "carrier" and "broker" responsibilities and liabilities under bills of lading.

Removal

19. Carter v. Alpha Moving Company, 2006 U.S. Dist. LEXIS 74021 (D. Colo. 2006).

Plaintiff sued defendant moving company in Colorado state court alleging claims for overcharges and cargo loss and damage in relation to a household goods move from Colorado to Florida. Plaintiffs had difficulty serving defendant who ultimately answered on November 22, 2005 and alleged counterclaims for transportation charges due. Evidently, the state district court dismissed the case for failure to prosecute, and on April 27, 2006 plaintiffs filed a motion to reopen the case. On June 20, 2006 plaintiffs served notice that trial would commence on October 17, 2006. On August 10, 2006 defendant filed a motion to dismiss the complaint on the basis of Carmack Amendment preemption which apparently was not ruled on by the state court. Then, on October 3, 2006, two weeks prior to trial, defendant filed a notice of removal, claiming that in plaintiff's response to defendant's motion to dismiss, plaintiffs "for the first time" admitted that the Carmack Amendment governed the claims. In vacating defendant's notice of removal and remanding the case to

state court, the Court cited the defendant's "reprehensible" conduct, its "flagrant misrepresentation of the law" and the "abhorrent tenor" of its notice of removal. The Court noted that defendant had "very subtly misstate[d] the law" and had been served as far back as November 7, 2005, which was the relevant pleading for calculating the 30 day period of removal. The Court also awarded plaintiffs costs and reasonable attorney's fees under 28 U.S.C. § 1447(c).

20. Von Essen v. Brase Trucking, LLC, 2006 U.S. Dist. LEXIS 86104 (D. Colo. 2006).

The defendant was served with plaintiff's state law Carmack Amendment complaint on September 18, 2006. Defendant emailed its notice of removal to federal court on October 19, 2006, the last day of the 30 day removal window. However, the notice was not docketed until the following Monday, October 22, 2006, because defendant had not submitted its filing fee until that date. In granting plaintiff's motion to remand, the Court noted that its electronic case filing procedures do not alter or obviate the duty of the clerk to collect a filing fee before a civil action is filed. Since the fee was not received until October 23, 2006, the notice of removal was filed too late.

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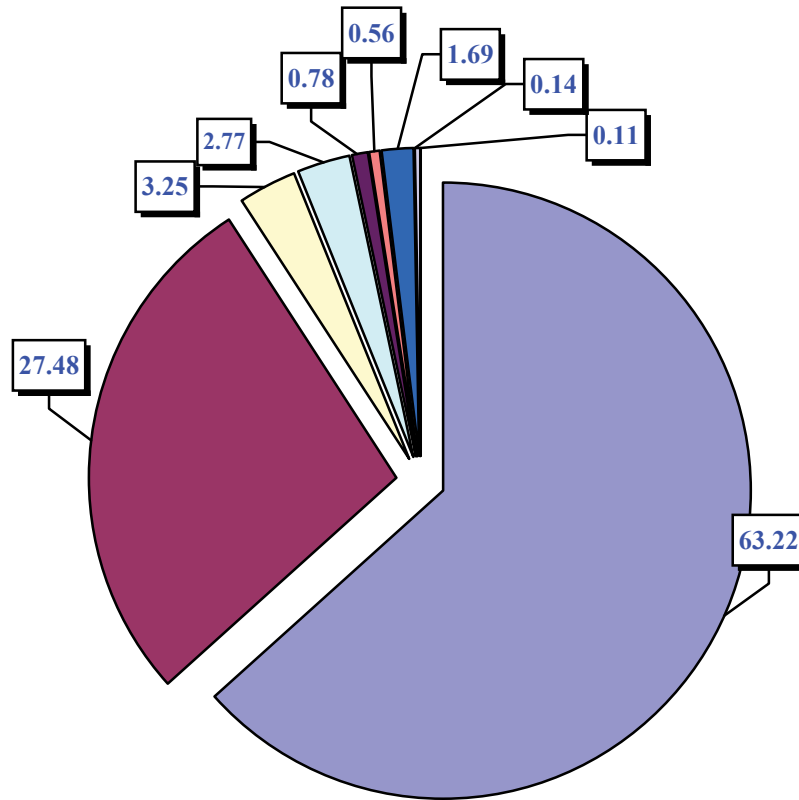
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Concealed Damage	3.25 %	5.61 %
Wreck / Catastrophe	2.77 %	.19 %
Delay	.14 %	.05 %
Water	.56 %	.21 %
Heat / Cold	.11 %	.03 %
Other	1.69 %	.59 %
Total numbers of claims paid Vs. number of claims filed.		75.90 %
Total dollars paid Vs. total dollars filed.		43.50 %
Net dollars paid Vs. total dollars filed.		39.10 %
% of claims filed to total number of shipments made.		.75 %
Total company claim ratio.		1.14 %
Percent of claims resolved in less than 30 days.		78.7 %
Percent of claims resolved 31-120 days.		17.7 %
Percent of claims resolved more than 120 days.		3.6 %

2006 CLAIMS SURVEY CHART



- Visible Damage - 63.22%
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- Concealed Damage - 3.25%
- Wreck/Catastrophe - 2.77%
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- Delay .14%
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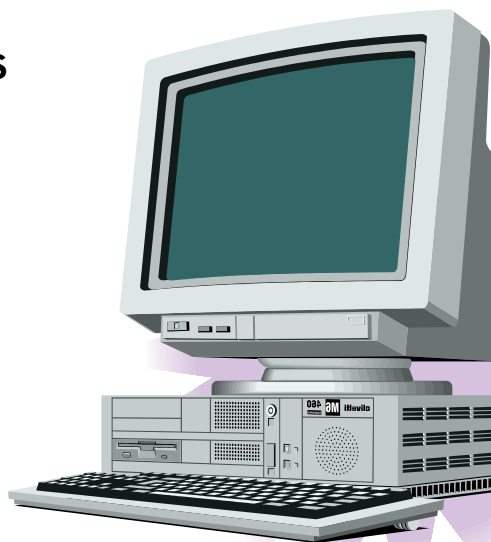


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Anyone who wishes to advertise in our **In Transit** quarterly newsletter can do so by completing this form and sending it, along with a copy of your advertisement and your company check to:
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Company Name: _____
Contact Name: _____
Company Address : _____

Telephone: () _____
Fax: () _____
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AD RATES:	\$ 150.00 Business Card	\$250.00 Half page
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1. Name of Applicant: _____
Last Middle Initial First

2. Affiliation: _____

3. Other Information: *Indicate the company and position, or, if state or federal agency, the position held.*

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I am involved in transportation through one or more of the following areas: (please check appropriate listing or listings).

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Please enclose payment with application form.

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Association, Inc
c/o Nowell Amoroso Klein Bierman, P.A.
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Please send completed application and payment to:

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Eloughman@nakblaw.com

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