In Transit

Transportation Loss Prevention & Security Association

Spring 2009

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
www.TLPSA.org

CONFERENCE DRAWS A FULL HOUSE

Check Conference pictures on pages 12-13, 16-17

Look Inside!
See Page 14 for Carrier Claims Survey and Chart

ST. LOUIS WAS SPECTACULAR
HIGHLIGHTS OF THE CONFERENCE

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

For those of you who were there, you will remember this extraordinary conference. For those who could not attend, you missed an exceptional educational experience.

St. Louis was the host city for the unique Joint Conference sponsored by TLP&SA and TLC. As far as we know, this is the only annual meeting of carriers and shippers exploring mutual goals.

SPECIAL SEMINARS

From the special optional Seminars all day Sunday which provided concentrated course study on contracting, claims and logistics to the final Transportation Attorney Panel on Wednesday featuring eight of the most knowledgeable transportation attorneys in the country, hardly a minute went by where the attendees were not exposed to well presented information. One could hear whispered comments from the audience that they worked harder during the Conference then they would have at their jobs.

VIEW FROM INDUSTRY BIGWIGS

The individual General Sessions were riveting. Right off the bat, leading representatives of the transportation industry set us straight. Joe Bonney from the Journal of Commerce gave us a snapshot of the transportation industry from a reporter's point of view. Eric Starks of TranzAct Technologies made his point with slides that brought home the facts and figures of our current problems. While Mike Regan lifted everyone off their seats with an animated no holds barred presentation of the world according to Regan. Finally Bob Voltmann, Executive Director of the Transportation Intermediaries Association, described the present status of 3PL's as well as what is going on in Washington D.C.

LUNCHEON SPEAKER FROM PACER

At lunch everyone was impressed by Jeffrey R. Brashares, Divisional President of Pacer International. Mr. Brashares presented a no nonsense look at how rail and logistics combine to move freight and he provided insight on where we are going in the near future.

To end an eventful first day of meetings, the group was treated to a slugfest called LAW OF THE LAND Vs. LAW OF THE JUNGLE. This popular event featured attorneys and industry representatives battling it out over what the law says as opposed to what the real word does.

SECURITY...SECURITY...SECURITY

Tuesday was a day filled with Security and targeted Workshops. Everyone was enthralled by David Shillingford, an Englishman who was as at ease solving art theft as he was suggesting ways to combat cargo theft in the U.S. He has come up with unique initiatives about establishing a national property database to track cargo theft and he is in the process of obtaining insurance company, law enforcement, and industry participation.

One of the highlights of the Conference was the fast paced hard hitting session featuring Detective Keith Lewis of the DeKalb County Georgia Police Department. This decorated police officer with a background as Director of Logistics for Ryder specializes in fighting cargo theft. Detective Lewis punctuated his talk with stories, slides and videos giving the audience inside information which they can use immediately. Detective Lewis told the attendees, "If you do not

have a cargo theft police officer on your speed dial, you are not properly protecting your company's valuable merchandise."

WELCOME FROM MODOT

Having our Conference in St. Louis allowed us to have James Smith, a representative of the Missouri Department of Transportation, as our Tuesday luncheon speaker. Jim welcomed all on behalf of the state of Missouri. His easy manner and Midwest perspective was well received by both shippers and carriers even though Jim is the Transportation Enforcement Administrator for the MODOT. Jim described how his department educated and enforced both the federal and state rules and regulations applicable to carriers in Missouri (the Gateway to the West).

Workshops on diverse areas such as loss & damage; forwarders & 3PL's; international trade; and insurance rounded out the Conference presentations.

EXHIBITORS

What distinguishes our Conference from many others is the quality of our loyal Exhibitors. Everyone who attended had the opportunity to visit the well appointed booths occupied by our Exhibitors. Each booth was "Manned" or "Womaned" by knowledgeable representatives of their companies who spared no effort or time to answer all your questions and to demonstrate their products.

Over the years, our Exhibitors have become our friends. The attendees look forward to seeing them and the Exhibitors support our Conference. What a partnership. Whether you were at the Conference or are sorry you were not, please take a moment and review the list of our Exhibitors in this NEWSLETTER. If they can help you, please seek their services and tell them you appreciate their support.

CONCLUSION

We will not soon forget St. Louis afforded a historical venue, hospitable people, and a wonderful ambience to learn and network. Those who attended are richer for it.

GOLDEN RULE OF DEMURRAGE CHARGES

By: John K. Fiorilla, Esq.

When providing services to the named consignor or consignee or their properly identified principal, the Railroad always gets paid.

> *CSX Transportation v. Novolog Bucks County*, 502 F3d 247 (3rd Cir. 2007) Cert. Denied 2008 Before Slovitor, Aldisert, Roth, Circuit Judges

In this recent case, the U.S. Court of Appeals for the 3rd Circuit in Philadelphia examined the question of who is legally responsible to pay demurrage charges for the use of railroad-owned equipment when a named consignee of the shipment was not the owner of the goods transported and did nothing to cause the delay which resulted in the assessment of demurrage.

Demurrage is a charge exacted by a rail carrier from a consignor or consignee named on the contract of carriage (i.e., a bill of lading) for failure to load or unload railcars within the specified "free" time found in an applicable tariff or contract.

In the *Novolog* case, Novolog was the classic middle man. An agent for an undisclosed principal it was not the seller nor the buyer nor the owner of the tons of steel which was shipped. Novolog acted as a transloader which had a contract with the seller of the goods to unload the railcars and to load ships for the movement of the steel from a port on the Delaware River to Europe.

The railroad bills of lading issued on instructions of the consignor named Novolog as the consignee to receive the steel at the port facility.

Novolog contended that it was not the owner of the goods and was not the cause of the delay of transloading the shipments (more steel having been sent to the port than available ships to load) and, therefore, Novolog stored the railcars loaded until the buyers and sellers of the steel provided sufficient ocean transport to move the steel.

The District Court below took the position that the railroad could not rely on the bill of lading to determine the party responsible for demurrage, but must look to the "responsible party" for the delay.

The railroads argued this was not possible since in many cases including this one, it did not even know the identity of such parties, since they were not named on the bill of lading.

The 3rd Circuit Court in a unanimous opinion of three of its most senior judges, reversed the District Court. It found that the railroad need look no further than the bill of lading to determine the responsible party for demurrage no matter who was actually responsible for the delaying in loading or unloading the cars.

The court assured the parties that its decision was entirely equitable since pursuant to 49 *U.S.C.* §10743(a), the consignor or consignee could avoid the responsibility by either of the following two ways:

1. By refusing delivery of the railcars when tendered by the carrier; or

2. By providing the carrier timely written notice of agency as noted in 49 *U.S.C.* §10743(a) and identifying the principal who will be responsible for the demurrage charges.

The Court, therefore, found that since the consignor, consignee or their properly identified principal will always be responsible for demurrage - the Golden Rule of Demurrage - "the Railroad always gets paid" wins out.

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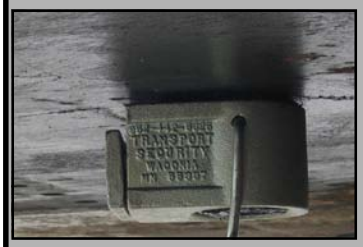

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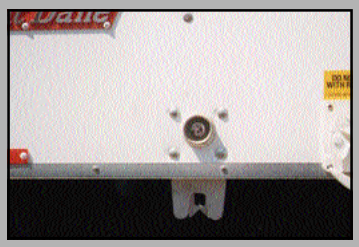

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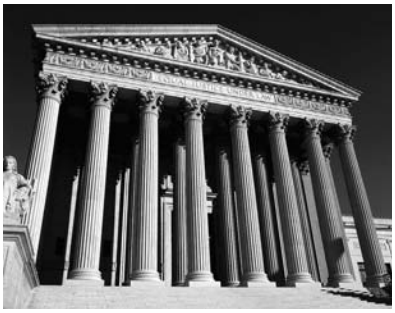

Recent Court Cases

as analyzed by the Conference of Freight Counsel

William D. Bierman, Esq., Chairman • Marian Weilert Sauvey, Esq., Vice Chairman

A. Carrier Liability

1. Design X Manufacturing, Inc. v. ABF Freight System, Inc., Civil Action No. 3:06-CV-1381 (MRK) (D. Conn.2008) (prima facie case; limitation of liability).

Plaintiff Design X sued defendant ABF Freight for damage to a shipment of custom made furniture that ABF transported pursuant to a "turnkey quote" under which ABF's liability was limited to $5.00 per pound. The turnkey quote called for a second floor delivery, but the largest of the pieces was too big to get to the second floor so it was left on the first floor, with a "clear" delivery receipt, apparently signed by ABF's delivering agent. Plaintiff claimed that the large piece was damaged in a botched attempt to bring it up to the second floor, while other evidence showed that the consignee, the next day, hired a crane company to hoist the piece up into a second floor window, so there was conflicting evidence as to how and when the damage occurred. Design X sued ABF for $15,835 in damage to the desk plus $250,000 for loss of business and damage to its reputation. The Court granted ABF's motion for summary judgment, ruling that plaintiff failed to prove the shipment was delivered in damaged condition since the only evidence relating to "damage" at the time of delivery was inadmissible hearsay. The court went on to rule that even if plaintiff had established a prima facie case, ABF was entitled to the $5.00 per pound limitation of liability ($1,700) based on plaintiff's deposition testimony as to the weight of the article and that he was familiar with the turnkey quote and ABF's bill of lading and tariff provisions.

2. Salis v. American Export Lines, 566 F. Supp.2d 216 (S.D.N.Y.2008).

Shipper brought action against ocean carrier and freight forwarded for nondelivery. Defendants moved for summary judgment under Rule 56 on basis of carrier's forum selection clause and freight forwarder's limitation of liability. The District Court granted summary judgment. Bill of Lading contained forum selection clause directed to the Oslo City Court, Norway, and contained Himalaya Clause bringing all of the carrier's agents with its protections. In addition, the Court applied the $50.00 limitation of liability in the freight forwarder's contract with the shipper.

3. Gonzalez v. Caballero, Civil Action No.: 07-CV-4801 (S.D.N.Y.2008).

Even assuming that an interstate motor carrier had a contractual obligation to an animal hospital, to deliver display racks to the inside of the hospital, the carrier did not have a duty of care, under New York law, to the animal hospital's employee, to try to save him from injuring himself by attempting to move the display racks into the hospital. The carrier's driver undertook no duty to protect the employee, and instead, he departed after unloading the display racks into the street and after refusing to move them into the animal hospital.

4. Zurich North America (Canada) and Woodbridge Foam, Inc. v. Triple Crown Services Company, 2008 WL 4642864 (E.D. Mich.2008).

Subrogated cargo damage claim based on state law removed to federal court seeking damage to rack and pinion steering components allegedly occurring during two (2) separate shipments where the trailers overturned. Complaint amended to bring suit under Carmack. Carrier then moved for summary judgment under Carmack asserting plaintiff could not establish prima facie case as it could not prove damage to the cargo despite the rollovers. Carrier contended the shipper failed to sufficiently inspect the goods for damage. Shipper and insurer contended the cargo was "sensitive machinery subject to complex, computerized certification process" and that the rollovers cast doubt on the parts. The District Court denied the motion on questions of fact based on the insurance adjuster's report and shipper's testimony that the auto parts may have been damaged, or were of "unknown status" because of the rollover.

5. Tabb v. Journey Freight International, 2008 WL 4767908 (D. Mass.2008).

Loading and unloading case. Worker injured unloading glass sued Canadian motor carrier and Canadian shipping broker. On defendants' motion to dismiss under Rule 12(b)(2) and/or 12(b)(6) for lack of personal jurisdiction, the Magistrate Judge issued a report and recommendation to dismiss.

Carrier moved for summary judgment because plaintiff failed to comply with the Hague Convention in attempting to serve the Canadian carrier and because the suit was untimely under the state law statute of limitations. The District Court adopted only that part of the Magistrate's recommendation to dismiss the carrier based on the expired statute of limitations.

On broker's motion to dismiss for lack of personal jurisdiction, the Magistrate Judge recommended dismissal because the broker's actions were not directed to Massachusetts, it only acted as broker and did not touch, handle, load or brace the cargo, and there was no purposeful availment of Massachusetts by the broker. The District Court adopted the report and recommendation of the Magistrate Judge and dismissed the case against the broker for lack of personal jurisdiction.

6. Advantage Freight Network v. Javier Sanchez, et al., Civil Action No.: 07-CV-F-00827(LJO) (D. Ca.).

AFN, a freight broker paid a claim of $540,000 to Best Buy arising from a stolen shipment of DVD players. AFN accepted an assignment of the claim and subrogated against Sanchez, a carrier with whom it had an ongoing contract. Sanchez contracted to pick up the load in Puyallup, Washington and deliver it to Best Buy's DC in Dinuba, California. Sanchez' truck broke down and he referred to load to another carrier who

had a contract with AFN, Ortiz. AFN had not secured an appointment time, despite the fact Best Buy only takes appointment freight. When Ortiz's, driver arrived, he was turned away and an appointment was made for two days hence. Ortiz drove the load home to Los Angeles where it was stolen while parked in a truck jungle near a railhead.

On cross-motions for summary judgment the court ruled that Carmack liability was extinguished when the load was tendered to Best Buy and rejected because Best Buy insisted on an appointment. At that point the carriers became warehousemen subject to a negligence standard only. Moreover, the court ruled that unless he was aware of the value of the goods the carrier could not be held liable for their full value. Facing daunting proof problems, AFN settled before trial.

7. VIS Sales, Inc. v. Old School Transport, LLC, et al., Civil Action No.: 5:07-CV-2026 (N.D. Ohio.2007).

Freight loss and damages – consequential damages/lost profits. In this freight loss and damage case, the defendant motor carrier removed the case to federal court and successfully obtained court ordered preempt of all of the Plaintiff's claims except for Carmack. The case proceeded on liability under Carmack and laundry list of damage components, including attorneys' fees, interest, lost profits and consequential damages. Old School Transport sought summary judgment on various of these damage components. While the court found that a bill of lading issued and executed after the shipment could not limit the motor carrier's liability, the court did find that the Plaintiff's claim for "lost opportunity costs of money" of $531, 357.20 was speculative and unforeseeable and dismissed that portion of the claim.

8. David & Barbara Halpern v. Atlas Van Lines, Inc., Civil Action No.: 1:07-CV-02730 (LW) (N.D. Ohio.2007).

Freight loss and damage/sufficiency and particularity of claim. In this moving and storage case, the Plaintiff sought recompense for freight loss and damage related to items damaged in a household goods move by Atlas in interstate commerce. Within the appropriate claim period, the Plaintiff notified Atlas that the goods had been damaged. Also within that claim period, Atlas replied that it needed more particularized information. Plaintiffs then submitted a list of 133 items but only listed an "amount claimed" for six of the items. After the nine month filing deadline, Atlas notified the Halperns that their claim did not meet the minimum filing requirements and offered a check for the six items. Plaintiffs refused and filed a Complaint. Atlas moved to dismiss on the grounds that the claim was insufficient except for the six items. The court granted that motion for summary judgment based upon 49 C.F.R. §370.3. A subsequent, more particularized damage claim was beyond the time limit and could not be used to "reach back" within the nine month filing period.

9. Lewis v. Atlas Van Lines, Docket No.: 07-2688 (C.A.3. 2008).

Plaintiffs hired Atlas agent (Warners) to pack, load and move their household goods from Pennsylvania to New York. Settlement on the sale of plaintiff's Pennsylvania home was scheduled for August 27, 2004, at which time the house was to be "vacant". By letter dated July 27, 2004, (one month before the move), Warners sent a letter to plaintiffs, wherein they confirmed that the goods would be packed, loaded and moved out of the home prior to closing.

Warners did not complete loading before closing. The prospective buyers declared default and backed out of the purchase. (It appears that the prospective buyers used Warners' "failure" to remove the goods as an excuse to back out of the deal when they learned that they would not be able to home school their children in Pennsylvania). Plaintiffs, through counsel, advised Warners by letter dated October 26, 2004 that they incurred various, unspecified, undocumented and non-specific "losses" as a result of the default. Warners acknowledged the aforementioned letter and requested additional documentation and specificity. In the interim, plaintiffs executed another Agreement of Sale on March 14, 2005, and closing took place on June 3, 2005, which was exactly nine months from the date of delivery of plaintiffs' goods in New York. Nevertheless, plaintiffs, through counsel, did not provide Warners with a specific claim figure until November 9, 2005 (16 months after delivery).

Atlas denied the claim due to insufficient notice and because the damages were clearly not foreseeable. Instead of suing the buyers for specific performance and damages related to the default, plaintiffs sued Atlas for $71,729.91 in Pennsylvania state court. The case was removed to the U.S. District Court for the Middle District of Pennsylvania.

Plaintiffs' goods were moved under an Atlas Bill of Lading which contained a nine-month claim filing provision. We moved to dismiss due to plaintiffs' failure to submit a timely claim in accordance therewith. Plaintiffs contended that the July 26, 2004 letter from Warners was a separate agreement which controlled the transaction.

U.S. District Judge John E. Jones, III agreed and denied our motion. Judge Jones ruled, as an initial matter, that Carmack did not apply since "the type of injury sustained by plaintiffs was not contemplated by Carmack". We filed a Motion for Reconsideration. By Order dated May 30, 2007, Judge Jones not only reversed his ruling as to the applicability of Carmack but went a step further and granted our motion to dismiss. In the ruling, Judge Jones admitted to making a "clear error of law" as to the applicability of Carmack. He then examined the timeliness and sufficiency of the notice provided by plaintiffs and dismissed the Complaint.

Plaintiffs appealed the ruling to the Untied States Court of Appeals for the Third Circuit. Oral argument was held on June 3, 2008. By Order and Precedential Opinion dated September 9, 2008, the Third Circuit vacated the District Court's ruling and remanded the case for further proceedings.

As an initial matter, the Third Circuit agreed with the District Court that the controversy was governed exclusively by Carmack. However, the panel found that plaintiffs satisfied the requirements of 49 C.F.R. §370.3(b)(3) even though they failed to provide Atlas with a dollar amount of their damages during the nine-month claim filing period. Indeed, the Court ruled that plaintiffs' failure to provide even a range of damages, or an estimate of potential damages, did not bar their action. The Court focused on the definition of "determinable", and held:

Notably, because a claim for a "specific amount of money" must state the amount explicitly, such claims must be reduced to an exact dollar amount at the time the claim is made. By contrast, a claim that is "determinable" need not include any dollar amount at all. Instead, all that is required is that the claim provide enough information to make it possible to assign a dollar amount to the claim at some point after the claim itself is filed.

The Court's definition of "determinable" is remarkably vague and reveals an activist trend in the Third Circuit. The opinion is rife with castigatory language about Atlas' conduct and its efforts to "evade the ordinary meaning of the statute" and apply an "unwarranted twist" to the definition of determinable. The results-oriented ruling creates,in effect, a third standard for the sufficiency of notice under 370.3(b)(3).

A petition for writ of certiorari will be filed.

10. Neill v. Steel Master Transfer, Inc., Mich. Ct. App. #279122 (M.C.C. 2008) (unpublished).

In this wrongful death action plaintiff appealed the dismissal of her claims against a shipper

which had helped load a conveyor component which had fallen off during unloading, killing plaintiff's husband. The opinion is interesting for its discussion of the FMCSA regulations [49 C.F.R. 392.9] imposing loading and securement duties upon the motor carrier's driver, the adoption of same by the states [here Michigan's MCL 480.11a] and the allocation of loading duties between carriers and shippers. The Neill court reviewed the "shipper exception found in United States v. Savage Truck Line, Inc., 209 F.2d 442, 445 (C.A.4. 1953), which holds that if a shipper assumes responsibility for loading, the general rule is that it becomes liable for latent and concealed defects that cannot be discerned by ordinary observation of the carrier's agents. The Neill court noted that while Michigan had not formally adopted the Savage rule, the majority of state courts had [citing Decker v. New England Pub Warehouse, Inc., 2000 ME 76; 749 A.2d 762, 767 (Me.2000) and more recent opinions from New Hampshire and Ohio]. Assuming that Michigan would apply Savage, the court found no liability on the shipper's part because it had not exclusively assumed responsibility for loading the conveyor parts, noting that the loading decisions were jointly made by a shipper employee and the carrier's driver. While this decision is a wrongful death action, the reasoning is equally applicable in a cargo damage context.

B. Limitation Period

11. St. Paul Fire and Marine Insurance Company v. Delta Air Lines, Inc.,2008 WL 4547202 (S.D.N.Y.).

Under federal common law a freight forwarder's 21 letters to an airline stating that a problem was experienced with 21 separate shipments of fresh seafood were sufficient under notice of claim provision of the contract of carriage. The letters provided the date and number of the air waybill, the destination, and the total dollar value of the shipment, and stated that the letters were to serve as "notice of formal claim". The freight forwarder was not required to specify the damages or to identify the nature of the loss involved.

12. Destination Products International Ltd. v. Wilson Transportation, Inc., 2008 WL 2901611 (N.D.Tex.)

DPI shipped 1,381 cases of enchiladas. AMC had contracted with DPI to store and load the enchiladas, and properly instruct the interstate carrier to transport the enchiladas at proper temperature. AMC prepared a bill of lading instructing the carrier to maintain the enchiladas' temperature at 0 degrees. AMC also delivered, however, a bill of lading to the interstate carrier requiring a maximum temperature of 38 degrees. The carrier transported the enchiladas at 38 degrees, and thus the whole enchilada shipment was rejected and destroyed. DPI sued the interstate carrier of damage to the shipment, and DPI sued AMC, the broker, and Wilson, the carrier, for negligent failure to take adequate precautions to secure the load, negligent entrustment of goods to third parties, and negligent instruction. The carrier, Wilson, contended that DPI did not file a written notice within nine months of loss, or a lawsuit within the two year statute of limitations. The Court analyzed the claim letters and responses by the carrier, eventually ruling that the carrier denied DPI's claim against Wilson on October 31, 2005. Thus, the suit filed on November 27, 2007, was barred by limitations. The Court then exercised its discretion to dismiss the remaining state law claims by DPI against the broker, AMC, dismissing the claims without prejudice for subsequent filing in state court.

13. Galvin v. Suddath Van Lines, Civil Action No.: 1:05-CV-2376-HTW (N.D.Ga.2008).

Facts

Plaintiffs shipped their household goods from storage in Florida to their new residence in Peachtree City, Georgia. Plaintiffs submitted to United Van Lines a timely claim for lost and damaged household goods and damage to the new house (the "First Claim Form"). The First Claim Form included dozens of lost or damaged items, but provided values for only eight (8) items that totaled $4,709.00.

Procedural History

Plaintiffs filed suit in Gwinnett County State Court seeking recovery of over $40,000 for the loss or damage to the household goods and approximately $15,000 for the damage to the residence. United removed the case and moved to dismiss Suddath Van Lines, its disclosed agent, and to dismiss all state law claims based on Carmack preemption.

Plaintiff amended the complaint and asserted a claim under "16 U.S.C. § 36901" for recovery under the Carmack Amendment and asserted all the same state law claims again. United moved for judgment on the pleadings on the state law claims arising from the loss of or damage to the household goods. The Court took no action regarding the motion for judgment on the pleadings for several years.

United deposed both Plaintiffs. Neither could testify as to the values of the lost items or the cost to repair the damaged household goods. Both testified that the First Claim Form was their complete description of the damages to the household goods and the monetary losses resulting from this damage. Similarly, neither could testify about the cost to repair the residence.

United moved for summary judgment on the grounds that the First Claim Form did not specify a determinable amount of money as required by 49 C.F.R. §1005(b)(2), as interpreted by Siemans Power Transmission & Distribution, Inc. v. Norfolk Southern Ry. Co., 420 F.3d 1243 (11th Cir.2005), and there was no evidence in the records as to the measure of damages to the residence. In response, Plaintiffs proffered the affidavit of John Galvin which included 2 important exhibits: (1) a previously undisclosed second claims form (the "Second Claims Form") which included specific dollar amounts for each item of household goods; and (b) a letter from a bidding contractor which stated that it would cost about $9,500 to repair the damage in the residence that the Plaintiffs described as having been caused by United three (3) years earlier.

United moved to strike these two (2) exhibits because (1) the Second Claim Form contradicted the Plaintiffs' deposition testimony and it had not been disclosed and (2) the letter from the contractor was hearsay. Plaintiffs failed to respond to the motion to strike.

Holdings

I. Motion for Judgment on the Pleadings The Court granted this motion regarding the state law claims after Plaintiffs' counsel admitted at oral argument that 49 U.S.C. § 14706 preempted all these claims.

II. Motion to Strike

The Court granted the motion to strike the Second Claim Form, but denied the motion as to the contractor's letter.

A. Second Claim Form Excluded

1. The Second Claim Form was "inherently inconsistent" with the Plaintiffs' deposition testimony because it provided precise values for all the household goods, while on deposition neither Plaintiff could provide any valuations. In addition, on deposition, both Plaintiffs testified that the incomplete First Claim Form was a full description of their losses to the best of their knowledge. Plaintiff provided no explanation for the discrepancies.

2. Plaintiffs failed to identify the Second Claim Form in their Mandatory Disclosures and failed to produce it until after United moved for summary judgment. It would excluded as a dis-

covery sanction because Plaintiffs provided no explanation for its "11th hour" production and the document prejudiced United after it had presented its case on summary judgment.

B. Contractor Letter Admitted

The Court held that it would consider the contractor's letter because it was probable that the Plaintiffs could present the letter in an admissible form at trial and exclusion on summary judgment was therefore improper. Citing McMillan v. Johnson, 88 F.3d 1573 (11th Cir.1996).

III. Motion for Summary Judgment

The Court granted the motion for summary judgment on the household goods claims but denied the motion as to the damage to the residence and remanded that claim to the State Court of Gwinnett County.

1. 49 C.F.R. §1005(b)(2) requires that a shipper provide a claim for a determinable amount of money prior to filing suit.

2. Siemans, supra, requires that the "estimate" in the claim need not be exact. Rather, the "estimate" must be "reasonable".

3. The First Claim Form failed to meet this reasonableness standard because it omitted values for almost all of the items included on the form. In support of this conclusion, the Court cited and quotes with approval the opinion in Hansen v. Wheaton Van Lines, Inc., 486 F. Supp.2d 1339 (S.D.Fla.2006), in which the court held that claim form that included valuations for only 2 of 23 items was insufficient.

4. The Court rejected Plaintiffs' claim that a letter from United which stated it was looking for their lost estopped United from relying on 49 C.F.R. 1005(b)(2).

C. Limitation of Liability

14. Federal Insurance Co. v. Union Pacific Railroad Co., Civil Action No.: 08-CV-3212-ODW (AJW) (C.D. Cal. 2008).

UP was able to enforce the covenant not to sue in American President Lines' through bill of lading on an international intermodal movement. The UP train carrying the container (of text books) derailed and the container at issue was destroyed in an ensuring fire. UP argued that under Kirby, and under the plain meaning of the terms of the through bill, UP was entitled to enforce the agreement that the shipper would not sue any American President Lines' subcontracting carriers in the event of cargo loss or damage. UP also argued alternatively, that if for some reason the court found the covenant not to sue unenforceable, UP was entitled to enforce the $500 per package COGSA liability limit in APL's through bill.

FIC argued that under Sompo, the Carmack Amendment's statutory effect on UP could not be displaced by a contractual extension of COGSA and that Kirby was inapposite since it did not discuss Carmack and because it resolved the issue of whether to apply state law which conflicted with federal law. UP argued that Kirby clearly permitted the extension of COGSA terms inland to cover a railroad's derailment, that the Eleventh Circuit properly recognized this fact in Altadi and that the very favorable Royal & Sun decision from Judge Hellerstein (S.D.N.Y.) this year criticizing Sompo clarifies that even a District Court within the Second Circuit has held that the Second Circuit got it wrong in Sompo, that Atladis supplies the better analysis and that Kirby mandates enforcement of COGSA terms inland in a land carrier's favor. In fact, I cited Royal & Sun's language fairly extensively in my briefs.

UP also argued that its subcontract with APL (MITA 2-A) was made pursuant to 49 U.S.C. § 10709 and that therefore, for a second independent reason, Carmack had no application to UP's carriage. In granting UP's motion, Judge Wright kept it simple. He avoided a discussion of Kirby, Altadis, Sompo, Royal & Sun and 10709 altogether by sticking to the basics. The parties' intent plainly expressed in the contract terms governed. The shipper, to whose rights (and limitations) FIC was subrogated, expressly agreed that it would not sue subcontracting carriers in the event of a cargo loss. APL was never brought in by FIC and I do not have information as to why that was not done. I do know from conversations with APL that, although it assigned its rights to FIC for filing a claim with UP, APL never paid FIC anything on the claim. It is too late now for FIC to sue APL. Even if it still had a timely suit against APL, FIC would be looking at a limited recovery of $4,500.00 under COGSA's liability limit since the shipper only declared "9 packages" on the face of APL's bill of lading, never declared a higher value for the cargo and did not pay an ad valorem freight rate.

15. Great American Insurance Company a/s/p Novartis Pharmaceuticals v. TA Operating Corp., et al., Civil Action No.: 06-CV-13230(WHP) (S.D.N.Y.2008)

Novartis hired Prime, Inc. to transport drugs from New Jersey to Tennessee pursuant to Transportation Services Agreement which included a $100,000 per truckload limitation and a merger clause. The total shipment value was $30 million. The load was "crammed" into two trailers (instead of three, as planned). Contrary to Prime's security procedures for high value cargo, one of the driving teams stopped shortly after loading at a TA truck stop with a distinguished history of high-value cargo theft. Also contrary to Prime's procedures, the drivers left the tractor and trailer unattended while they showered and enjoyed a meal, with the keys remaining in the tractor. When they returned to the parking lot, the tractor and trailer were gone. The equipment was recovered, empty, about a week later.

Several motions for summary judgment were filed, one of which concerned Prime's effort to enforce the limitation provision. Judge Pauley ruled that issues of fact existed as to whether Prime, through various electronically transmitted safety "comments" to its drivers, made "separate, risk-related promises" thus negating the limitation under the material deviation doctrine. Judge Pauley relied on similarly misguided decisions in the Southern District of New York, specifically the Praxair and NipponKoa cases, in support of his ruling. Judge Paulsey refused to certify the ruling for appeal. Jury selection was scheduled for January 5, 2009.

16. Sompo Japan Insurance Company of America and Sompo Japan Insurance, Inc. v. Yang Ming Marine Transport Corp., 578 F. Supp.2d 584 (S.D.N.Y.2008).

In this subrogated cargo damage claim, the Defendant, Yang Ming Marine Transport Corp. ("Yang Ming") issued the Bill of Lading and arranged for transportation of cargo via ocean from Japan to California and by rail (by a separate rail carrier) from California to Texas. En route by rail in Texas, a derailment occurred causing damage to the goods. Yang Ming moved to dismiss under Rule 12(b)(6) on the basis that as an intermediary shipping company, which does not operate a railroad, it cannot be held liable under the rail carrier provisions of Carmack, 49 U.S.C. §11706(a). The United States District Court for the Southern District of New York, Judge Chin, denied the motion on the basis that although Yang Ming does not operate a rail line, it nonetheless qualifies as a "trail carrier" under 49 U.S.C. §10102(5) because, by arranging for the transportation, it "provided" transportation as that term is used in §10102(5) and because Yang Ming issued the Bill of Lading.

17. Hansa Meyer v. Norfolk Southern Railway, 2008 US Dist Lexis 51016 (D.S.C.).

Shipper sued Carrier for damage to a shipment (machine). Carrier offered to pay Shipper $100,000 – the amount for which Carrier was liable under Carrier's limitations of liability. The judge ruled that Carrier's limits of liability apply, and Shipper is entitled to collect $100,000, and no more. So, the lawsuit's outcome was good for Carrier. 18. Trans-Pro Logistics, Inc. v. Coby Electronics Corp. v. CSX Intermodal, et al., 2008 WL4163992 (E.D.N.Y.2008)

Shipper Coby Electronics booked transit of a cargo with Trans-Pro Logistics from its California warehouse to consignee Brands Mart in Florida. The two have differing recollections as to whether Trans-Pro said it would use its own trucks or broker the load to a carrier.

In any event, Trans-Pro engaged TRT Carriers to arrange the transit. TRT is a division of NYK Logistics (although Coby denies this), and had a low-cost rate agreement with CSXI International, which bills itself as a "shipper's agent". It offers services through its "Service Directory No. 1", which provides terms for filing freight claims. These include a 24-hour notice of loss provision for shortages, and an eight-month written notice of claim.

CSXI booked with minor carrier American Railroad Line ("ARL") to dray the freight from Coby's facility to the Union Pacific Railroad; the UP hauled the load to Chicago, and transferred it to railroad CSX; CSX moved the freight to Jacksonville, Florida, where it handed it off to railroad Florida East Coast for transit to Dade County; and ARL delivered the electronics from there to Brands Mart. (Got all that?)

Anyway, the load arrived short (to the tune of some 81 grand), Coby filed a claim with Trans-Pro, and Coby refused to pay freight charges. That prompted Trans-Pro to sue Coby, and Coby counterclaimed against Trans-Pro, and brought a third-party action against some of the carriers. On cross-motions for summary judgment before the Eastern District of New York, CSXI asked for dismissal of claims against it because Coby failed to comply with terms of the Service Directory by giving untimely notice of claim.

CSXI argued that, per the U.S. Supreme Court's decision in Norfolk Southern Railroad v. Kirby, 543 U.S. 14 (2004) and other precedents, Coby's agent (well, agent's agent) TRT effectively bound Coby to the Service Directory. This would support the policy of disallowing carriers to distinguish between shippers and intermediaries in the services they offer and provide. The court distinguished those decisions on the ground that CSXI is a "shipper's agent", and not a carrier. Moreover, Coby was a shipper, and not a freight forwarder.

The motions were denied ultimately because of the confusing roles various players – especially Trans-Pro – agreed to play in this complicated transaction. Factual issues remain as to whether Trans-Pro held itself out as a carrier which would handle the entire job itself, or as a broker. Stay tuned.

18. Mitsui Sumitomo Insurance Co. v. Evergreen Marine Corporation and Union Pacific Railroad, 07-CV-3874 (S.D.N.Y. September 22, 2008).

Automotive parts were shipped from Japan to North Carolina. Evergreen issued its through bill of lading and transported the parts from Japan to Los Angeles. At L.A., UP took the shipment, no rail bill of lading was issued, and a derailment took place in Arkansas.

UP admitted liability and the issue was whether UP and Evergreen could obtain the $500 per package limitation. Judge McMahon, who rendered the decision in Sompo Japan v. UP against UP on Remand, held the following in granting Plaintiff's motion for summary judgment and in denying Evergreen and UP's cross-motions for summary judgment:

1) Sompo, decided by the Second Circuit, did not conflict with Kirby;

2) That the shipper was not party to the contract between UP and Evergreen and was not furnished this contract or UP's MITA 2-A. As such, it was not bound by UP's §10709 contract;

3) Evergreen did not offer Carmack rates to the shipper as defined by the Second Circuit in Sompo;

4) That Evergreen was a rail carrier and, as such, was subject to Carmack;

and

5) That UP could sue Evergreen for indemnity pursuant to its contract with them for failing to disclose the terms of the MITA as required by the MITA.

There are numerous errors in this decision. UP is appealing this decision.

19. Kellaway Intermodal & Distribution Systems, Inc. v. The Gillete Co., 2008 WL 4353501 (D.Mass.2008).

The loss of goods during the inland portion of an overseas shipment was not covered by the bill of lading, and thus was not subject to the Carriage of Goods by Sea Act's (COGSA) one-year statute of limitations. The bill of lading's clause paramount only extended COGSA's provision to "time that the Goods are in the actual custody of the Carrier or his Sub-Contractor at the sea terminal". The loss occurred before the goods reached the sea terminal.

20. Hyundai Corporation v. Contractor's Cargo Co., 2008 WL 4178188 (S.D.Tex.).

Hyundai contracted with Contractor's Cargo to transport three transformers from Texas to Iowa. The transportation contract between Hyundai and Contractor's Cargo contained a provision limiting liability. Contractor's Cargo subcontracted with Space City Hot Shot to move the transformers, one of which was damaged in transit. Hyundai sued both Contractor's Cargo and Space City. The carrier moved for partial summary judgment asserting the limitation of liability. Hyundai argued that neither Contractor's Cargo nor Space City was entitled to limited liability because neither company issued a bill of lading or receipt before shipment. The court held that the pre-shipment contract between Hyundai and Contractor's Cargo was an agreement to the salient terms of the bill of lading and constituted a receipt issued for shipment, meeting the fourth requirement of the Hoskins limitation of liability test. Hyundai then argued that Space City was not a party to the pre-shipment transportation contract, and could not assert the limitation of liability. The court rejected this argument, holding that under the Carmack Amendment, a limitation of liability extends to a carrier's subcontractor. The court specifically stated that the Carmack Amendment anticipates multiple carriers operating under one bill of lading. Partial summary judgment was granted to the defendants.

21. Mickens v. Longhorn DFW Moving, 2008 WL 3020788 (Tex.App. Dallas).

The Mickens contracted to have all of their household goods moved from Dallas to McKinney, Texas. The shippers signed a moving services contract that had a 60 cents per pound limitation of liability. Mickens, a former Florida State Seminole and Green Bay Packer, had all of his considerable football memorabilia collection, as well as over 200 pairs of Mrs. Mickens' shoes, in the shipment. When the trailer containing the shipment arrived at the Mickens' new home, the trailer ignited, and the ensuing fire destroyed the entire shipment. No cause for the fire was ever conclusively determined. The shippers sued for negligence and gross negligence, specifically disavowing that they were making any claim under the moving services contract. After denying two summary judgment motions, and after a two day pretrial conference in which Longhorn's motion in limine

was considered, the Court ruled that the plaintiffs' claim sounded in contract, not negligence, and granted judgment to plaintiffs for 60 cents per pound. On appeal, the state appellate court agreed with the trial court that the limitation of liability was conspicuous, ruled that contract, not tort, law governed a contractual move of household goods, and determined that an estimate of weight by Longhorn was sufficient to support the trial court's award of damages under the limitation.

22. Talajic v. Hi-Way 9 Express Ltd., et al., 2008 ABPC 289 (CanLII).

The plaintiff, through an origin agent, arranged for goods to be carried by the defendant carrier. During delivery the cargo fell off the truck, sustaining damage. The plaintiff, who was the owner of the cargo, was not named on the waybill. The plaintiff did not see the waybill until after the damage occurred. The "declared valuation" space on the waybill was left blank. A dispute arose as to whether the carrier could limit its liability to $2.00 per pound under the uniform bill of lading.

The Court reaffirmed the presumptive liability rule in Canada that while the cause of damage might not be known, it need not be proven for the purposes of the claim. This is by virtue of common carriers of goods by road being considered insurers in respect of same. A carrier will be liable for goods carried unless it can bring itself within one of the few exceptions or limitations to its liability as set out in the uniform bill of lading. A carrier may also be liable to the owner of goods transported notwithstanding that there is no contract between the owner and carrier (either on the theory that the shipper may have been acting as an agent for the owner, or alternatively that there remains liability in tort).

In any event the $2.00 per pound limit of liability applied in this case, there being no declaration of a value. The court also confirmed that the uniform bill of lading liability limitation applies to every agreement for the carriage of freight, regardless of whether or not the shipper, carrier or another party has prepared the bill of lading.

The weight was also a contentious issue for the purposes of the limitation of liability calculation. The court cited the uniform bill of lading rules, whereby the maximum liability of a general freight carrier is expressed in terms of being computed on the total weight of the shipment. In those cases where the weight is not listed on the carriage document, or there is a question as to accuracy of the weight listed on the same, it remains the carrier's onus to prove the actual weight of the cargo for the purposes of any limitation formula it puts forward.

For future reference I refer you to the uniform bill of lading from Ontario, which is virtually identical to that of the other provinces.

23. Exalta Transport Corp. v. C & A Industries, Inc., 2008 ABQB, 637 (CanLII).

A shipper arranged for a carrier to deliver a welding machine to a destination where it was to be put in use. The carrier did not effect delivery; the wrong delivery address was listed on the bill of lading. Unable to effect delivery, the carrier rerouted the cargo and put it into his warehouse.

The consignee had a mandate from the shipper to manufacture certain items, involving the use of a welding machine. As such, following the date of the intended delivery, the shipper was charged rental fees by the consignee for the use of a replacement unit for a period of time. On being invoiced for these charges the shipper sued the carrier for this outlay. The carrier argued that it could limit liability under the uniform bill of lading for this delay claim.

It did not help the carrier's cause that while the delivery address was incorrect (the wrong address, being the company literally across the street from the intended destination, having been listed on the bill of lading) that the carrier did not try to determine the proper address nor did it notify the shipper of the non-delivery. It simply rerouted the cargo to its own warehouse.

The court ruled that on a construction of the entirety of the uniform bill of lading document that the $2 per pound limitation of liability applies only in respect of loss or damage to the goods. The limitation does not extend to claims for delay in delivery. In delay claims, it follows then that while the shipper does not obtain the benefit of the presumption of liability created in respect of loss or damage, thus having to prove liability and causation (in addition to damages), it enjoys a benefit in that the carrier cannot limit liability to $2.00 a pound (absent a declaration of a value) for delay.

24. ACE Aviation Holding, Inc. v. Holden, 2008 CanLII 40223 (Ontario Superior Court of Justice – Divisional Court).

The plaintiffs, being husband and wife were passengers on an international Air Canada flight. The wife checked a piece of baggage which was lost and which was never recovered. The bag contained articles belonging to both the wife and the husband. In a claim brought by both for damages for the loss of their articles, the court affirmed that the matter was governed by The Montreal Convention, 1999, which is incorporated into the laws of Canada by the Carriage by Air Act, R.S.C. 1985 c.C-26, as amended. Article 22(2) therein features a limitation of liability in the carriage of baggage of 1,000 special drawing rights for each passenger, unless the 'passenger makes a special declaration of interest at the time that the bag was checked'. The parties agreed as to the currency equivalent of 1,000 special drawing rights however, the plaintiffs protested that the limit of liability was never brought to their attention. The court affirmed that the limitation of liability applies even in the absence of notice.

In turn, Air Canada raised an interesting issue as to whether a passenger is entitled to compensation for loss of articles in a bag that was checked by someone else with the airline. Specifically, could the husband recover damages in this case? The court held that the proper construction of the Convention called for a finding that only the passenger who checks a bag may sue in respect of same. Otherwise, the carrier losses the benefit of the certainty as to the nature of and quantity of its liability exposure sought to be established by the Convention regime, there otherwise being the possibility of multiple plaintiffs suing in connection with one bag that was checked by only one passenger. In the result the wife was able to recover for her baggage up to The Montreal Convention limit but the husband was unable to recover.

25. Royal & Sun Alliance Insurance PLC v. Ocean World Lines, Inc., 572 F. Supp.2d 379 (S.D.N.Y.2008).

In this case the district court declined to follow the Second Circuit's 2006 Sompo decision and ruled that inland motor carriers were entitled to the benefit of the $500 per package limitation in the ocean carrier's bill of lading on an import shipment moving under a through ocean bill of lading. The plaintiff, Royal & Sun, filed a subrogation action against Ocean World Lines ("OWL"), an NVOCC, Yang Ming, the ocean carrier, and Djuric Trucking, the inland motor carrier, for the loss of seven packages of printing equipment damaged during the last leg of the journey from Bremerhaven, Germany to Bourbon, Indiana. Both OWL's and Yang Ming's bills of lading contained the standard $500 per package limitation provision and defendants therefore sought to limit their liability to $3,500. The court granted defendants' motions for partial summary judgment, citing the language in the Himalaya Clause and OWL's Clause Paramount, that the $500 per package limitation would continue to govern the carriage even after discharge from the port, "throughout the entire time during which carrier is responsible for the

goods under the bill of lading…" The ruling includes an excellent analysis of the bill of lading limitations, the extension of COGSA to inland carriers, a detailed discussion of Norfolk Southern v. Kirby, the limitation of motor and rail carrier liability under the Carmack Amendment, OWL's liability as an NVOCC under COGSA and the extension of Himalaya Clause and Clause Paramount protections to all subsequent carriers of the goods to final destination. In particular, the court recognized the tension between the Second Circuit's decision Sompo and the Supreme Court's decision in Kirby and questioned the Second Circuit's departure from the rule of Kirby ("But how can it be said that the nine Justices simply forgot about Carmack?"). This is an important decision well worth reading for anyone involved in intermodal/COGSA cases.

26. Fortis Corporate Insurance v. Canadian National Railway Company and BNSF Railway Co., 07-CV-07388 (DSF).

We gave the Court a paper referencing the facts and the legal arguments made by BSNF on a motion for summary judgment in a case involving a claim of $750,000.00 worth of damages to an electrical transformer carried by rail from Winnipeg, Canada (by CN as the origin rail carrier) to Surprise, Arizona (with BNSF as the delivering carrier). The shipper's insurer, Fortis, sued both railroads in subrogation. I got CN out after filing a motion to dismiss CN for lack of jurisdiction.

As to BNSF, Fortis claimed that Canadian law applied and that a statutory provision in the Canadian Transportation Act precluded enforcement by BNSF of the limitation of liability clause in the contract between the shipper and CN because as a condition precedent under Canadian law to a railroad's limitation of its liability, there must be a signed agreement to limit its liability. The signed agreement between the shipper and CN did not mention BNSF or otherwise contain some kind of "Himalaya" type clause.

BNSF argued that U.S. law applied and that under U.S. law, BNSF was entitled to enforce its own agreement with CN on principals of estoppel. BNSF also argued that even under Canadian law, BNSF was entitled to enforce the limitation of liability the shipper agreed to with CN.

The case settled for $25,000 days before the plaintiff's MSJ opposition papers were due filed.

27. Rexrith v. Ocean World Lines, 547 F.3d 351 (2d Cir.2008).

In affirming the District Court's decision granting defendants' motion for partial summary judgment based upon the package limitation, the NVOCC and ocean carrier were not deemed rail carriers under Carmack. This decision conflicts with the S.D.N.Y. decisions holding that ocean carriers were rail carriers, i.e. Sompo Japan v. Yang Ming and Mitsui v. UP and Evergreen, both on appeal to the Second Circuit.

D. Preemption

28. Taylor, et al. v. Allied Van Lines, et al., Civil Action No.: 08-CV-1218PHX-GMS, 2008 WL 5225809 (D. Ariz. Filed: December 15, 2008).

This action arises out of a household goods move from Texas to Arizona. The shippers filed a complaint against Allied and SIRVA, its parent company, which alleged breach of contract against Allied, in addition to negligent misrepresentation, consumer fraud and unjust enrichment against both Allied and SIRVA. After removing the case to federal court, Defendants filed a motion to dismiss alleging that Carmack preempted all state law claims against the Defendants and that SIRVA was not a proper party under Carmack. The Court summarily dismissed all of the state law claims against Allied but held that Carmack does not preclude independent claims for the non-carrier's individual acts. Specifically, the Court found that Carmack does not preempt all actions against non-carrier entities, such as SIRVA, arising out of the interstate shipment of goods simply because a Carmack claim is also available against a carrier. The presence of a savings clause, the Court added, demonstrates that some claims were intended to survive implementation of the Carmack Amendment. In short, the Court concluded that the Carmack Amendment should not be interpreted to grant all non-carrier entities absolute immunity for the torts they commit during interstate shipment of goods because (1) the purpose of the Carmack Amendment was to clarify for shippers which carrier among many could be sued, and (2) not to establish carrier liability as the sole method of recovery for damages that occur in interstate shipping.

29. Tracy Jones v. USA Express Moving, Civil Action No. 08-CV-880 (E.D.Pa 2008).

Plaintiff hired USA Moving Express to transport her household goods from Delaware to Maryland. The non-binding estimate for the move was $1,100.00. At delivery, plaintiff refused to pay additional charges. USA Moving refused to deliver. Plaintiff filed suit in small claims court for conversion and was awarded the jurisdictional limit of $8,000, plus costs.

USA Moving Express then retained counsel and appealed the award. Plaintiff filed a Complaint in state court based on conversion and breach of contract. Plaintiff subsequently demanded $40,000.00 and we removed and filed a 12(b)(6) motion based on Carmack Preemption. In the interim, the parties reached an agreement to release the goods in consideration of payment of the originally quoted estimate.

Judge Brody granted the motion and dismissed the Complaint. No leave to file an amended complaint was granted.

While the case was in suit, USA Moving Express was the subject of a local television news documentary about "rogue movers" who "extort" money from shippers while they hold their goods "hostage." Plaintiff in this case did not sue for damage to her goods. Her claims were based solely on the "loss" of her goods while in USA Moving's possession. The Court ignored the bad facts and focused on Carmack. The case has particularly useful language with respect to the preemption of conversion claims.

30. DWC Company, Inc. v. CSX Transportation, Inc., Civil Action No. 2:08-CV-718 (S.D. Ohio 2008)

In this freight loss and damage claim, the Complaint stated a damage amount of $9,355.11. However, a settlement demand letter from Plaintiff's counsel sought damages of $15,000.00. Consequently, CSX removed. On plaintiff's motion to remand, the court found that the "other papers" requirement of 28 U.S.C. '1446(b), applied, and thus retained federal court jurisdiction.

31. Sompo Japan Insurance Co. of America, Inc. v. VIP Transport, Inc., 2008 568 F. Supp.2d 1080 (N.D. Cal. 2008).

Subrogated cargo damage claim asserting negligence was removed to federal court under Carmack. Plaintiff moved to remand and defendant moved to dismiss pursuant to Rule 12(b)(6) because the negligence claims were preempted by Carmack. The District Court denied the motion to remand and granted the motion to dismiss on preemption grounds with leave to plaintiff to amend the complaint to bring a claim pursuant to Carmack.

Continued on page 18

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Hall of Fame Exhibitors 2009

Donna Wyss
Cargo Salvage Claims
Cscsalesnet@earthlink.net

Al Benkert & David Hawking
E.J. Brooks
Al.Benkert@ejbrooks.com
David.Hawking@ejbrooks.com

Jerry Milner, Tom Hensby & Pete Petrucci
Kapstone Paper

Randy.keller@kapstonepaper.com
Tom.henby@kapstonepaper.com

Bill Gardner
HUB Group

Marcus Hickey, CCP
Forward Air
mhickey@forwardair.com

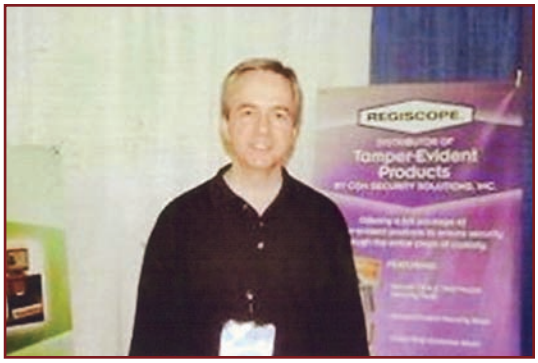
Wally Dammann, CCP
MSI Claims
wdammann@msicus.com

John O'Dell, HCCP
Landstar
jodell@landstar.com

Michael Klear & Greg Jones
ITW/Gale Wrap
mklear@galewrap.com
gjones@galewrap.com

Dan Greitzer, Joelene Franco & Mark Caires
ITW/Shippers Centerload
dan.greitzer@itwshippers.com
Joelene.franco@itwshippers.com
Mark.caires@itwshippers.com

Kelly Smith
Recovery Management
ksmith@reccorp.com



John Adams
Regiscope
Adamsj@regiscope.com

Kimberly Stanton
Rimkus Consulting
kastanton@rimkus.com

Nathan Leaphart, Cindy Vaughn & Jack DeMao
Sentry Security/Electric Guard Dog
jdemao@electricguarddog.com

Vickie & John Albrecht
Transport Security

enforcer@transportsecurity.com

Brian Kiel
Nestle, USA

Ray Young & Eric Senkowsky
Sigma (SBTI)
ryoung@sbtimail.com
esenkowsky@sbtimail.com

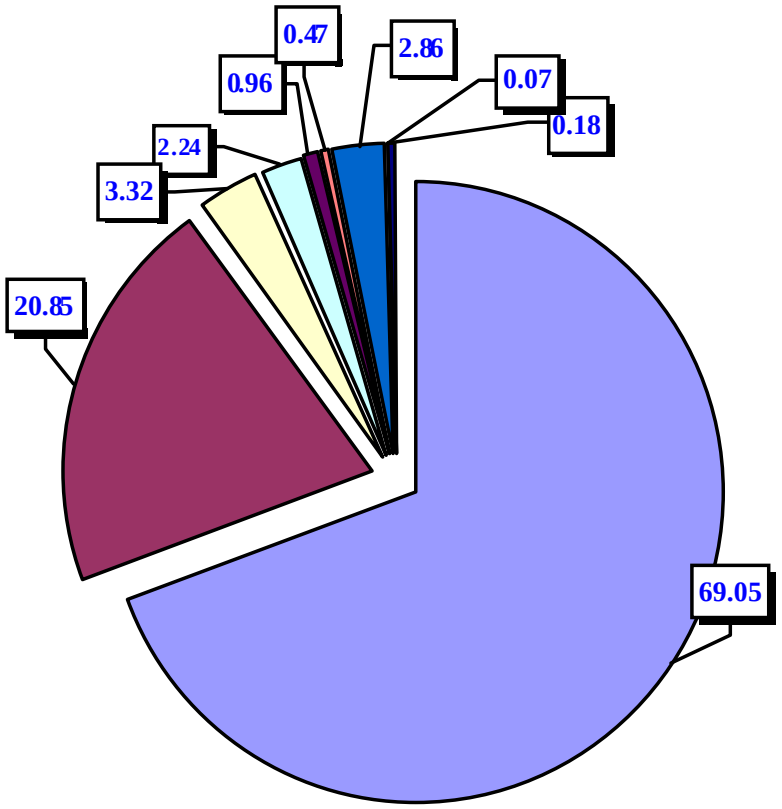
St. Louis '09

TLP & SA MOTOR CARRIER CLAIMS SURVEY – 2008

CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	20.85 %	14.41 %
Theft / Pilferage	.96 %	.06 %
Visible Damage	69.05 %	54.73 %
Concealed Damage	3.32 %	3.91 %
Wreck / Catastrophe	2.24 %	.17 %
Delay	.07 %	.03 %
Water	.47 %	.09 %
Heat / Cold	.18 %	.04 %
Other	2.86 %	.84 %

Total numbers of claims paid Vs. number of claims filed.	74.28 %
Total dollars paid Vs. total dollars filed.	42.55 %
Net dollars paid Vs. total dollars filed.	37.79 %
% of claims filed to total number of shipments made.	.65 %
% of claims paid to total number of shipments made.	.48 %
% of claims paid to total number of claims filed.	74.20 %
Total company claim ratio.	.99 %
Percent of claims resolved in less than 30 days.	79.00 %
Percent of claims resolved 31-120 days.	17.00 %
Percent of claims resolved more than 120 days.	4.00 %

2008
CLAIMS SURVEY CHART



Visible Damage - 69.05%
Shortage - 20.85%
Concealed Damage - 3.32%
Wreck/Catastrophe - 2.24%
Theft/Pilferage - 0.96%
Water - 0.47%
Other - 2.86%
Delay .07%
Heat/Cold - 0.18%

Highlights of the

2009 TLP & SA and TLC Conference in St. Louis

Bill Bierman, Exec. Dir. TLP & SA (Nowell Amoroso Klein Bierman) introduces James Smith of the Missouri D.O.T.

**Rob Strouse (Wooster Brush)
Jerry Smith & Ray Selvaggio
(Pezold, Smith, Hirschmann & Selvaggio)
Eric Zalud (Benesch, Friedlander, Coplan & Aronoff)**

William D. Bierman listens to Detective Keith Lewis (Major Theft Unit, Georgia Bureau of Investigation)

**Ron Williams (Williams & Associates)
Diane Smid (TLC)
George Pezold, Exec. Dir. TLC
(Pezold, Smith, Hirshmann & Selvaggio)**

Bill Bierman addresses a full house at the St. Louis Conference

Bob Voltmann, Exec. Dir. TIA

See you next year at our Joint Conference!

Rob Silverman (Atlas Traffic)
Arcie Jordan (Jackson Walker, LLP)
Jim Richardson (UTI, United States, Inc.)
Christoph Wahner (Law Offices of Countryman & McDaniels)

From page 11

32. Farrah v. Monterey Transfer & Storage, Inc., 555 F. Supp.2d 1066 (N.D. Cal. 2008).

In a case involving damage to personal property brought under Carmack, against moving and storage company on intrastate shipment, the District Court, granted the defendant's motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction on the basis that the action was not within Carmack where shipment was never intended to leave California, the shipment, in fact, never left California and the agreement between shipper and carrier did not include transportation on to the ultimate destination which destination was out of state.

33. White v. Mayflower Transit, L.L.C., 2008 WL 4181600 (9th Cir.2008).

In a matter of first impression, a shipper's claim against a common carrier for intentional infliction of emotional distress due to lost or damaged goods during shipping was preempted by the Carmack Amendment to the Interstate Transportation Act. The claim was based solely on the same conduct giving rise to the shipper's claims for property damage.

34. Moreau v. Allied Van Lines, Inc., Civil Action No. 1:07-03257-RBH (D.S.C.).

Complaint filed in state court alleging negligence in connection with alleged damage in transit on a shipment from South Carolina to Florida and where it was stored in a Florida warehouse for ten (10) months. Case was removed by defendant, which then moved to dismiss under Rule 12(b) (6) as preempted by Carmack. Motion denied without prejudice because it was unclear to the Court whether the storage was permanent or was storage-in-transit.

35. NII Brokerage, L.L.C. v. Roadway Express, Inc., 2008 WL 2810160 (D.N.J. 2008).

Plaintiff NII hired defendant Roadway to transport a shipment of used copier/printer units from New Jersey to points in New York. At some point along the way, the shipment was given to defendant Aaction Freightways to deliver. The equipment was severely damaged in transit and NII sued Roadway and Aaction for damages in excess of $150,000. In its original complaint, NII alleged common law claims which Roadway moved to dismiss on grounds of Carmack Amendment preemption. The court granted the motion, leaving only plaintiff's Carmack Amendment claim for trial. Aaction, moved to dismiss on grounds of lack of personal jurisdiction. That motion was granted, the court ruling that it could not exercise specific jurisdiction over Aaction since Aaction's transportation of the shipment did not occur in New Jersey, there was no direct contact between NII and Aaction, and Aaction had no presence in New Jersey to subject it to personal jurisdiction there. The court further ruled it could not exercise general jurisdiction over Aaction because Aaction had no contacts in New Jersey, its business is conducted almost entirely in northern New York, it did not have a place of business in New Jersey, advertise in New Jersey nor was qualified to do business in New Jersey under that state's corporate laws. "It follows that Aaction did not purposefully avail itself of any benefits of doing business in New Jersey." The court also rejected NII's argument that it should be allowed to conduct discovery as to Aaction's New Jersey contacts because it had not established "with reasonable particularity, sufficient contacts between the defendant and the forum state."

E. Jurisdiction/Removal

36. Briscoe v. Price-Coomer Relocation, Inc., 2008 WL 2699901 (E.D.Ky).

This attached Order is short, but the victory was sufficient. Vanliner insures the agent that was sued in this case. We removed the case because Plaintiff sued for a refund of $2,078.00 in tariff charges. The cargo claim was less than $10,000.00 and thus not removable. We also filed a separate Motion to Dismiss the preempted state law claims that Plaintiff's counsel asserted in the Complaint.

As usual, the attorney for shipper confused the federal question removal with the Motion to Dismiss arguing that his state law claims were preempted. The Judge initially (on April 17, 2008) remanded the case holding that the Carmack claim was less than the required $10,000.00 and that the case was improperly removed.

We filed a Motion to Alter or Amend the Court's ruling, pointing out that the removal was proper based upon the federal question whereby Plaintiff's counsel plead for a refund of the tariff charges for the move.

On July 2, 2008, the Court granted our Motion and reinstated the case on the federal docket

37. Bailey v. Janssen Pharmaceutical, Inc., 2008 WL 2894742 (C.A.11(Fla.)), 21 FLA. L. Weekly Fed. C 945.

Wrongful death defective product case against multiple defendants brought in Florida State Court. Upon removal and motion to remand, the District Court denied plaintiff's remand. The United States Court of Appeals for the Eleventh Circuit, upheld removal on the grounds that the "last-served defendant" rule applies in multi-defendant cases thus extending the thirty (30) day limitations period within which to remove from thirty (30) days from service upon the last-served defendant. Earlier-served defendants may consent to the removal made by later-served defendants

38. Apparel Production Services, Inc. v. Indiana Transport S.A. de C.V., 2008 WL 1912056 (S.D. Tex.).

Transfer of venue granted from the United States District Court for the Southern District of Texas, Houston Division to the United States District Court for the Southern District of Texas, Laredo Division in case involving suit by shipper against freight forwarder for damages when shipment from Texas to Mexico was hijacked in Mexico. The Court weighed the access to records, local availability of witnesses and other practical considerations.

39. Mitsui Lines, Ltd. v. CSX Intermodal, Inc., 2008 WL 2741116 (S.D. Fla.).

Civil suit in Florida State Court removed to Federal Court. Plaintiff moved to remand. The District Court granted the motion to remand on the grounds that one of the four defendants failed to timely manifest its consent to removal. Defendant, CSX Transportation ("CSXT") timely filed for removal stating that the other defendants consented to the removal. Nevertheless, another defendant, Florida East Coast Railway ("FEC"), filed an answer in the state court, thus electing to stay in state court and, further, FEC did not file a written consent to removal until nearly three weeks after the time period to remove had expired. The Court remanded despite the fact that in its timely removal petition CSXT, stated that FEC's general counsel e-mailed CSXT stating, "this will serve as my concurrence with your intention on behalf of CSX."

40. Murchison v. Progressive Northern Ins. Co., 564 F. Supp.2d 1311 (E.D. Okla. 2008).

Insured brought suit against its insurer alleging bad faith denial of coverage and breach of contract. In responses to demand for admissions, plaintiff denied that the amount in controversy was not in excess of $75,000.00. Based on plaintiff's response, Defendant removed

because amount in controversy requirement on diversity jurisdiction had been met.
District Court denied plaintiff's remand motion. Face of the complaint did not allege $75,000.00 amount in controversy and plaintiff's response to demand for admission qualified as "other paper" upon which the defendant first received information that the case was removable. Removal accomplished within thirty days of defendant's receipt of plaintiff's responses to demand for admission.

F. Freight Charges

41. Lear Corporation v. LH Trucking, Inc., 2008 WL 26102 39 (E.D. Mich.).

Breach of contract claims brought in state court on allegations of freight overcharges. Defendant removed and counterclaimed for payment of disputed freight charges. Cross-Motions for summary judgment were filed. Interpreting the written contract under Michigan state law, the District Court granted the Plaintiff's motion for summary judgment on liability and denied the Defendant carrier's cross-motion for summary judgment on pre-emption. The District Court then applied the limitations period of 49 U.S.C. ' 14705(b) to Plaintiff's interstate (but not intrastate) shipments and limited the amount of the damages.

42. Azbell Trucking, L.L.C. v. Lighting Logistics, LLC., Case No. 06CVH 11-14900, (Ct. of Common Pleas, Franklin Co., Ohio 2008).

Lawsuit in state court for unpaid freight charges. Defendant shipper asserted a defense that it had already paid the broker and was therefore not liable. Plaintiff carrier moved for summary judgment against shipper asserting that shipper is liable irrespective of whether the shipper paid the broker. For its part, the shipper cross-moved for summary judgment. The Court granted the shipper's motion and denied the carrier's motion on the grounds that the carrier issued the bill of lading to a third party, that it failed to follow the Code of Federal Regulations requiring carrier to bill shipper directly, the bill of lading was marked prepaid and the carrier never notified the shipper of the non-payment prior to filing suit. The court applied equitable estoppel in that the shipper was led to believe the carrier was expecting payment from a third party.

43. Wisconsin Central Ltd. v. Hilgy's L.P. Gas Inc., 2008 WL 3098023 (E.D. Wis.).

In this demurrage case brought in the US District Court in the Eastern District of Wisconsin, District Judge Griesbach sitting in Green Bay significantly increased a default judgment amount because of wording in the complaint that the amount sued for included "amount due at time of hearing." The Court found the wording was not mere "boilerplate" and that the defendant was on notice that if it chose to default that it might be held liable for a greater amount than that which was in the original complaint. In addition the Court found that amending the complaint did not give the defendant the right to "reopen" the default making it responsible for tariff charges it had not seen when deciding to default in the matter.

44. Norfolk Southern Railway, Co. v. Basell USA, Inc., 2008 WL 3832518 (E.D. Pa.).

The District Court had been presented with a situation where one shipper had in separate contracts committed to ship 95% of its freight along certain routes to both CSX and Norfolk Southern. Norfolk Southern filed suit claiming material breach, and seeking to recover the difference between tariff rates and the contract rates that were actually paid. The District Court granted summary judgment in favor of NS, but awarded only lost profits for the "lost" moves carried by CSX. NS appealed, and the Court of Appeals vacated and remanded for a trial on the issue of material breach. Following remand, the court conducted a trial per the mandate, and wrote the attached Opinion on what constitutes the material breach of a volume commitment freight contract. The Court determined that NS was entitled to recover the tariff differential, and awarded damages of $2,586,031.00. (It's always nice to see that many numbers on a check when you represent plaintiff).

G. Miscellaneous

45. Great American Ins. Co. v. N/V Mackinac Bridge, 2008 WL 2518623 (S.D.N.Y.) 2008 U.S. Dist. LEXIS 47802 (S.D.N.Y.).

Subrogated cargo theft claim for VCR's in overland transit from New Jersey to Chicago. Kawasaki Kiseu Kaisa, Ltd. ("K-Line") arranged for the overland transportation with Norfolk Southern pursuant to an Intermodal Agreement. K-Line's motion for indemnification from Norfolk Southern was granted based on the Intermodal Agreement, which incorporated provisions of Intermodal Rules Circular #2. Rule 8.3.2 governing indemnification.
On K-Line's motion for counsel fees and costs against Norfolk Southern the magistrate denied the motion on the basis that the Intermodal Agreement did not specify an award of counsel fees and costs.

46. Alvan Motor Freight, Inc. v. Department of Treasury and United Parcel Services, Inc. v. Department of Treasury, 281 Mich. App. 35 (2008), 2008 WL 4365971 Mich. App.).

Alvan Motor Freight, Inc. ("Alvan"), which operates wholly within the State of Michigan, appealed lower court's ruling that it was subject to state tax. On the basis that Alvan, although an intrastate carrier, was engaged in interstate commerce and therefore not subject to the state tax, because Alvan carried freight originating from and/or destined to locations outside of the State of Michigan. Michigan Court of Appeals reversed and held that state tax was not applicable. United Parcel Service ("UPS") won separate appeal for a tax refund on same grounds.

47. Ogin v. Ahmed, 563 F.Supp.2d 539 (M.D. Pa. 2008).

In a personal injury case involving plaintiff's request for an adverse inference for spoliation of evidence, the District Court granted the motion because the carrier defendant failed to produce and then destroyed the driver's logs.

48. Fulfillment Services, Inc. v. United Parcel Service, Inc., 528 F.3d 614 (9th Cir. 2008).

This was a class action lawsuit in which plaintiff sought to recover damages and attorney's fees allegedly resulting from UPS' violation of 49 U.S.C. '13703, based upon '14704(a) (2), which creates a private cause of action for shippers. Fulfillment had shipped goods using UPS' Hundredweight Service and alleged it was entitled to "damages" because Item 2000 of UPS's tariff, upon which the Hundredweight Service was based, incorporated by reference the National Motor Freight Classification 100 Series Classification, but UPS stopped participating in the NMFC in October 2000. Fulfillment, therefore, claimed UPS' continued reference to the NMFC violated '13703(f), as a result of which it was entitled to damages and injunctive relief under '14704(a)(2). The district court granted UPS's motion to dismiss on the basis that a carrier's liability under '13703 does not extend beyond anti-trust violations and denied UPS' motion for attorney's fees. Fulfillment appealed and the Ninth Circuit affirmed, although for different

reasons.

The Circuit Court disagreed with the district court on standing issue. Whereas the district court held that Fulfillment had no standing under '13703, the Ninth Circuit ruled that because Congress enacted specific legislation, namely '14704(a), establishing a private cause of action for violations of the Motor Carrier Act, including violations of '13703, a shipper subject to pricing arrangements governed by the MCA has a legitimate interest protected by '13703. Hence, Fulfillment had standing to sue. However, the Court affirmed dismissal because Fulfillment had failed to state a claim under ' 14704(a)(2) since it did not allege "damages" incurred as a consequence of the '13703 violation. Although Fulfillment's complaint under the term "damages," in effect, it was seeking disgorgement of UPS' "unlawful" tariff. "Because Fulfillment alleges only restitution and penalties, it has alleged no damages, and therefore, failed to state a claim." The Court also rejected Fulfillment's argument that the "savings" clause, 49 U.S.C. '13103, preserved its action against UPS because it "does not eliminate '14704(a)(2)'s basic requirement that a plaintiff allege damages." The "savings" clause does not allow courts to impose equitable remedies as an adjunct to damages under '14704(a)(2). Finally, the Court ruled UPS was not entitled to attorney's fees because '14704(e) applies only to successful plaintiffs and refused to adopt the "loser pays" rule.

Late Cases

Thermal Technologies, Inc. v. United Parcel Service, Inc., 2008 WL 4838681 (N.D. Ok. 2008)

Class Action against United Parcel Service ("UPS") alleging unlawful tying and monopolization in violation of Sherman Antitrust Act and alleging unjust enrichment. Plaintiff theorized that UPS unlawfully tied or bundled the sale of ground shipping services for goods valued in excess of $100.00 to the purchase of insurance from UPS.

UPS successfully moved to dismiss the complaint under Rule 12 (b) (6) on the basis that the complaint failed to state a claim. The protection against loss or damage up to $100.00 was a limitation of UPS' liability, not insurance. The state law claims of unjust enrichment were pre-empted by Carmack. The District Court reviewed the plain language of the UPS tariff and the case law pertaining to insurance versus limitations on liability and concluded that the language at issue was a limitation of liability that allocated risk between the shipper and the carrier.

FFE Transportation Services, Inc. v. Julio Martinez, individually and d/b/a Cedimexa Forwarding; and Luis Martinez, individually and d/b/a Cedimexa Forwarding, Case No. 2007-CYQ001724-D3 (111TH Dist. Ct. of Webb County, Texas) - Jack Coke, Jr.

The case involved a movement in a refrigerated sealed through trailer that contained both domestic and in bond traffic. The shipper was Dufry who operates the Duty Free Shops in the ports and airports. Dufry America was shipping from Miami, FL on the through trailer to Dufry Mexico in Mexico City, MX with a required stop called for on the bill of lading at Cedimexa Forwarding in Laredo, TX USA. The driver delivered the shipment to Cedimexa at Laredo and got the B/L signed clear with seal in tact by Cedimexa in Laredo. The driver then left to haul other freight dispatched from the local terminal. About a week later the local terminal got a call from Dufry Mexico City asking if the carrier had removed the trailer from the yard of Cedimexa at Laredo. At that point it was determined that the trailer had been stolen off of the Cedimexa yard although the lading was still in the Cedimexa warehouse being counted and classified for Mexican Customs duty collection purposes.

Through trailers have to have special documentation in place at the time of border crossing so you can't just use any line haul trailer in the yard to continue the movement to Mexico City. The US carrier conducts no operations in Mexico by law, so interchange agreements have to be in place with a trusted Mexican carrier to power the continued movement in Mexico and to try to insure the return of the trailer intact from Mexico.

Once the theft of the trailer was discovered, the carrier demanded the return of the trailer alleging breach of contract, breach of bailment, negligence, and demurrage losses.

Defendant Cedimexa defended on the basis that it had signed for the contents of the trailer and not the through trailer destined to Mexico City. Cedimexa alleged that if they had intended to sign for the trailer they would have signed a Trailer Interchange Agreement and none was signed so they said they were not responsible for the trailer that the carrier left unattended on their yard.

The B/L did not include the boiler plate language adopting the tariffs, rules and regulations in effect, etc. The court would not allow recovery of demurrage under the tariffs saying that was recovery for loss of usage and compelled election of remedies be limited to value of the property forming the basis of the bailment.

Cedimexa Forwarding is not a forwarder at all. It has no authority or license issued by the US or Mexico. It acts as what is actually only Texas / Mexican peculiarity, a "forwarding agent" of its customer, Dufrey Mexico City. The goods can't even be lawfully classified by forwarding agent as that is the function of the licensed Mexican Customs broker under the law.

Cedimexa is not a bonded warehouse but broke the seal in the US, off loaded the mixed in bond and domestic lading into its warehouse. Cedimexa was to thereafter tender the reloaded through trailer to a Mexican drayman to move the freight through the "no man's zone" to the Mexican Customs broker where the Mexican Motor carrier was to thereafter transport it to Mexico City.

Comparative Negligence was submitted to the jury who found the carrier 70% negligent and Cedimexa 30% negligent. The jury found a breach of the bailment contract and awarded the value of the two year old refrigerated trailer at the date of its loss, prejudgment interest, court cost, and attorney fees. We have argued that because the recovery was in contract and not in tort the comparative negligence did not impact the damages recoverable. Likewise, because the recovery was in contract, the Texas statute authorized recovery of attorney fees, which recovery would have been precluded if the base recovery had been in tort.

If you think the matter of interest sufficient to justify addition to the addenda, I will be glad to present it. At present the case is not reported, the entry of the judgment is not scheduled until hearing on January 20, 2009 and there is thus only a jury verdict. I just thought it had some interesting twists and turns.

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