IN TRANSIT

Transportation Loss Prevention & Security Association

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INSIDE

Transportation Loss Prevention and Security Association

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FROM THE EXECUTIVE DIRECTOR...

I AM SURE WE HAVE ALL BEEN FACED WITH THE QUESTION, "WHAT ARE THE BENEFITS OF ATTENDING AN INDUSTRY CONFERENCE"? MANY OF OUR CO-WORKERS WHO MAY NOT GO TO CONFERENCES SILENTLY OR NOT SO SILENTLY THINK THAT THIS IS ONE OF THE BEST BOONDOGGLES AROUND. LEAVE WORK…GO TO A FAR AWAY CITY…STAY AT A FANCY HOTEL…DRINK TO ALL HOURS OF THE NIGHT….HOW COULD THIS POSSIBLY BE CONSIDERED WORK?

WHEN I AM ASKED THIS QUESTION, I TELL PEOPLE THAT I USUALLY GIVE UP ALL OR PART OF MY WEEKEND; I GET UP EARLY AND SPEND FROM 8AM TO 5PM LISTENING TO KNOWLEDGEABLE INDUSTRY SPEAKERS; I PARTICIPATE IN DISCUSSIONS WITH MY PEERS; I LEARN THINGS I NEVER WOULD HAVE KNOWN BEFORE AND I FIND RESOURCES THAT WILL LAST ME FOR A LONG TIME. FROM MY POINT OF VIEW, THIS IS AN INVESTMENT THAT PAYS DIVIDENDS WELL INTO THE FUTURE.

THE TRANSPORTATION INDUSTRY HAS ALWAYS BEEN UNIQUE. WITH ITS SPECIAL RULES, REGULATIONS AND CUSTOMS, WORK IN TRANSPORTATION IS LIKE BELONGING TO A SPECIAL SECRET SOCIETY. THERE IS NO ONE SOURCE WHERE YOU CAN GO TO FIND ALL THE ANSWERS. THERE IS NO "TRANSPORTATION GOOGLE" WHERE YOU CAN ENTER YOUR QUESTION AND EASILY FIND THE ANSWER.

AT OUR JOINT CONFERENCE, NOT ONLY WILL YOU FIND ANSWERS TO YOUR QUESTIONS, BUT ALSO YOU WILL FIND ANSWERS TO QUESTIONS YOU DID NOT KNOW EXISTED. WHERE ELSE WILL YOU BE IN THE SAME ROOM WITH TOP EXECUTIVES, TRANSPORTATION ATTORNEYS, WELL-KNOWN VENDORS, UNIVERSITY PROFESSORS AND INDUSTRY TRADE PRESS? ATTENDING OUR CONFERENCE IS TRULY A UNIQUE EXPERIENCE.

THE OFFICERS AND DIRECTORS OF TLP & SA AND TLC WORK HARD ALL YEAR TO BRING YOU THIS EXCEPTIONAL ANNUAL CONFERENCE. TAKE A MINUTE AND LOOK THROUGH YOUR CONFERENCE AGENDA. YOUR NEXT THREE DAYS WILL TRULY BE LIKE A COLLEGE EDUCATION. AT THE END OF YOUR STAY IN SAN ANTONIO, YOU WILL BE ABLE TO ANSWER ANY CRITIC WHO QUESTIONS YOUR ATTENDANCE. YOU WILL BE ABLE TO SAY, "I LEFT WORK…I WENT TO A FAR AWAY CITY…I STAYED AT A FANCY HOTEL….I DRANK TO ALL HOURS OF THE NIGHT….BUT…I LEARNED MORE THAN I EVER THOUGHT POSSIBLE!"

ON BEHALF OF THE OFFICERS AND DIRECTORS OF TLP & SA, WE WELCOME YOU TO THE SIXTH ANNUAL JOINT CONFERENCE IN SAN ANTONIO, TEXAS. LISTEN CAREFULLY, ASK QUESTIONS, ENJOY EACH OTHERS COMPANY AND REMEMBER THE ALAMO.

William D. Bierman, Esq.
Executive Director

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CANADIAN LAW DEVELOPMENTS ON INTERMODAL TRANSPORTATION

By Catherine A .Pawluck-Partner, Gowling Lafleur Henderson LLP - Toronto, Ontario, Canada

One of the most exciting developments in Canada affecting the transportation industry relates to the Pacific Gateway Strategy. Canada is positioning itself as the gateway to North America for goods from China, India and other Asian countries.

With the surge in intermodal transportation, a recent decision of the Federal Court of Canada is of particular interest. Intermodal transportation and the ability of an inland rail carrier to invoke the benefit of an ocean carrier's "Himalaya clause" were the focal points of the decision. While the facts of this Canadian case will quickly be recognized as being parallel to those in Kirby v. Norfolk Southern Railway, the result is anything but "deja vu".

In Boutique Jacob Inc. v. Pantainer Ltd. et al [2006] F.C.J. No. 292 the Federal Court of Canada held that section 137 of the Canadian Transportation Act (the "Act") precludes a rail carrier from asserting the limitation of liability contained in an ocean carrier's Himalaya clause (even where it expressly extends the limitation of liability to its subcontractors). The Court also held that section 137 of the Act is a bar to the limitation of liability found in a rail carrier's confidential contracts, where the aggrieved person is not a party to such agreement.

The Facts

Boutique Jacob Inc. ("Boutique Jacob") through its freight forwarder, arranged for a shipment of women's clothing to be transported from Hong Kong, People's Republic of China, to Montreal, Canada. The freight forwarder engaged Pantainer Ltd. ("Pantainer") to perform the transportation. Pantainer issued Express Line bills of lading to Boutique Jacob. The value of the cargo was not declared. Pantainer, in turn, engaged and paid OOCL to transport the shipment from Hong Kong to Montreal. OOCL issued an electronic waybill, referring to its website for the applicable terms and conditions. OOCL in turn engaged and paid Canadian Pacific Railway (CP Rail) pursuant to the Confidential Rate Contract between OOCL and CP Rail to transport the shipment by rail from Vancouver to Montreal. As a result of a train derailment, the cargo was destroyed. There was no dispute that the damages occurred during the rail carriage. Boutique Jacob commenced an action against Pantainer, OOCL and CP Rail. The parties had dealt with each other on an ongoing basis.

Liability of Pantainer and OOCL

The Court found that both Pantainer and OOCL were exempt from any liability for the loss suffered by Boutique Jacob following the derailment of the train carrying its cargo. The court relied on an exemption clause found in Pantainer's bill of lading, which read:

6.5 The Carrier shall not be liable for any loss or damage arising from

...

h) any cause or event which Carrier could not avoid and the consequences of which the Carrier could not prevent by the exercise of due diligence.

Coincidentally, the same exemption clause was contained in OOCL's terms and conditions. Having noted that, the Court nevertheless found that OOCL could rely on the exemption clause in Pantainer's bill of lading because the document stipulated that:

3.2 Every servant or agent or sub-contractor of Carrier shall be entitled to the same rights, exemptions from liability, defences, and immunities to which Carrier is entitled. For these purposes, Carrier shall be deemed to be acting as agent or trust for such servants or agents, who shall be deemed to be parties to the contract evidenced by this Bill of Lading.

The Court reaffirmed the Canadian law with respect to "Himalaya clauses", and stated:

These so-called "Himalaya clauses" are well recognized terms in transport contracts, and they are enforceable by the courts notwithstanding a third party's complete ignorance of the existence of a clause granting it a benefit at the time of the performance of its own contract. They have long been recognized by the highest British Courts ... and have similarly been endorsed by the Supreme Court of Canada ...

On that basis, the Court dismissed the Plaintiff's claim as against Pantainer and OOCL.

Liability of CP Rail

Turning to the claim against CP Rail, the Court considered the obligations of CP Rail as a common carrier in the context of section 137 of the Act and the Railway Traffic Liability Regulations. The court found that CP Rail was clearly responsible for the loss or damage to the Plaintiff's cargo.

CP Rail argued that it was entitled to benefit from the terms and conditions found in its Confidential Rate Contract with OOCL, in CP Rail's published Tariff CPRS 7589, in OOCL's bill of lading or in Pantainer's bill of lading. The Court held otherwise and stated:

This argument would be compelling, as it is for the other two Defendants, if it was not for section 137 of the Canadian Transportation Act. This section clearly provides that a railway company shall not limit or restrict its liability to a shipper except by means of "a written agreement". Now, there is no written agreement as between Jacob and CPR...

Nor was CP Rail entitled to rely on its Tariff (which would have limited its liability to $1,432.89) because it did not have a signed agreement with Boutique Jacob.

Of significance, the Court held that CP Rail could not invoke the Himalaya clause in Pantainer's bill of lading nor in OOCL's terms. The Court stated:

But the application of these clauses [referring to the Himalaya clause] to a railway carrier would defeat the purpose of s.137 of the Canadian Transportation Act. It would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are the railway companies.

CP Rail was held solely responsible for Boutique Jacob's damages and was not able to limit its liability. Damages were assessed on the basis of arrived sound market value. (As of the date of this writing, an appeal to the Federal Court of Appeal had not been filed by CP Rail.)

The decision is of significance to those involved in intermodal transportation, particularly as it affects rail carrier liability in Canada.

20 March 2006-Toronto, Canada

CALIFORINIA COURT OF APPEAL RULES DECLARED VALUATION IS INSURANCE

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

It is emphatically the province and duty of the judicial department to say what the law is…If two laws conflict with each other, the courts must decide on the operation of each… This is the very essence of judicial duty." Marbury v. Madison, 1 Cranch, 1317 [1803]

The California State Court of Appeal, Second Appellate District, in January ruled that the declared valuation protection for intrastate and interstate shipments offered to customers of Staples office supply stores is a form of insurance, subject to California's consumer protection and insurance laws. Your author asserts that the court did not properly consider competing federal law, and that the resulting decision not only is wrong, but is a dangerous trend for the transportation community. Alan Wayne v. Staples, Inc., (2006) 135 Cal. App. 4th 466, involves a class action suit by Mr. Wayne on behalf of all Staples customers who shipped packages through Staples' stores and who purchased increased valuation protection. Staples is an authorized "shipping outlet" for United Parcel Service ("UPS"), and sold UPS shipping services through its stores. The problem, according to plaintiff, is that Staples was charging $.70 per hundred dollars of declared valuation for packages, when UPS was charging Staples only $.35 for that same level of protection. Staples was not sneaky about its charges: literature provided to its customers plainly advised of its charges, including a potential mark up of valuation charges, but did not reveal the specific amount that UPS charged Staples for the declared value protection. Staples asserted in its successful summary judgment motion that its markup was used, in part, to cover administrative costs when it filed and monitored loss and damage claims with UPS on behalf of Staples' customers. Plaintiff alleged that the mark up and sale of increased valuation was actually the sale of insurance, for which Staples was unlicensed in California, and for which it was subject to fines and penalties as an unfair business practice under the State's draconian Business and Professions Code section 17200 consumer protection law. The trial court dismissed the plaintiff's claim finding that increased valuation was not insurance under California law. The State Court of Appeal reversed, as discussed later in this article.

"Whoever you are-I have always depended on the kindness of strangers." Tennessee Williams, a Streetcar Named Desire [1947]

Plaintiff Wayne is no stranger to the California Courts. He, and the law firm representing him against Staples, filed a similar class action claim in California state court against DHL Worldwide Express, reported at 2000 U.S. Dist. Lexis 19654 (D.C. Cal. 2000). Wayne paid an extra $1.40 to ship a package with a declared value of $200. He then filed a class action suit against DHL claiming that the charges for declared value "insurance" were excessive and in violation of California insurance and consumer protection laws. DHL removed the state law claim to federal court based on the complete federal preemption of state laws which affect the price, routes or services of airlines. During argument, Wayne asserted that his complaints related only to flights within California. The court found that while under those circumstances the Warsaw Convention would not apply, the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. 41713, did support the dismissal of Mr. Wayne's claims because they were completely preempted (i.e., trumped) by that federal statute. The judge expressly held that the airline's charges for declared value "insurance," as a "price" for service, were not subject to regulation by the California Insurance Commissioner. The Court further relied upon two U.S. Supreme Court cases as authority for the proposition that states may not regulate the price, routes or services of airlines: Morales v. TransWorld Airlines, 504 U.S. 374, 378 (1992), and American Airlines v. Wolens, 513 U.S. 219, 232 (1995).

Wayne appealed that dismissal, and the Ninth Circuit, without ruling on the merits of the dismissal of the state law claims, showed Wayne some kindness by holding strangely that the federal district court did not have removal jurisdiction to rule on those issues. Wayne v. DHL, (9th Cir. 2002) 294 F.3d 1179. In other words, that the federal courts do not have exclusive jurisdiction to rule on federal defenses under the ADA, and such federal defenses do not justify taking the claims out of state court for resolution. The appellate court sent the case back to state court for further handling. The state court then dismissed the complaint on DHL's motion for judgment on the pleadings, holding that Wayne's claims, even if true, were preempted by federal law, and that selling declared value insurance was not the primary purpose of the contract to ship plaintiff's cargo. He appealed. In an unpublished 2005 decision, the California State Court of Appeal returned the case again to the trial court holding that the trial court did not properly consider the allegation of the complaint that DHL was selling insurance. The trial court, at the pleading stage, had to accept as true the allegation that DHL was selling insurance, and the Court's determination that the sale of insurance was not the primary purpose of the transaction was improper in ruling on a motion for judgment on the pleadings. Wayne v. DHL Express, 2005 Unpubl. Lexis 4274.

"One must separate from anything that forces one to repeat No again and again." Friedrich Nietzsche, Ecce Homo [1888]

Mr. Wayne initially did not fair any better against Staples than he did with the two trial judges in the DHL case. The state court judge held that the sale of package insurance was not the "principle object and purpose" of the transaction: getting the package to its intended destination was the shipper's primary aim. California cases hold that a car rental customer's purchase of insurance from the rental company is not subject to state insurance regulation, because the principal purpose of the transaction is the car rental, not the extra insurance charges. In like manner the trial court found that Staples' incidental charge for declared value insurance was not the sale of insurance as defined under California statutes, and would not sustain Wayne's claims. It granted DHL's motion for summary judgment and dismissed all claims.

The State Court of Appeal again came to Wayne's rescue. It first noted that UPS's declared valuation program itself was insured by a national insurance company. When claims were presented to UPS by Staples and its customers, some claims would be referred to the insurance company for resolution. The decision does not discuss whether UPS handled claims to a certain level, whether it had a deductible amount, or what criteria was used to determine if, or when, UPS paid such claims without referral to its insurance carrier. However, the customers who purchased the declared value coverage were regarded as additional insured under the UPS policy with its insurance company. That may be the only fact which lends any support to this decision.

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TRANSPORTATION CASE SUMMARIES

by *Wesley S. Chused, Esq.* - Looney & Grossman, LLP, Boston
and *Edward M. Loughman* - TLP & SA - Hackensack, NJ

Mach Mold Inc. v. Clover Associates, Inc. et al., 2005 U.S. Dist. LEXIS 17451 (N.D. IL. 2005)Mach Mold contacted Leading Edge New Machinery about purchasing a milling machine. Leading Edge referred Mach Mold to one of its dealers, KM Industrial. KM Industrial provided Mach Mold with a quote to purchase a machine from Eumach, a Japanese manufacturer. The written quote provided that KM Industrial retain title until the contract was fully paid but the sale would be free on board so that Mach Mold bore the risk of loss after KM Industrial tendered the machine. KM Industrial expressly disclaimed any liability for damages that might occur during shipment and required Mach Mold to seek recovery from the carrier. Mach Mold agreed to these terms and financed the purchase in a lease-own agreement with Fifth Third Bank.

The structure of this deal went as follows: Eumach sold the machine to Leading Edge which sold it to KM Industrial which sold it to Mach Mold. This agreement was not reduced to writing.

The machine was shipped from Japan to Chicago where it was displayed at a trade show. Following the show, Mach Mold hired Clover to transport the machine from Illinois to Michigan. The machine was transported in two shipments. The first shipment arrived without exception. Clover hired Kingman to transport the second shipment, and the shipment was damaged in transport. Mach Mold sued Clover and Kingman who in turn sued everyone involved in the deal.

Mach Mold's complaint sought recovery from Clover and Kingman under the Carmack Amendment and against Clover for negligence and breach of contract. Clover and Kingman argued that Mach Mold did not have standing sue because it was not the legal owner of the machine. Under the oral contract the risk of loss passed to Mach Mold when the machine was tendered to the carrier, but Clover and Kingman argued that the oral contract was unenforceable under the UCC's statute of frauds. The Court held that the performance of the contract rendered the otherwise unenforceable agreement enforceable.

Clover also contended that it was exempt from Carmack because it acted as a broker in the shipping contract. The Court rejected this argument because Clover failed to produce any evidence that it was registered with the DOT as a broker.

Clover also claimed that Mach Mold was not entitled to receive damages for business interruption because such damages were not foreseeable. The Court refused to find that such damages were unforeseeable and left the question for the jury.

Clover and Kingman had argued that Mach Mold failed to establish that the carrier received the goods in good condition because no bill of lading was ever issued, however, an Order Form was issued that all of the parties treated as a bill of lading. Kingman's driver signed the Order Form, indicating that the machine was received in good condition.

The Court entered partial summary judgment in favor of Mach Mold establishing liability under the Carmack Amendment. The amount of damages was left for trial.

B. CLAIM FILING

Siemens Power Transmission v. Norfolk Southern Railway, 420 F.3d 1243 (11th Cir. 2005).In a case of first impression for the 11th Circuit, the Court held that a shipper must file a claim that meets the requirements of 49 CFR § 1005.2(b) before filing suit, but that a specific dollar amount was not required in the claim. Siemens hired Norfolk Southern to transport an electrical transformer by rail. The transformer was damaged in route. Siemens mailed Norfolk Southern a letter indicating its intent to claim the costs of repair but indicated it did not yet know the total costs. Siemens inspected the transformer and invited Norfolk Southern to send a representative to the inspection. After inspecting the transformer, Siemens mailed Norfolk Southern a letter estimating the total cost of repair between $700,000.00 and $800,000.00. Siemens transported the transformer back to its facilities and subsequently field suit seeking $791,136.00 in damages.

Norfolk Southern moved for summary judgment claiming that Siemens failed to meet the minimum standards for filing a freight claim; specifically Norfolk Southern argued that Siemens failed to provide an exact notice of damages. The District Court granted Norfolk Southern's motion and Siemens appealed.

On appeal, Siemens argued that timely compliance with the claim filing requirements was not a prerequisite to filing suit and that if it was a requirement; its letters met the minimum requirements. The 11th Circuit held that filing a timely claim was a prerequisite to filing suit, and adopted the substantial compliance test for analyzing the claim. Accordingly, Siemens' letters providing a range between $700,000 and $800,000 met the minimum requirements. The Court reasoned that the point of the claim requirement was not to absolve a carrier from liability but to provide reasonable notice of a claim.

C. LIMITATION OF LIABILITY

AIG v. Landair Transport et al., 902 So.2d 169 (Fla. Dist. Ct. App. 2005) Shipper hired Montevideo Freight Forwader to arrange for the transport of Motorola phones from Illinois to Florida and then ship the goods to Uruguay. Montevideo contracted with Miami International Freight Forwarders to arrange for the transport of the goods. Miami International hired USA Cargo to transport the phone to Miami. USA Cargo issued a bill of lading limiting liability to "actual damages or $100, whichever is less." USA Cargo hired Forward Air to transport the phones to Miami. USA Cargo issued a waybill limiting value to $.50 per pound. Forward Air hired Landair under a contract that limited Landair's liability to the same limits as Forward Air. Forward Air's waybill governed the shipment. The cargo was lost en route to Miami. USA Cargo sent a claim letter to Forward Air and Forward Air tendered a check under the limitation of liability clause. Thereafter, USA Cargo released Forward Air from liability.

Shipper insured the goods with AIG, who paid the value of the goods to shipper. Shipper assigned AIG its rights and AIG, as subrogee, brought suit against all the carriers. Landair and AIG filed summary judgment motions. The court granted Landair's summary judgment motion finding that its liability was released when Forward Air was released. AIG appealed but the judgment was affirmed.

Royal Air v. AAA Cooper Transportation, 2005 U.S. Dist. LEXIS 14880 (W.D.La. 2005). Royal Air hired AAA to ship a used airplane engine. The bill of lading contained a limitation of liability and referenced AAA's tariff. Royal Air did not sign the bill of lading. AAA delivered the engine and a receipt noting that the engine was delivered in good order and condition was issued. A month later, Royal Air filed a claim with AAA for concealed damage and demanded full payment for the damages arguing that the limitation of liability was inapplicable because the bill of lading was not signed. AAA counteroffered the amount due under the limitation of liability clause. Royal Air filed suit in state court and AAA removed. Once removed, AAA moved for

summary judgment on the limitation of liability issue.
The Court held that the limitation of liability contained in the bill of lading applied even though Royal Air did not sign the bill of lading. Citing Supreme Court precedent, the Court held that Royal Air's actions evidenced an intent to enter into bill of lading contract. The Court further reasoned that Royal Air cannot seek to enforce a contract (by virtue of filing a claim), and then claim its failure to sign the bill of lading makes it unenforceable. Royal Air also sought attorneys' fees and the Court ruled that such a claim was preempted by Carmack and granted summary judgment on that issue as well.

Hath v. Alleghany Color Corp. et al., 369 F.Supp. 2d 1116 (D. Ariz. 2005). Plaintiff hired ABF Freight System to transport his household goods from Michigan to Arizona. The bill of lading contained a limitation of liability clause limiting liability to $0.10 per pound. Plaintiff called ABF about the limitation of liability and was offered the opportunity to obtain additional insurance. Plaintiff declined the offer and signed the bill of lading. During transit a shipment of ink allegedly stained Plaintiff's goods. Plaintiff brought suit under Carmack and alleged claims of negligence and res ipsa loquitor.
ABF moved for summary judgment on the Carmack claim under the limitation of liability. The Court granted summary judgment, finding that ABF's limitation of liability clause met the requirements under Hughes Aircraft. ABF maintained a valid tariff, provided Plaintiff with reasonable notice of the limitation and an opportunity to obtain information to make a well-informed choice, obtained Plaintiff's agreement by virtue of his signature, and issued a bill of lading evidencing this agreement. The Court also found that Plaintiff had a reasonable opportunity to choose between two or more levels of liability and accepted ABF's limitation of liability clause. As a side note, the Court held that ABF's self-pack method was not subject to the household goods regulations. The Court also dismissed Plaintiff's state law claims without any discussion.

D. PREEMPTION

Miracle of Life v. North American Van Lines et al., 368 F.Supp. 2d 494 (D.C.S.C. 2005) (Miracle I). Plaintiffs Miracle of Life, Brooke Faville and Dr. Leonard Coldwell own the "Time Out System" which they claim provides health and stress relief to individuals. Plaintiff Dr. Hohn purchased the complete Time Out Center to open an identical business in Germany.
Plaintiffs hired Atlantic Transport & Storage ("ATS") to ship office furniture and other items from Charleston to Germany. Plaintiffs claimed that when the goods arrived in Germany some were missing and others were damaged beyond repair. The Plaintiffs brought state law claims against ATS and several other entities for breach of contract, breach of contract accompanied by a fraudulent act, fraud, negligence, promissory estoppel, civil conspiracy, conversion and unfair trade practices. The Defendants removed to federal court and moved to dismiss on preemption grounds. Plaintiffs conceded that Carmack preempted many of their state law claims but asked the Court to deny Defendants' motions as to the claims for fraud, conversion, and unfair trade practices. The Plaintiffs argued that the Court was presented with an opportunity to reign in the scope of Carmack's "unwarranted preemptive power." The Court declined Plaintiffs' invitation and held that Carmack preempted each of Plaintiffs' claims. The Court granted Defendants' motions to dismiss, but allowed Plaintiffs to file an amended complaint setting forth a claim under Carmack.

Miracle of Life, LLC v. North American Van Lines, Inc et al., 368 F.Supp.2d 499 (D.C. S.C. 2005) (Miracle II). The Court denied Defendant Stevens International Freight Forwarders' Motion to Dismiss Plaintiff's Second Amended Complaint. Stevens argued that Plaintiff's claims were barred by COGSA's statute of limitations and, alternatively, by Carmack's statute of limitations. The Court determined that there were insufficient facts for it to determine where and under which defendants care the damage occurred so it refused to hold that COGSA applied. The Court recognized that it would be in a better position to determine if COGSA governed Plaintiffs' claims after the completion of discovery.
In addressing the Carmack statute of limitations, the Court found that Plaintiffs' claims were not barred by the one-year limitation period even though Plaintiffs failed to file any damage claim with Stevens and filed their suit after the one-year limitation period expired. The Court determined that Plaintiffs filed a timely claim with the carrier and never received a disallowance letter. Further, Plaintiffs alleged that they did not know of Stevens' involvement in the transport until after the lawsuit was filed. Since the Court was required to accept Plaintiff's allegations as true for purposes of the motion, it refused to grant Stevens' motion to dismiss.

Nippon Yusen Kaisha v. The Burlington and Northern Santa Fe Railway, 376 F.Supp.2d 1292 (C.D. Cal. 2005). Shipper hired NYK to transport electronics from Japan to Texas. NYK contracted with BNSF to provide rail transport from California to Texas. NYK's contract with BNSF opted out of Carmack and provided that BNSF will only be liable for damage to goods if "there is proof of BNSF negligence causing the loss or damage." The contract further limited BNSF's liability to $250,000 per shipment and excluded liability for damages when BNSF's liability is determined to be $250 or less.
BNSF's train crashed on tracks owned by Union Pacific Railroad. Shipper's goods were destroyed as a result of the crash. NYK paid shipper for the damaged goods and sought indemnification from BNSF.
NYK filed five state law claims alleging breach of contract, negligence, breach of bailment duties, indemnity and contribution, and declaratory relief as well as an alternative claim under Carmack. BNSF moved for summary judgment on each of NYK's claims. The Court ruled that Carmack preempted each of the state law claims and granted summary judgment on those claims. The Court rejected NYK's claim that BNSF was strictly liable for all damage under Carmack because the contract with BNSF explicitly incorporated alternative terms under 49 U.S.C. § 10502(e). The Court held that Carmack provides rail carriers with the option of providing alternative terms limiting liability so long as they also offer Carmack liability. Therefore, the Court held that BNSF was only liable for its own negligence.
The Court then determined that the Federal Railroad Safety Act preempted conflicting state law standards of negligence under Carmack, but allowed state law standards to apply where the FRSA was silent. NYK claimed that BNSF was negligent because its driver operated the train too fast for conditions, failed to use dynamic braking, and negligently changed throttle positions.
The Court held that federal regulations preempted the standard of car for rail speed. The Court found that BNSF's driver operated the train below the maximum speed and granted summary judgment as to negligence on this issue. The Court found that the dynamic braking system and proper use of the throttle control were not governed by federal regulations and denied summary judgment on those claims.

Delta Research Corp. v. EMS, Inc., S.K. Rigginng, et al., 2005 U.S. Dist. LEXIS 18353 (E.D. Mich. 2005).
Delta purchased a boring machine and hired SK Rigging to transport the machine from Ohio to Michigan. SK Rigging contracted with EMS to transport the goods. The mill was destroyed en route to Michigan, and Delta filed suit under Carmack and state law negligence claims.
Both Delta and SK Rigging cross moved for summary judgment on the Carmack claim. Delta claimed that SK Rigging acted as a freight forwarder as a matter of law, and SK Rigging claimed that Delta failed to properly plead SK's status under Carmack. The Court denied SK Rigging's motion, holding that even though Delta did not use the term "freight forwarder" in the Complaint, the

notice pleading rules placed SK Rigging on notice of a claim under Carmack. The Court also held that material fact existed as to whether SK Rigging acted as freight forwarder, broker, or carrier, and denied Delta's motion.

The Court granted SK Rigging's motion for summary judgment on the negligence claim because there was no evidence that the boring mill was improperly loaded. The Court never reached the issue of preemption of the negligence claim. The Court also stated that Delta failed to set forth proof that SK Rigging negligently selected the carrier who transported the freight.

E. DAMAGES

Schwarz v. National Van Lines et al., 375 F.Supp.2d 690 (N.D. Ill. 2005).

This case is a stunning example of how bad facts create bad law. Plaintiff, a 65 year old widow, hired National Van Lines ("NVL") to transport her household goods from Arizona to Oregon. From the moment the goods were to be loaded to the court's decision in this case, NVL did everything wrong.

NVL hired an interline carrier to transport Plaintiff's goods. They failed to conduct any criminal or driving record check on the carrier or its driver. They also failed to insure that the carrier was insured or even had operating authority for interstate transport at the time of the shipment. The carrier failed to arrive on the scheduled load date. Plaintiff called NVL and told them she needed to be out of her house, she had slept in her clothes and had no food left. After several delays, the carrier finally showed up in a Ryder rental truck to transport Plaintiff's goods. After loading the goods on the Ryder truck, the driver demanded Plaintiff pay an additional $400.00 cash to complete the move. Not surprisingly, Plaintiffs goods never arrived in Oregon.

Plaintiff called NVL to inquire about the whereabouts of her goods, but NVL refused to provide her with nay information regarding their investigation. NVL also failed to review its own files on the interline carrier until several weeks after Plaintiff's shipment had disappeared. Apparently, that file contained information on the location of the carrier, including the location where the goods were finally located four months later. NVL also failed to provide any of this information to the police or the FBI, though it told Plaintiff that they had been in contact with the proper authorities. NVL also admitted that it failed to follow its own procedures to locate a missing truck or even hold a meeting to determine a course of action. During this time, NVL stopped payment on a check to the carrier for a different shipment. The carrier contacted NVL and told them he would reveal the location of Plaintiff's goods if NVL removed the stop-payment order. NVL refused this offer and never informed Plaintiff of this development.

Plaintiff continued to call NVL about her lost shipment. She told them in a voicemail message that she was a nervous wreck and "on the brink of a nervous breakdown." NVL never returned the call. NVL admitted that losing your household goods could cause a great deal of stress and anxiety. NVL originally offered to pay the cost of a round-trip ticket so she could inspect the goods when they were finally located. Once the goods were finally located, NVL only offered to pay 50% of the ticket cost. The National Hispanic Circus v. Rex Trucking and Mason Dixon Lines et al., 2005 U.S. LEXIS 12131 (5th Cir. 2005).

The National Hispanic Circus hired Mason & Dixon Lines to transport its custom-manufactured bleachers to Chicago. The bleachers never made it to Chicago and the Circus was forced to rent bleachers for the Chicago show, but the rented bleachers held fewer people. The Circus eventually ordered new custom-made bleachers to replace the lost set. Three months later the lost set was found in Arkansas.

The Circus sued under Carmack to recover its damages and Mason counterclaimed for the balance of the freight charges for the goods it delivered to Chicago. At trial the jury awarded the Circus damages for the rental of the bleachers in Chicago, for the purchase of the custom made bleachers, and for lost ticket sales. The jury also awarded Mason the freight charges for the goods it delivered to Chicago. The trial court struck the award of lost ticket revenue as being too speculative but affirmed the rest of the jury award. Mason appealed.

The 5th Circuit held that Carmack allows recovery of both general and special damages so long as the special damages are reasonably foreseeable. The Court found that the Circus and Mason had a long standing relationship such that Mason knew it was shipping a wide variety of the Circus' equipment. As a result, the Circus' damages should have been foreseeable to Mason. After considering several evidentiary and jury instruction issues, the Court addressed Mason's contention that the trial court failed to properly calculate the Circus' damages.

Mason contended that it misplaced the bleachers for a few months and should now have to pay for the total cost of replacing the bleachers. Instead, Mason argued, it should only pay for the cost to replace the bleachers during the time they were misplaced as well as any diminution of value. While ordinarily a shipper's damages are measured by the difference between the market value at the time of delivery and the time when they should have been delivered, that is not the only method for calculating damages. The 5th Circuit held that a court can use any method that accurately reflects the plaintiff's actual loss. In this case, the Circus required custom made bleachers for its shows. By the time Mason located the original bleachers, the Circus had already paid for a new set of bleachers because it had no reason to believe the old bleacher would ever be found. Under the circumstances, the Circus acted reasonably in purchasing the new bleachers and should be compensated for the full price of the bleachers.

Campbell v. Allied Van Lines et al., 410 F.3d 618 (9th Cir. 2005). In a case with troubling implications for carriers of household goods, the Ninth Circuit recently held that shippers who successfully sue carriers of household goods can recover their attorneys' fees without first resorting to arbitration.

The Campbells obtained a jury verdict against several carriers for damage to their household goods. The court then awarded attorneys' fees representing almost one third of the total damages awarded. The carriers appealed the award of attorneys' fees arguing that 49 U.S.C. § 14708(d) requires a shipper to first resort to arbitration before being eligible for attorney's fees. The Ninth Circuit affirmed the award of attorneys' fees holding that a literal reading of the 49 U.S.C.§ 14708(d) applies to "any court action."

A strongly worded dissent argued that this "literal" reading applied the statute in an absurd manner. The context of the statute and plain common sense required shippers to use arbitration before being awarded attorneys' fees. The dissent pointed out that this ruling may actually serve as a disincentive to arbitrate disputes because the statute specifically provides that no attorneys' fees will be awarded if the claim is resolved within the 60 day statutory period. In light of this holding, why would anyone risk a quick resolution when they could file suit and recover their full attorneys' fees?

F. FREIGHT CHARGES

I. FREIGHT FORWARDER/BROKER LIABILITY

Hewlett-Packard v. Brother's Trucking et al., 373 F.Supp.2d 1349 (S.D. Fla. 2005).

Danzas AEI contracted with Salem Logistics for Salem to provide transportation for a shipment from California to Florida. The contract called for Salem to arrange to have the goods transported by a reputable carrier. Salem used an internet freight matching website to select Brothers Trucking and arranged for Brothers Trucking to pick up the goods in Los Angeles and transport them to Miami. Two Brothers drivers picked up the goods and signed the bill of lading indicating receipt of the shipment. When they reached South Florida, the drivers parked the truck in an unattended shopping center parking lot around the corner from one of the drivers' home. The truck was stolen and the goods never recovered.

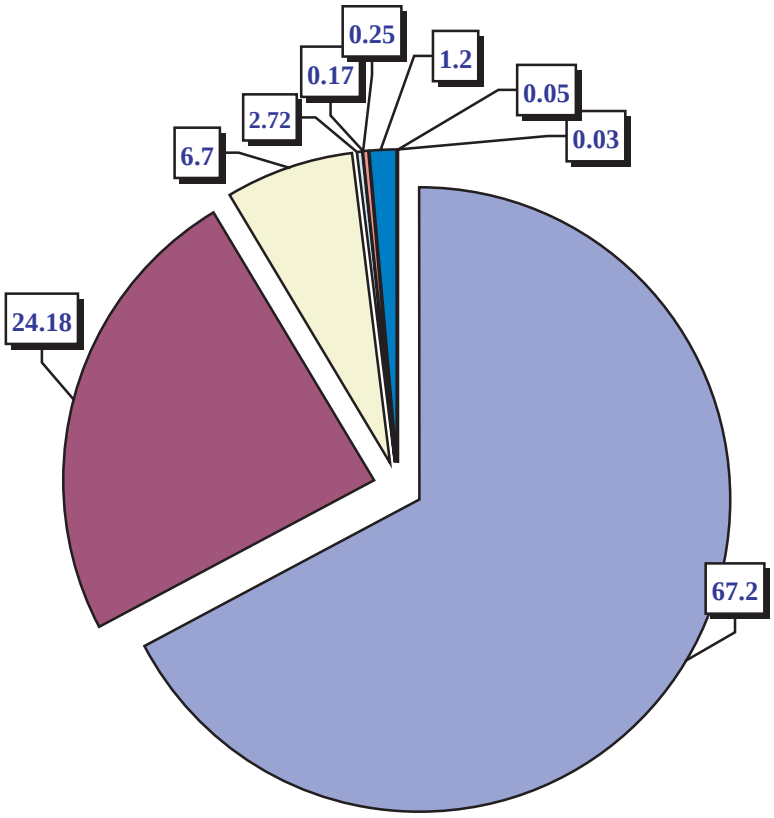
Danzas filed suit alleging Carmack and state law claims against Salem. Salem moved for

-Continue on Page 12-

2004

TLP&SA

Claims Survey Chart



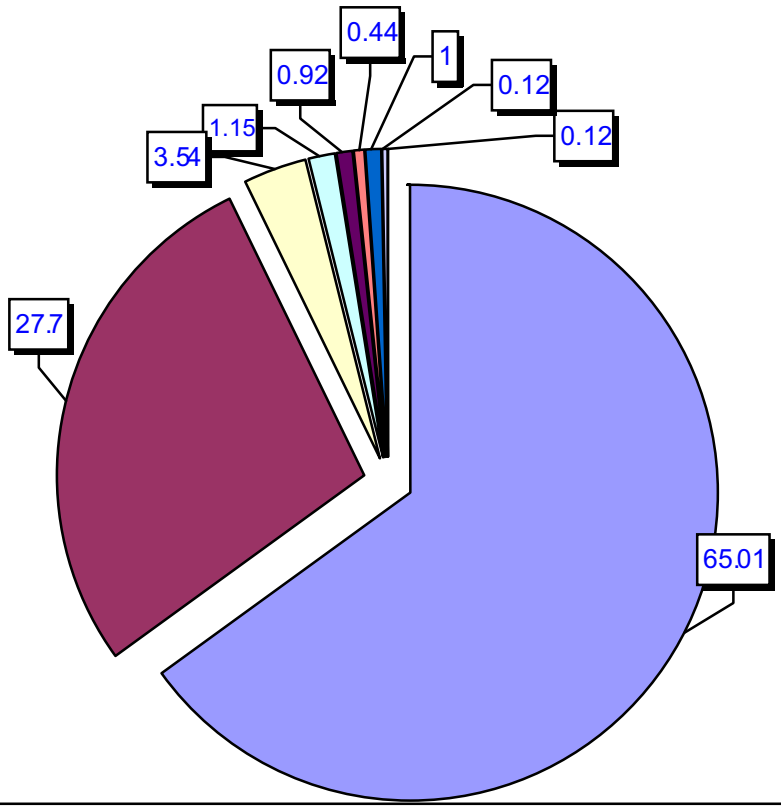
Visible Damage - 67.2%	Shortage - 24.18%	Concealed Damage - 6.7%
Wreck/Catastrophe - 0.22%	Theft/Pilferage - 0.17%	Water - 0.25%
Other - 1.27%	Delay - 0.05%	Heat/Cold - 0.03%

Compare Last Year's Numbers

2005

TLP & SA

Claims Survey Chart



Visible Damage - 65.01%
Shortage - 27.70%
Concealed Damage - 3.54%
Wreck/Catastrophe - 1.15%
Theft/Pilferage - 0.92%
Water - 0.44%
Other - 1.00%
Delay .12%
Heat/Cold - 0.12%

With This Year's Numbers

TLP & SA MOTOR CARRIER CLAIMS SURVEY – 2005

CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	27.70 %	25.17 %
Theft / Pilferage	.92 %	.16 %
Visible Damage	64.01%	67.90 %
Concealed Damage	3.54 %	5.21 %
Wreck / Catastrophe	1.15 %	.19 %
Delay	.12 %	.04%
Water	.44 %	.22%
Heat / Cold	.12 %	.03 %
Other	1.00 %	1.08 %

Total numbers of claims paid Vs. number of claims filed.	76.67 %
Total dollars paid Vs. total dollars filed.	40.85 %
Net dollars paid Vs. total dollars filed.	37.18 %
% of claims filed to total number of shipments made.	.63%
Total company claim ratio.	1.154%
Percent of claims resolved in less than 30 days.	81 %
Percent of claims resolved 31-120 days.	16 %
Percent of claims resolved more than 120 days.	3 %

-Continue from Page 4-

"There is no error so monstrous that it fails to find defenders among the ablest men." Lord Acton, Letter to Mary Gladstone [1881]

The appellate court essentially ignored the auto rental cases relied upon by the trial court, and found that even if the sale of insurance was not the principal purpose of the transaction, any sale of insurance would place the transaction within the ambit of the insurance code regulations. The court attempted to distinguish those auto rental cases, but its efforts were entirely unsatisfactory in this author's view. The court also held that Staple's mark up on the increased valuation charges were a "commission" on the sale of insurance, rather than "profit" as urged by Staples. Under this finding, Staples became an unlicensed, "commissioned" insurance salesperson, and was in violation of the California Insurance Code, and the unfair business practices act.

The court made other findings in favor of Staples, including that its markup was not unconscionable and that its marketing of the declared value option was not deceptive. However, the harm was done. A wise dissenting opinion concluded that the majority simply ignored the controlling precedent of the principal purpose test. The dissenting judge would have upheld in its entirety the trial court's decision that the sale of increased declared valuation is not subject to state insurance regulation.

"So here hath been dawning Another blue day: Think, wilt thou let it Slip useless away?" Thom. Carlyle [1795-1881], Today

Your author has great concerns about the decision in Wayne v. Staples and its possible effect on interstate transportation. Every interstate motor carrier, railroad, and cargo airline offers increased valuation to their shippers. They must offer a choice of liability levels, and get the shipper's agreement as to the applicable liability limit, before a court will enforce any limit of liability in the contract of carriage. Hughes Aircraft v. North American Van Lines, (9th Cir. 1992) 970 F.2d 609, 611-12. One way to demonstrate that the shipper was aware of a limitation of liability is when the shipper has purchased separate insurance for cargo loss. Read-Rite Corp. v. Burlington Air Express, (9th Cir. 1999)186 F.3d 1190, 1198. However, increased valuation offered by a carrier, regardless of the mode of carriage, is NOT insurance. Even the Wayne v. Staples decision recognized that a mere shifting of risk of loss, alone, does not constitute insurance. Wayne, supra, at 475. An insurance policy also must distribute the risk of loss among similarly situated persons. A typical declaration of value does shift a greater proportion of the risk of loss to the carrier. Under the Carmack Amendment the carrier already has full liability for loss unless it takes the steps necessary to limit that loss. Hughes Aircraft, supra; 49 U.S.C. 14706. But critically to this analysis, the carrier retains the risk of loss: it is not distributed among its other customers. While the carrier may insure itself for cargo loss or damage beyond a certain self-insured limit, or after application of a deductible, it is not required to do so (except, of course, for common carrier BMC cargo insurance requirements). So, declared valuation is not insurance under usual definitions, and the offering of declared valuation ought not to subject transportation providers to scrutiny under state insurance laws.

Careful readers will note a significant variant in the Staples case. Both Staples, and UPS advertised the declared valuation as "insurance" and the shipper was a purported additional insured under the UPS policy. Arguably a shipper's loss would be distributed among other policy holders, and could fall within the definition of insurance. However, the Staples defense did not assert the federal preemption argument that Mr. Wayne encountered in his claim against DHL. The State court of appeal was not asked to analyze whether the provision of declared value protection was subject to federal preemption under the Carmack Amendment, the ADA, or even under federal common law. Perhaps raising that argument would have subjected Staples to an unwanted inquiry whether it was serving as a broker or unlicensed freight forwarder for UPS. We will never know if that defense would have prevented this case from placing the transportation industry's foot on the precipice of an ugly, slippery slope to state regulation of interstate commerce.

2006 Special Board of Directors' Award

The Officers and the Board of Directors of TLP&SA presents the

2006 SPECIAL BOARD OF DIRECTORS' AWARD

to an outstanding member of our organization who has demonstrated distinguished leadership and devotion to our Association. This year's recipient has volunteered to take on substantial responsibilities and to go where no man has gone before. He has championed issues of importance to TLP&SA and he has been in the forefront of addressing security concerns important to the industry as well as to the country.

TLP&SA presents this award for exemplary professionalism, achievement and contribution to the association and its membership. This recipient has diligently worked behind the scenes for years to ensure that our Annual Conference is second to none and represents the best educational experience possible. Nevertheless, when called on to lead this award winner does not shy away from the task. His strong no nonsense style encourages people to follow. Everyone knows as the saying goes, "he has your back."

Therefore, this year's recipient of the 2006 SPECIAL BOARD of DIRECTORS' AWARD richly deserves this important and unique recognition from his associates, his peers, and his friends.

The name of the recipient will be announced and the award presented during our Conference.

-Continue from Page 7-

summary judgment on all claims. Salem claimed that it qualified as a broker and as such was not governed by Carmack. The Court ruled that a material fact existed as to Salem's status because evidence showed that Salem advertised itself as providing control over drivers and promising timely delivery of the goods. The Court felt that these representations could make Salem a carrier under Carmack..

Salem also moved for summary judgment on Danzas negligence action, arguing that no duty of care existed. The Court disagreed, finding that Salem failed to provide qualified drivers, with certified security requirements including a GPS tracking system and two way radios as requested by Danzas.

G. MISCELLANEOUS

Sompo Japan Insurance v. Geanto's Trucking Co., 2005 U.S. Dist. LEXIS 18240 (N.D. Ill. 2005). In a rare intrastate shipping case, the U.S. District Court, exercising its diversity jurisdiction, considered Defendant's motion for summary judgment. JVC and Phillips hired Yamato to ship camcorders from Malaysia to Illinois. Yamato hired Defendant to transport the goods from O'Hare airport to a JVC warehouse. Defendant's Trucking Form lists Yamato as the shipper and JVC as consignee. The Trucking Form contained a paragraph in regular font that read "The liability of Geanto's Trucking is limited to Fifty ($50.00) Dollars per shipment unless a greater value is declared hereon and charges for such greater value paid." The form did not contain an area to record the greater value or the charges for transporting a greater value. Defendant loaded the goods on its truck and left the truck overnight in a gated parking facility. During the night the truck and the goods were stolen. The truck was later recovered but the goods were still missing. Apparently, Geanto was insured but its insurer became insolvent and could not pay the claim. Sompo insured JVC, and after paying on the claim, Sompo brought this subrogation action.

Defendant moved for summary judgment claiming the Court lacked subject matter jurisdiction, that the Illinois Insurance Guaranty Fund act precludes Sompo's claim, and that Sompo failed to produce sufficient facts to recover on its claims for negligence and conversion.

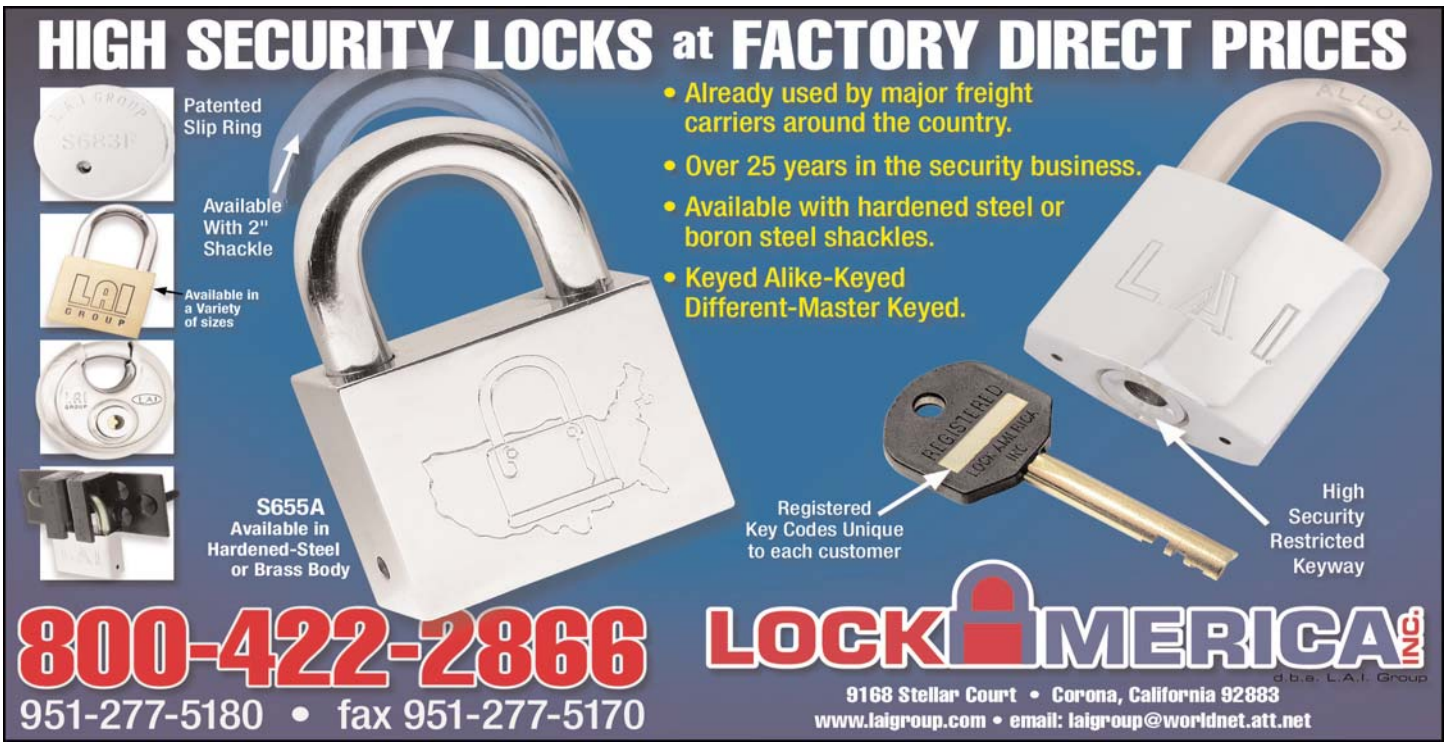
Defendant claimed that its limitation of liability clause reduced the amount in controversy to $50.00 and removed the diversity case from the Court's jurisdiction. The Court rejected this argument finding that a jury question existed as to the validity of Defendant's limitation of liability clause under Illinois law because it failed to provide JVC with an opportunity to request a higher value. However, the Court rejected Sompo's argument that the fifty dollar limitation was unreasonable as a matter of law.

Defendant also claimed that Sompo's claim was void because a solvent insurer cannot seek subrogated recovery from both the fund and the insured of an insolvent insurer. The fund allows an insurer to recover up to $300,000.00 from the Guaranty fund. The Court held that a solvent insurer was free to seek any excess from the insured of an insolvent insurer and denied Defendant's summary judgment motion. Defendant moved for summary judgment on Sompo's negligent bailment theory, claiming that no bailment existed. The Court rejected this argument holding that a bailment existed when Yamato tendered the goods to Defendant and Defendant held them in its exclusive control until such time as the goods were to be delivered. Defendant also moved for summary judgment on Sompo's conversion claim. Sompo claimed that the thief had access to Defendant's keys and knowledge of the trailer's location. The Court found no evidence to support this claim and dismissed the conversion claim.

Membership Additions

The TLP & SA wishes to welcome new members:

Marc Gilbert -Jevic Transportation-Delanco, NJ
Keith W. Burnett-Con-Way Transporation Services-North Richland Hills, Texas



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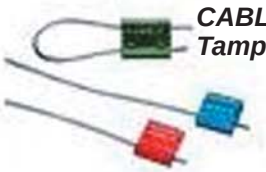

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