In Transit

Transportation Loss Prevention & Security Association

Summer Issue 2005

INSIDE

Rutgers Puts Freight in the Forefront 2

Is Brown the New Green 3

The Pitfalls of Motor Cargo Insurance 4-6

TLP&SA Claims Survey Revised 7

Transportation Case Summaries 8-9

Exhibitors 2005-5th Annual TLP&SA/TCPC Conference 10

Subrogation Opportunities 12

Shippers Recover Attorney Fees 12-13

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

VISIT OUR WEB-SITE & SEE PAGE 2

www.tlpsa.org

Transportation Loss Prevention and Security Association

* Next Year's Conference...April 2nd thru 5th, 2006 at the Crowne Plaza at Riverwalk in San Antonio, TX!!!..........Click link below for Details!

E-mail Address
E-mail
Password
Login
Application Form

About Us | Membership Advantages | Contact Us

TLP&SA Annual Conference
April 2 - 5, 2006
Crowne Plaza at the Riverwalk
San Antonio, Texas
Click Here

Copyright 2005
TLP&SA
155 Polifly Road
Hackensack, NJ 07601
(201) 343.1652

Transportation Loss Prevention & Security Association, Inc.
Officers - Directors and Staff

Daniel Saviola-Chairman
Yellow-Roadway Corp.

Tom Rotunda-Treasurer
Yellow-Roadway Corp.

Ken De Vries-Past Chairman
USF Holland Inc.

Ernie Benge - Director
Old Dominion Freight Line

Moe Galante - Director
New Penn Motor Express

James Attridge, Esq. - Vice Chairman
Attridge Law Firm

Martha J. Payne, Esq. - Director
Law Offices of Martha J. Payne

William D. Bierman, Esq.- Executive Director

Nowell Amoroso Klein Bierman, P.A.

John Gibbs - Director
Watkins Motor Lines, Inc.

Richard Lang - Director
ABF Freight System

Michael Willis - Director
Fed Ex Freight

Edward M. Loughman- Assistant Executive Director, TLP&SA

Copyright © 2004 TLP&SA. All rights reserved

RUTGERS UNIVERSITY PUTS FREIGHT AT THE FOREFRONT

The **Alan M. Voorhees Transportation Center (VTC)** at Rutgers, The State University of New Jersey, is a national leader in the research and development of innovative transportation policy. Established in 1998, the VTC is a research center which includes the National Transit Institute, which was created by Congress in 1992 to design and deliver training and education programs for the nation's transit industry.

VTC's growing expertise in the area of freight transportation policy has gained additional momentum, as a result of two new studies authorized by the New Jersey Motor Truck Association and the University Transportation Research Center at CCNY.

The motor truck association asked VTC to outline recent changes in the state's economy and the current role served by trucks in the movement of goods. The report, tentatively to be called "**Reality Check**", also will examine the role of trucks in highway congestion. The CCNY center awarded a grant to a Rutgers group including VTC, the Department of Civil and Environmental Engineering and the Rutgers Economic Advisory Service to investigate whether goods movement can serve as a leading indicator of the New Jersey/New York region's economic performance. This marks an early success of interdepartmental collaboration fostered by the University Transportation Coordinating Council. An earlier study commissioned by the Brookings Institution regarding principles for regional and federal freight policy is nearing publication.

TLP & SA has the ability to participate in the decision making process at the Voorhees Transportation Center as our Executive Director, Bill Bierman, sits on the Advisory Board at VTC. Bill has been instrumental in convincing VTC about the strategic importance of freight transportation to the nation's economy and security. We predict that TLP & SA will be able to play a key role by assisting VTC with their various endeavors in keeping the freight industry at the forefront of the public's consciousness.

Check Out New Member Options Below:

IS BROWN THE NEW GREEN?

BY *William D. Bierman, Esq.,* Nowell Amoroso Klein & Bierman P.C.

When we were kids, we used to choose up sides in the playground. Who ever got their hand on the top of the bat and was able to swing it over their head without dropping it went first. Now that we have grown up, choosing sides has become more a matter of economics and finances. Well, there appears to be a big game coming and teams are forming. Yellow acquires Roadway and then USF. UPS buys Menlo Worldwide and then Overnite. FedEx acquires Caliber Systems, Kinko and American Freightways. Excel buys Tibbett & Britten.

So what is the game and what are the stakes? The game is domination and the stakes are dollars. As New York Times columnist Thomas L. Friedman suggests in his new book, "The World Is Flat: A Brief History of the Twenty-first Century", supply chain and logistics are key elements of the new economics. Along with the new age concepts of outsourcing and information management, transportation related industries allow a company, no matter how small, to be a global player. Therefore, he who controls transportation from origin to destination, including just-in-time delivery, provides an invaluable service without which the new economy fails.

Brokers and third party logistics companies led the way by offering cost savings through consolidation and negotiation of volume rates and discounts with carriers. Deregulation allowed contracts between shippers and carriers guaranteeing continuing relationships with predictable prices and terms. Shipper traffic departments began to disappear as they were outsourced to both independent third parties and to carrier logistics companies. The shippers were promised lower rates and important cost savings through the elimination of their own traffic departments. This initial consolidation made one company responsible for the entire move. No longer did the shipper have to negotiate and deal with carriers of all different modes; no longer did the shipper have to provide for warehousing; no longer did the shipper have to subsidize its own traffic department.

So what is the game and what are the stakes? The game is domination and the stakes are dollars.

Now we seem poised for a great battle of the giants.

Well financed motor carriers rode this new business wave and began to acquire smaller carriers or took over their customers when they went bankrupt due to the pressures of deregulation. In one prominent case a smaller carrier, Yellow Freight Systems Inc. purchased a larger company, Roadway Express. Subsequently, Yellow/Roadway purchased USF. These motor carriers also established logistics companies to service shippers and to make sure that they did not lose control of their own customers. Price cutting through contracts became commonplace and shippers were seeing real savings. The only way for carriers to make money in such a competitive environment was to control the entire movement of goods. While a carrier logistics company offered the lowest freight rate throughout the movement, the carrier would always try to use its own equipment and its own company, if possible.

Whether one is Brown or Yellow or some shade in between, the name of the game is green.

Now we seem poised for a great battle of the giants. UPS and FedEx, by their actions, have announced loud and clear that they are players in every mode of transportation throughout the world. Several strong companies are still out there waiting to choose sides. Less than truckload carriers such as Con-Way, ABF and Watkins to name but a few may be waiting for a call. Truckload "biggies" Schneider, J.B. Hunt, Werner, Landstar Goup and U.S. Xpress all may play some role. And then there is DHL, a global logistics company offering a complete range of services such as air, ocean, customs brokerage, warehousing and distribution. If a company such as DHL makes a significant acquisition, they may enter the arena as a match for the other two giants. Whether one is Brown or Yellow or some shade in between, the name of the game is green. Money drives the supply chain. Savings, profit, and spread are bywords of today's economy. If you are involved in transportation, you better be ready to choose a side or as we used to say on the ball field when you were not chosen, your position is "left out".

THE PERILS AND PITFALLS OF MOTOR TRUCK CARGO, WAREHOUSE LEGAL LIABILITY AND CRIME INSURANCE

What You Need To Know

By Michael W. Gurval, ARM - Insurance Consulting Associates

The transportation industry is unique in many ways. So too are the insurance policies available to cover the types of risks that are common throughout the transportation industry. Due to the uniqueness of transportation risks, insurance companies do not have off-the-shelf, standard forms to cover these exposures. Instead, insurance carriers issue non-standard insurance forms and endorsements that may contain pitfalls for the unsuspecting transportation-insurance consumer. Specifically, these non-standard forms are not always broad enough to cover all the transportation risks that face your company. So, with a good understanding of these coverages, you can request that these forms be modified to more adequately cover the unique risks facing your company. In this article we will review some of the coverage limitations in motor truck cargo, warehouse legal liability and crime insurance policies and the gaps that can emerge under certain circumstances (such as when an insured contractually assumes liability for the property of others or utilizes the services of independent contractors, owner operators and professional employment organizations or PEOs) so that you can assess whether any of these forms needs modification in order to best protect your company.

The transportation industry is unique in many ways. So too are the insurance policies available to cover the types of risks that are common throughout the transportation industry

The rule is simple: Insurance companies are not willing to cover an insured's lackadaisical procedures related to the handling of their customers' property. Consequently, insurance carriers use two coverage exclusions in their policies to drive this point home. These exclusions relate to "voluntary parting of property" and "mysterious disappearance."

Each of the insurance policies mentioned above exclude coverage related to an insured voluntarily parting with property. Insurance carriers want to make sure that their insured's are being as responsible as possible with the property of others. Clearly, insurance carriers do not want to cover careless sloppiness. Accordingly, motor truck cargo and warehouse legal liability policies typically use policy wording such as "[w]e do not pay for loss caused by or resulting from voluntary parting with title to or possession of any property because of fraudulent scheme, trick, or false pretense." Here is an example: ABC Trucking Company receives a call from a man who identifies himself as an employee of a customer, EZ Furniture Company. The caller provides the dispatcher with specific information to change the delivery address of furniture being stored in ABC's warehouse. Without any investigation or confirmation whatsoever, ABC delivers the furniture to the new address and receives a signed delivery receipt acknowledging the delivery of the merchandise. EZ Furniture then files a claim with ABC Trucking because they did not receive the merchandise. Upon investigation, ABC finds that the new shipping address is not affiliated with EZ Furniture and the person that accepted the merchandise can no longer be found. As a general rule, neither the motor truck cargo nor warehouse legal liability policy would cover this claim due to the voluntary parting of property exclusion.

insurance carriers use two coverage exclusions in their policies to drive this point home. These exclusions relate to "voluntary parting of property" and "mysterious disappearance."

motor truck cargo and warehouse legal liability policies typically use policy wording such as "[w]e do not pay for loss caused by or resulting from voluntary parting with title to or possession of any property because of fraudulent scheme, trick, or false pretense

While there may be a minimal amount of coverage under the motor truck cargo policy, which will typically have a limit of $1,000 to cover "fraud and deceit" that occurs through a false representation, fictitious bill or shipping receipts or the use of computer hardware, this "throw in" coverage is not meant to be your first line of defense and cannot usually be significantly increased. Further, it is very difficult if not impossible to get the voluntary parting exclusion deleted from your insurance policies. Therefore, it is critical that transportation companies maintain tight controls related to the warehousing and delivery of a customer's merchandise.

Crime insurance companies also do not want to pay for careless or sloppy transportation-industry procedures. Consequently, crime insurance policies similarly contain such exclusions. The crime exclusion typically states that the insurance carrier will not pay for "[l]oss resulting from your, or

anyone acting on your express or implied authority, being induced by any dishonest act to voluntarily part with title to or possession of any property." The word "your" in the crime policy refers to the named insured. While it is a gray area and other crime exclusions may apply depending on the circumstances, there might be coverage in our example under the employee dishonesty section of the policy if the call to the dispatcher came from an ABC Trucking employee. "Employee" as defined in the crime policy includes among other things, a person that is compensated directly by wages or commissions and temporary employees used to meet seasonal or short term workload conditions. "Employee" does not include any agent, broker, person leased to the insured by a labor leasing firm, factor or commission contractor. It also does not include any manager, director or trustee except while performing acts coming within the scope of normal duties of an employee.

it is very difficult if not impossible to get the voluntary parting exclusion deleted from your insurance policies

In the same vein, there is another standard exclusion in the warehouse legal liability policy that relates to mysterious disappearance and loss or shortage of property. For example, if, on taking an inventory, it is discovered that property is missing or in any other instance where there is no physical evidence to show what happened to the covered property, there would be no coverage under the warehouse legal liability policy. Similarly, the crime policy does not cover any part of a loss where the proof of its existence or amount is dependent upon an inventory calculation or profit and loss calculation.

there is another standard exclusion in the warehouse legal liability policy that relates to mysterious disappearance

As a result of advancements in technology, many logistics companies no longer issue warehouse receipts. Unfortunately, however, it is important to know that the warehouse legal liability policy has not kept up with technology. The policy typically contains the following or similar wording: "We cover your legal liability for loss to covered property while under your care, custody, and control. Loss which you become legally obligated to pay as a warehouse operator under a warehouse receipt issued by you." The typical definition of a warehouse receipt is: "Warehouse receipt means the receipt issued by you to your customer acknowledging that property is being stored at your warehouse and includes: (a) a description of the property; (b) the weight or number of units being stored; and (c) the limited liability assumed by you." The definition of warehouse receipt is important because it is crucial to the coverage agreement in the policy. If the insured does not use a warehouse receipt or the receipt is lost or destroyed, then the insurance carrier will have a basis to deny a claim.

As a result of advancements in technology, many logistics companies no longer issue warehouse receipts. Unfortunately, however, it is important to know that the warehouse legal liability policy has not kept up with technology

It is best to try to have a loss-to-covered-property-type claim covered under the warehouse legal liability policy

It is best to try to have a loss-to-covered-property-type claim covered under the warehouse legal liability policy for many reasons. Important among those reasons is the insurance carrier's duty to defend. This means that where a suit is brought against the insured because of a loss to covered property, the insurance company has the right and duty to provide the insured with a defense. Since defense can be more costly than the loss itself, it is of paramount importance to make sure that the warehouse policy will apply by, at a minimum, safeguarding your warehouse receipts.

Where a warehouse receipt is not issued or is lost or destroyed, bailee coverage might be the best way to get a claim covered. The bailee form, which provides all-risk coverage, is a first party coverage. Consequently, the defense provision in this form will normally state that the insurance company reserves the right at its option to conduct and control the defense on behalf of and in name of the insured. So, while the warehouse form includes a duty to defend, the bailee form does not. There are other pitfalls associated with the bailee form, though. Specifically, when using the bailee form one must be careful to make sure that there is no coinsurance penalty or protective safeguard endorsements, which both serve to curtail the available coverage. Coinsurance and protective safeguard endorsements are not usually found in the warehouse legal liability form.

Where a warehouse receipt is not issued bailee coverage might be the best way to get a claim covered.

Another pitfall is the lack of "malpractice" coverage or Transportation Operators Errors and Omissions coverage. While this coverage is important, it is not included in the standard motor truck cargo policy.

Another pitfall is the lack of "malpractice" coverage or Transportation Operators Errors and Omissions coverage. While this coverage is important, it is not included in the standard motor truck cargo policy. However, if requested,

many insurance carriers will add this coverage by endorsement to the motor truck cargo policy to cover delay, wrongful delivery, other financial loss and incorrect completion of bills of lading. "Delay" covers the insured's liability for financial loss to its customer resulting from delay in performing contractual obligations. "Wrongful delivery" covers the insured for liability for financial loss by its customer resulting from delivery of cargo contrary to instructions to withhold delivery or without taking payment or document title. "Other financial loss" covers the insured for its liability for any other financial loss incurred by its customer resulting from the insured's failing, partly or totally, to perform its contractual obligations. "Incorrect completion of bill of lading" covers the insured for its liability for physical loss of or damage to cargo to the event that it is incurred or increased by an incorrect statement in or omission from its bill of lading or other contract of carriage or handling documents. But, it is important to remember that the insurance carrier rarely volunteers to offer this coverage. You must actively request it to be endorsed onto your Motor Truck Cargo coverage.

there are two areas of contractual risk transfer that often result in claim problems with customers: Valuation clauses and the actual limit for which the transportation carrier has contractually agreed to be responsible

Adding to our list of pitfalls, there are two areas of contractual risk transfer that often result in claim problems with customers: Valuation clauses and the actual limit for which the transportation carrier has contractually agreed to be responsible. The standard crime policy loss valuation is the cost to replace the lost or damaged property with property of comparable material and quality and used for the same purpose. Motor truck cargo and warehouse legal liability policies normally value property based upon the actual cash value (ACV) of the goods. ACV is defined as the cost to repair or replace the goods, less depreciation. When shipping new goods, very little depreciation has occurred and ACV may be sufficient. However, it is common that contracts require a different valuation or include provisions for loss of sales or market share. Therefore the valuation wording in the contract must be carefully evaluated to determine if the insurance policy loss valuation will meet the contractual requirement. While most contracts will have an insurance requirement section that outlines the limits of insurance required, that does not mean that it limits the liability of the warehousing or shipping company. It is only a requirement to maintain a certain level of insurance. There could be other sections of the contract that make the warehousing or shipping company responsible for the entire amount of the loss to the customer. The entire contract must be carefully reviewed to determine if the insurance policy limits are adequate to meet the true exposure to loss.

For a multitude of reasons, many transportation companies utilize the services of owner operators and other independent contractors and/or labor leasing firms which are commonly referred to as professional employer agencies (PEOs). This can lead to other insurance pitfalls. Motor truck cargo and warehouse legal liability policies exclude coverage for theft by criminal, fraudulent or dishonest acts by anyone to whom the insured entrusts property. The only policy that could cover theft of property by independent contractors, owner operators or PEO employees is the crime policy. However, the crime policy must be properly endorsed to cover this exposure. The standard crime policy is designed to cover theft of property owned by an insured and stolen by insured's employee. The crime policy form that is designed for companies that handle property of others is modified to cover property in the insured's care custody and control, but the definition of employee does not include the above groups. It is very important for companies to identify all classes of non-employees that will have care, custody and control of a customer's goods while the goods are entrusted to the company and have those classes endorsed to the crime policy to be defined as employees.

many transportation companies utilize the services of owner operators and other independent contractors and/or labor leasing firms

The only policy that could cover theft of property by independent contractors, owner operators or PEO employees is the crime policy. However, the crime policy must be properly endorsed to cover this exposure

This article has outlined many insurance pitfalls and coverage gaps that may arise under normal transportation industry operations. While these risk management issues are technical, they are very important to understand, as they can impact the financial well being of your company. I highly recommend sitting down with an independent risk management consultant to review your company's risks and exposures, as well as your current insurance policies and applicable contracts. The task may be daunting, but the result is peace of mind.

While these risk management issues are technical, they are very important to understand, as they can impact the financial well being of your company. I highly recommend sitting down with an independent risk management consultant to review your company's risks and exposures

MOTOR CARRIER CLAIMS SURVEY REVISED

CLAIM CATEGORY	TOTAL GROSS % OF $ PAID	% OF CLAIMS PAID VS FILED
	2004	2004
Shortage	26.69%	24.18%
Theft/ Pilferage	.97%	.17%
Visible Damage	64.10%	67.20%
Concealed Damage	4.30%	6.70%
Wreck/ Catastrophe	2.00%	.22%
Delay	.12%	.05%
Water	.60%	.25%
Heat/ Cold	.21%	.03%
Other	1.01%	1.20

	2004
Total number of Claims Paid vs. Number of Claims Filed	75.40%
Total Dollars Paid vs. Total Dollars Filed	39.50%
Net Claim Dollars Paid vs. Total Dollars Filed	34.90%
Percent of Claims Filed to Total Number of Shipments Made	.61%
Total Company Claim Ratio *	1.1%

	2004
Percentage of Claims Resolved Less than 30 days	80.40%
Percentage of Claims Resolved 31-120 days	16.20%
Percentage of Claims Resolved more than 120 days	3.40%

* Our sincerest apologies for a mathematical error on page 9 of the Spring, 2005 issue of our Newsletter. We showed the average Total Company Claim Ratio to be .80 instead of 1.1%. See above.

TRANSPORTATION CASE SUMMARIES

(SUMMER 2005)

by *Wesley S. Chused* - Looney & Grossman, LLP-Boston MA

1. Vitramax Group, Inc. v. Roadway Express, Inc., 2005 U.S. Dist. LEXIS 8173 (W.D. Ky. 2005). (Preemption; prima facie case) The plaintiff sued the defendant motor carrier alleging state law claims of fraud, breach of contract and negligence resulting from damage to its interstate shipment. The defendant removed the case from state to federal court on the basis of complete preemption under the Carmack Amendment and then moved to dismiss the common law claims. The Court granted the defendant's motion to dismiss the fraud, breach of contract and negligence claims but denied the motion with regard to the claim under the Carmack Amendment. The Court ruled that the plaintiff had sufficiently alleged that the shipment was in damaged condition at destination and the amount of its damages, with the primary controversy revolving around whether the plaintiff had also properly alleged that the shipment was in good condition when it was delivered to Roadway at origin. The Court noted that while the complaint did not specifically allege this, the bill of lading, attached as an exhibit to the complaint, which contained a provision stating that the goods were delivered to the carrier in "apparent good order" was enough to satisfy this prima facie requirement and to deny the motion to dismiss with respect to the Carmack Amendment claim.

2. Miracle of Life, LLC v. North American Van Lines, Inc., 2005 U.S. Dist. LEXIS 8226 (D.S.C. 2005). (COGSA versus Carmack liability) The plaintiffs sued to recover $700,000 for loss and damage to a shipment from Charleston, South Carolina to Germany that was delivered on December 18, 2002. Initially, the plaintiffs filed several state statutory and common law claims against the originating motor carrier and its agent. Then, on October 4, 2004 the plaintiffs filed an amended complaint alleging claims against defendant Stevens International Forwarders, who apparently acted as a freight forwarder for the shipment. Stevens moved to dismiss the amended complaint, claiming that the plaintiffs' claims were barred by the statute of limitations under the Carriage of Goods by Sea Act and, alternatively, that they were barred by the "statute of limitations of the Carmack Amendment." The Court ruled that to the extent the plaintiffs' claims are deemed to arise under COGSA, they would be barred by COGSA's one-year statute of limitations. However, the Court observed that because discovery "is ongoing," it remained unclear what role Stevens played, and that "Stevens might well face liability under the Carmack Amendment." Since the Carmack Amendment does not include a statute of limitations, as does COGSA, and since the plaintiffs had filed a timely claim with the motor carrier and had never received a disallowance of their claim, Stevens could be subject to Carmack Amendment liability under the timely claim filed with the underlying motor carrier. The Court therefore denied Stevens' motion to dismiss.

3. Power Standards Lab, Inc. v. Federal Express Corporation, 127 Cal. App. 4th 1039 (2005). (Punitive damage award reversed) The plaintiff had shipped electronic equipment from Emeryville to San Diego, California via the defendant carrier and paid for $20,000 of "declared value" coverage. After the shipment was damaged in transit, the plaintiff paid $17,450 to have the equipment repaired and submitted a claim for that amount, but FedEx denied the claim because the equipment had not been inspected before it was repaired. The evidence at trial showed that the defendant told the plaintiff, "the only way FedEx pays claims like this is if you sue us." So, plaintiff filed suit and, six weeks before trial, FedEx sent the plaintiff a check for the damages, plus shipping charges. At trial the jury awarded the plaintiff over $78,000 in damages, plus $1.5 million in punitive damages that were later reduced to $600,000. On appeal, the Court reversed the judgment, ruling that the punitive damage award was preempted by the Airline Deregulation Act of 1978 and by federal common law that limit a carrier's liability to the value of the shipment declared by the shipper. The Court recognized that the supremacy of federal law requires the courts to stay out of the field of statutory regulation and federal common law.

4. Mitsui Sumitomo Insurance Co., Ltd. v. Watkins Motor Lines, Inc., 2005 U.S. Dist. LEXIS 4450 (N.D. Ill. 2005). (Released rate fails) This decision reflects the Court's persistent denial of defendant Watkins' attempts to enforce the release rate provisions in its tariff. Watkins had received a shipment of projectors, with an invoice value of $85,100, which it failed to deliver. The shipment moved under a bill of lading prepared by the shipper, reciting that Watkins received the shipment "subject to classifications and lawfully filed tariffs in effect on the date of the issue of the bill of lading." On that basis, Watkins argued that the plaintiff's damages should be limited to $25.00 per pound, as prescribed by its tariff rule, because no value was declared on the bill of lading. However, the Court, in its stubborn refusal to allow the application of the limitation, ruled that since Watkins' tariff was not "filed," the limitation was unenforceable. The Court suggested that Watkins should have requested that the term "filed" be removed and the term "unfiled" added to the bill of lading so as to properly incorporate Watkins' unfiled tariffs. On that basis, the Court denied Watkins' motion for partial summary judgment.

5. In Re: Computrex, Inc., 403 F. 3d 807 (6th Cir. 2 005). (No preference liability of shipper for funds paid to bankrupt broker) This decision should

be of interest to shippers, motor carriers and intermediaries alike. The shipper, Contech, had an agreement with a broker/intermediary, Computrex, whereby Computrex, upon receiving freight bills from Contech's carriers, would process the bills and send a compiled invoice to Contech at the end of each week. Contech would then wire sufficient funds to cover the motor carriers' invoices and Computrex's fees to Computrex each Monday. Computrex was then to issue checks on Monday night to the carriers and mail them on Tuesday morning. However, as time went on, instead of promptly mailing the checks on Tuesdays, Computrex began to hold the checks so as to enjoy the "float" on the deposited funds. Computrex extended the float period up to twenty-one days leading up to its involuntary bankruptcy on December 20, 2001. Computrex's practice was to pay the carriers of complaining shipper clients ahead of the carriers of other clients in the queue. ("The squeaky wheel gets the grease.") Pursuant to that practice, Computrex paid $4.5 million to Contech's underlying carriers within 90 days of Computrex's involuntary Chapter 7 bankruptcy petition on December 20, 2001. Computrex's trustee then sought to recover that $4.5 million in a preference action against Contech. The district court denied the preference action and the trustee appealed. The 6th Circuit, on appeal, ruled that the $4.5 million in dispute did not belong to the estate of Computrex because it was merely a disbursing agent for Contech and did not exercise sufficient control and dominion over the funds for the money to constitute a part of Computrex's estate. The Circuit Court noted that the contract between Computrex and Contech did not anticipate that Computrex would have any dominion or control over the funds or would be able to put them to any use other than that specified by the contract. The Court likened Computrex's status to that of a bailee who lacked any property interest in Contech's money, and therefore affirmed the district court's judgment dismissing the Trustee's preference claim.

6. Ross v. Wall Street Systems, 400 F.3d 478 (6th Cir. 2005). ("Logo" liability) In a personal injury case that could affect freight loss and damage litigation issues, the U.S. Court of Appeals affirmed the dismissal of a plaintiff's complaint against a defendant motor carrier and its insurance company based on so-called "logo" liability theories. The plaintiff was seriously injured in an accident with a truck whose owner had leased the vehicle to the defendant, Wall Street Systems, an interstate motor carrier. However, Wall Street had terminated the lease by notice sent to the vehicle's owner about a month before the accident. Nonetheless, the owner had failed to remove the placard from the truck, indicating that it was leased to Wall Street Systems. In affirming the dismissal, the Court observed that the old ICC regulations had changed, and that the presence of the carrier's placard on the leased vehicle, standing alone, was not sufficient to keep alive the otherwise-terminated lease agreement. The Court noted recent decisions from other circuits that recognized the right of the lessee carrier to terminate the lease and its liability by taking "reasonable steps" to do so and by demanding return of the placards. The Court also rejected the plaintiff's secondary argument, that because the motor carrier's insurance policy had a 35-day grace period, its insurance coverage under the MCS-90 endorsement remained in effect for this claim, because the underlying insurance policy and the MCS-90 endorsement applied only to Wall Street's liability insurance policy, but here there was no policy between the defendant insurance company and the lessor/owner-operator.

7. Cetek Technologies, Inc. v. North American Van Lines, Inc., 126 Fed. Appx. 41 (2nd Cir. 2005) (Prima facie case -- damages) In a very short but very relevant and useful decision, the Second Circuit Court of Appeals addressed an issue in freight loss and damage litigation that is often overlooked or taken for granted: the burden of the claimant/plaintiff to prove the third element of its prima facie case, the amount of its actual loss. The Circuit Court of Appeals affirmed the judgment of the trial court in favor of the defendant carrier because the plaintiff had failed to produce evidence establishing the amount of its loss.

NEWS ITEM

Many an article has been written up in our industry trade magazines insofar as a shortage of truck drivers is concerned. Well, one of our TLP&SA members, New England Motor Freight, Inc. (NEMF) is doing something about it.

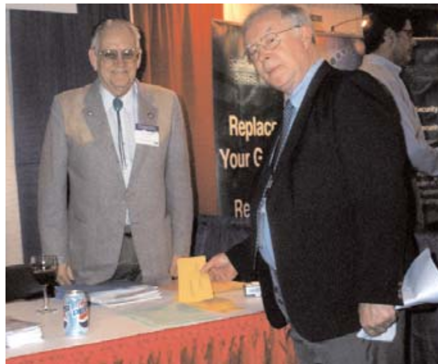
They opened a school for tractor-trailor drivers. They have four school sites. Each consists of ten weeks of training, eight classroom and one-on-one with trainer, and then, after they pass their CDL exam, they spend a week in the city with five different seasoned drivers and then a week on the road with five different seasoned veterans.

Tom Hartley, Director of Safety, and Ernie Hardy, V.P. Risk Management co-authored the program and then the four Regional Drive Trainers were hired and trained by Tom before the classes started. All of the trainers are certified Smith System instructors.

Tom stated that, "The program is working exceptionally well, but it never would have gotten off the ground without the total support of the Shevell family and Mike Shevell's belief in *'molding our own future'.*" The investment to start the four schools was half million dollars. Our hat's off to Tom & NEMF.

Remember Our Exbititors at the 5th Annual TLP&SA/TCPC Joint Conference in San Diego-March 21-23, 2005

Best Loading Service- Michael Morton
Blsmorton@aol.com



CCPAC-Dale Anderson
www.ccpac.com

Centerload Shipping-Mark Caires
mcaires@centerload.com

"Thanks. We enjoyed San Diego and are looking forward to San Antonio next year"

Commercial Sales- Donna Wyss
Cscsalesnet@earthlink.net

"Thank you for getting me to exhibit at your Conference."

Electric Guard Dog-Bill Mullis
Sentry@electricguarddog.com

ITW/Shippers-Vincent Raucoules
Vincent.Raucoules@itwshippers.com

Lock America Chris Shope
Cshope@laigroup.com

"Great Job. This was the best intereaction between suppliers and potential customers."

Pegasus/Elite Investigations-Chuck Orapeza
chucko@elitleinvestiagions.net

Recovery Management-Dee Pack
dpack@reccorp.com

"Thanks Ed. I'm all set."

Reverse Solutions-Vincent Cusano
Vcusano@reversesolutions.com

"Thanks for everything Ed."

Smart Interactive-Robert Crowe
Rcrowe@smartinteractive.com

"Good Conference. The key to success was having a reason for the attendees to visit each booth"

Transolutions-Peter Celestina
Pete.celsestina@transolutionsinc.com

"We enjoyed the Conference. The Exhibit Room was nice"

Awards

Tom Rotunda *of*

Yellow Roadway Enterprise Services, Inc. is being presented with the Platinum Award by Bill Bierman, Executive Director of The TLP & SA and George Pezold, Executive Director of the TCPC. This joint award is given to a unique individual who has earned the respect and admiration of his peers in the transportation industry. By virtue of his tireless efforts Tom has forged a relationship between Carriers and Shippers which has fostered understanding and friendship throughout the transportation community. Tom received this prestigious reward at the 5th Annual TCPC/TLP&SA Joint Conference in San Diego, CA on March 23, 2005

John Gibbs of

Watkins Motor Lines, Inc. receives the TLP & SA 2005 Special Board of Directors Award from Bill Bierman, Executive Director of the TLP&SA, given at the 5th Annual TCPC/TLP&SA Joint Conference in San Diego, CA. John has been with us since our inception and continues to contribute to the welfare of our Association and the transportation industry as a whole. He is a valued member of our Board of Directors.

SUBROGATION OPPORTUNITIES FOR CARRIERS

By Donald L. Wilber, Esq.-The Wilber Law Firm, P.C., Bloomington, Il

Pursuit and escape are a part of nature. Each claim event involves both. Carriers often focus on escaping by purchasing insurance, negotiating reduced settlements, hiring lawyers or other tactics.

The focus of escape by carriers leaves little time to consider pursuing their rightful claims against others. Insurance companies separate their claims (escape) department from their subrogation (pursuit) department. Pursuit and escape may pertain to the same event, but each requires a different mindset in order to be successful. Technically, "subrogation" is the act of pursuing reimbursement from a party at fault for payments you have already made to someone else whom you have protected from a loss. However, the term is commonly used to broadly describe pursuit of various types of claims (other than accounts receivable).

Many opportunities to pursue subrogation are missed. They arise in the area of cargo damage, vehicle damage, workers compensation claims and typical accidents caused by third parties. Where someone else contributed to a loss, you may sometimes require that they share the burden. A self-insured carrier may be able, for example, to recover its workers compensation loss from a customer whose forklift runs over your driver's toes. Damages to trailers, pallets, tires and other property can be recovered from any negligent party. Without the mindset of pursuit, many claims are thrown away. Often there is no company policy or routine for recovery of losses, especially when they are smaller. Learning to recognize the opportunities and implementing an effective routine are the first steps to recovering the missed revenue.

Angela Sepulveda, Credit and Collections Manager with Swift Transportation implemented such a program a few years ago. She says, "All subrogation should be pursued, even if it is a mirror or bumper. Those are the most common damages and no one likes to pursue them. For example, 25 files with an estimated average of $400 (per mirror) would equal $10,000."

Self-insured carriers and those with deductibles can set up their own subrogation unit or may outsource the work to subrogation specialists who efficiently pursue liability claims. Outsourcing subrogation can be very profitable to the carrier when done on a contingent fee basis. Outside firms will handle those claims that were not successfully handled in-house.

Whenever you are required to pay for a loss caused by someone else, you have an opportunity to recover in subrogation. Regardless of the approach, subrogation is a way to improve the bottom line.

dwilber@wilberlaw.com 800-397-5418

NINTH CIRCUIT GRANTS HOUSEHOLD GOODS SHIPPERS ATTORNEY FEES IN ALL LITIGATION.

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

On June 7, 2005 the Ninth Circuit ruled that a household goods shipper may recover attorney fees in a suit, even if they do not first undergo the arbitration required under 49 U.S.C. 14708(d). I am stunned by the decision in Campbell v. Allied Van Lines, et. al, 05 C.D.O.S. 4790 (9th Cir. 2005). The facts are not unusual. The plaintiff shippers had complaints against the moving companies that moved their household goods. Rather than proceed with arbitration under 49 U.S.C. section 14708, the shipper filed suit against the carriers. A trial resulted in an award of $15,000 in compensatory damages, and $31,000 in emotional distress damages. The decision does not disclose why the emotional distress damages were not preempted by the Carmack Amendment. The court also awarded the plaintiffs $15,400 in attorney fees and costs, based on one-third of the total award amount. The moving companies appealed, arguing that attorney fees are only available under 49

U.S.C. section 14708 if the carrier does not offer arbitration, or if the shipper prevails in such court action; and a decision resolving the dispute was not rendered through arbitration under this section within [60days after receipt of dispute by arbitrator]; or the court proceeding is to enforce an arbitration award rendered under this section.

The Ninth Circuit held that "nothing in section 14708(d) limits attorney's fees to shippers who engage in arbitration". The subsection applies to "any court action" involving disputes between a shipper of household goods and a carrier, and entitles shippers to attorney's fees if they meet the first two requirements of (d)(1) and (d)(2) (timely submitting a claim and prevailing in court), and are not barred by (d)(3)--which merely excludes those claims in which a timely arbitration decision is reached and does not necessitate court enforcement. In other words, (d)(3) prevents shippers from receiving attorney's fees if the arbitration program "works" as intended by swiftly resolving the dispute. It has no effect on shippers, such as the Campbells, who did not engage in arbitration.

This split decision (dissent by Justice Diarmuid F. O'Scannlain) changes everything. Most of us regarded section 14708 as the incentive for carriers to offer arbitration: failure to do so would allow a prevailing plaintiff to get attorney fees if suit was filed. It ensured that cases could be resolved economically by the shippers and carriers, without need for hiring attorneys or filing suit. This decision turns that concept on its head. Now there is little financial incentive for a shipper to go to arbitration. Now, the amount in controversy should be no disincentive because the attorney will get his or her fees regardless of the amount in controversy, if the plaintiff prevails. Presumably an award to plaintiff of $1 makes them the prevailing party and would allow the plaintiff attorney to recover its fees and costs.

I presume, but do not know, that state law offers of judgment might affect the definition of prevailing party under this federal statute. But, I doubt that the courts will grant carriers their attorney fees if they beat an offer of judgment. I believe this is an industry changing decision, and all concerned should inform their clients accordingly.

Anyone who wishes to advertise in our **In Transit** *quarterly newsletter can do so by completing this form and sending it, along with a copy of your advertisement and your company check to:*
Ed Loughman, c/o TLP&SA, 155 Polifly Road, Hackensack, NJ 07601.

Company Name: ______________________

Contact Name: ______________________

Company Address : ______________________

____

____

Telephone: (   ) ______________________

Fax: (   ) ______________________

E-mail: ______________________

AD RATES: $150.00 Business Card $250.00 Half page
$200.00 Quarter Page $350.00 Full page

Membership Additions

The TLP & SA wishes to welcome new members:

Pauline E. Canty-Artisan Associates, Inc..-Detroit, MI
Hilary Arrow Booth, Esq..-Gardner & Booth-Los Angeles, CA
Robert P. Corbin, Esq-German, Gallagher & Murtagh, PC-Philadelphia, PA

Welcome Back:

Kathleen C. Jeffries, Esq.-Law Offices of Kathleen C. Jeffries-Pasadena, CA
Marvin Winston-Winston Scientific Consultatnts-Old Bridge, NJ

Providing independent risk management advice since 1956.
ICA is an independent risk management and insurance consulting firm specializing in the areas of insurance marketing, risk management program audits, contractual risk transfer and expert witness and litigation support. We do not sell insurance.

See our website at icarisk.com for full details regarding our services or contact Michael W. Gurval, ARM at (732) 726-1500 Ext. 119 or mgurval@theriskpros.com

Specializing in risk management for the transportation industry

The ENFORCER ™

ENFORCER™
Adjustable Door Lock
**Totally portable and requires no permanent installation*

ENFORCER™
Roll-up Door Lock
**Locks automatically without decision from driver*

ENFORCER™
King Pin Lock
**Locks without a key*

ENFORCER™
Air Cuff Lock
**Prevents tractor theft*

We also have:

ENFORCER™
Rear Door Lock
**Bolt cutter resistant*

TRANSPORT SECURITY, INC.
Phone & Fax: (952) 442-LOCK (5625) (800) 328-3442
http://www.transportsecurity.com 820 South Pine Street Waconia, MN 55387

Freight claim management on the Internet, Anytime, Anywhere.

For a free demo, call **480-473-2453** or go to
www.transolutionsinc.com
www.myezclaim.com

EZ-Claim software available for desktop and network applications

TranSolutions, Inc.
22015 N. Calle Royale, Scottsdale, AZ 85255

TRANSPORTATION LOSS PREVENTION and SECURITY ASSOCIATION (TLP & SA)

APPLICATION FOR MEMBERSHIP

1. Name of Applicant: ____
   Last *Middle Initial* *First*

2. Affiliation: ____
   Indicate the company and position, or, if state or federal agency, the position held.

3. Other Information:

   Office Address: ____

   City: ______________ State or Province: ______________ Zip Code: ____________

   Office Telephone: (_____) ______________________ Office Fax: (____) ______________

   E-mail: ____

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

   ____ Freight Claims ____ Labor/Human Resources ____ Rail ____ Logistics

   ____ Litigation ___ Motor Carrier ____ Maritime/Admiralty ____ Aviation

   ____ DOT/NTSB ____ Other ______________________________
   (please specify)

5. **Please enclose payment with application form.** Please send completed application and payment to:

Transportation Loss Prevention and Security
Association, Inc
c/o Nowell Amoroso Klein Bierman, P.A.
155 Polifly Road
Hackensack, New Jersey 07601

(201) 343-1652 (tel)
(201) 343-5181 (fax)
E-Mail: WBierman@NAKBlaw.com
Eloughman@nakblaw.com

2005 Annual Dues $450.00.

William D. Bierman, Executive Director

Date: ________________ Signature of Applicant: ______________________________

DO YOU NEED SOMEONE WHO IS KNOWLEDGEABLE IN CLAIMS &/OR TRANSPORTATION SECURITY?

ARE YOU LOOKING FOR A POSITION WITH A CARRIER IN THE FIELD OF LOSS PREVENTION?

IF YOU ARE A MEMBER OF THE TLP & SA, LET US KNOW AND WE WILL TRY TO HELP YOU FIND SOMEONE OR FIND A JOB.

- NO CHARGE!

ADVERTISE IN OUR NEWSLETTER

ASK HOW!

201-343-1652
201-343-5181 FAX
eloughman@nakblaw.com

*Please Support Our Advertisers. Thank You**

Transportation Loss Prevention and Security Association

155 Polifly Road
Hackensack, NJ 07601

201-343-5001
201-343-5181 FAX