IN TRANSIT

Transportation Loss Prevention & Security Association
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Have a Great Year

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FROM THE EXECUTIVE DIRECTOR...

Random Acts

Last week we had an unexpected snowstorm in the northeast. It hit at the worst time, at the height of the morning commute. It usually takes me twenty minutes to get to my office and I can count on one hand how many times in over thirty years I did not make it there. Nevertheless, our local towns had not sanded and since the snow came just after sunrise, no plowing had been done.

I do not drive an SUV. My car is not one you would have if you lived in New England, and I can't remember the last time I saw chains on anyone's car. I ventured out with all the glee of a child experiencing the first snowfall of winter. It never occurred to me that I would not make it. But there I was, no more than one quarter of a mile from my house, on a hill I think nothing about until it is ice-covered. My wheels were spinning. I steered left, backed up, and went forward, steered right, rocked back and forth. All the things you instruct your kids to do so they know you are the master of bad weather driving. Nothing worked. Maybe I wasn't the master I thought I was. The idea had never passed my mind before.

I started to formulate the excuse I would give my wife for why I didn't make it to work and why I was languishing in a pile of slushy snow spinning my wheels on Mr. McCormick's front lawn. There came a knock on my car window. Two local guys had stopped; one in a suit, and one in overalls. They wanted to know if they could help. Before I could thank them, they were pushing and pulling my car until at last it was free. While I was thinking what to say, these two Samaritans were back in their cars driving away. All I could blurt out was, "It's a great community we live in when unknown neighbors help just because you need it."

I then vowed to take the flat route to my office. I had almost forgotten about my run in with Mr. McCormick's front lawn, when I saw a slight rise up ahead. Cars were slipping and sliding. I wanted to get a running start, but half way up the incline the light turned red and everyone stopped. Even though I was alone, I screamed loudly, "Don't stop", I fogged up the whole front window. Before I could gauge my own predicament, I noticed a very large sedan spinning its wheels unable to move. Buoyed by the goodwill of my recent experience, I jumped out of my car to help this stranded motorist. Although I consider myself in relatively good shape, I was not confident I could move a three to four thousand pound vehicle. But I was able to push the car in the slush and change its position so the driver could obtain some traction and move on. However, before the car left, the tinted window came down. A woman stuck her head out and gave me tearful thank you.

It was a good feeling, but I had to turn to the new task at hand. I was stuck again. My childish glee, at seeing fresh fallen snow, was long gone. I had visions of coming back in the spring to get my car when three of the biggest men I had ever seen other than on a football field appeared out of nowhere. They were laughing. I was about to get cautiously angry as one of the men said, "Hey buddy, we saw what you did for that women. You're a good guy and we'll get you going." And so they did. I arrived at work an hour or so late and no worse for wear. As a matter of fact, I was better than when I left. I had experienced and participated in "Random Acts of Kindness."

So while I usually use this space to give you my personal thoughts on a transportation related matter, I thought this was a perfect time of year to relate an experience that applies to any walk of life. If you have an opportunity, I recommend that you may want to experience and participate in a "RANDOM ACT OF KINDNESS". Try it, you'll like it. To all our members and friends…..Have a Happy Holiday and a great New Year!

William D. Bierman, Esq.
Executive Director

The New Reality of Cargo Theft

By Pamela S. Stratton, Special Agent-Federal Bureau of Investigation - Philadelphia

There are three calls a transportation company dreads receiving. The first, and potentially most damaging call, is about an accident which has occurred involving their equipment. The second is from a driver who announces that his load, tractor, trailer and/or container have been stolen. The third is from a consignee calling about a shipment which has not been delivered and the company cannot locate the driver, equipment and load. Most transportation companies have established procedures for handling an accident, but many companies do not have a procedure to follow when a theft occurs, or they may have a procedure, but it no longer fits the reality of current cargo theft investigations.

It may be hard to think of "cargo theft" and "good old days" in the same frame of reference, but if you have been in the transportation industry for more than ten years, you will remember the "good old days" in cargo theft investigations. In the "good old days", when a theft occurred, the first thing you did was call the local/state police to file a theft report.

If your company has not had a recent theft, you may not be aware of how cargo theft investigations are currently being handled by law enforcement at all levels. Without this knowledge you will not be prepared to handle the situation if, or when, it happens to your firm. To better understand the current situation, let's review the way cargo theft investigations were handled in the past.

The "Good Old Days"

It may be hard to think of "cargo theft" and "good old days" in the same frame of reference, but if you have been in the transportation industry for more than ten years, you will remember the "good old days" in cargo theft investigations. In the "good old days", when a theft occurred, the first thing you did was call the local/state police to file a theft report. You provided all the information about the equipment (tractor, trailer, container) and the details of the load (type of merchandise, quantity, serials numbers, etc.). This call would have generated a police theft report for your insurance company.

Once you had reported the theft to the appropriate law enforcement authorities, you went about your usual business of transporting goods

If your load had been traveling interstate, you might have also called the Federal Bureau of Investigation (FBI) to report theft because the FBI has the major jurisdiction in investigating such a theft. The FBI is also the law enforcement agency best equipped to investigate a theft in which the criminal activity may cross state lines since the FBI can call on field divisions across the country to assist in the investigation.

The events of 9/11/01 changed this country's perspective on almost everything. Many changes have occurred since then in an effort to prevent another attack in the future. Law enforcement agencies were forced to adopt a new emphasis on anti-terrorism investigations.

Once you had reported the theft to the appropriate law enforcement authorities, you went about your usual business of transporting goods. Occasionally you might call the police to get an update on the investigation or you would respond to requests from law enforcement for additional information. Basically, you let law enforcement do their job investigating the theft. If you were lucky, law enforcement would solve the case, locate the stolen equipment, possibly recover the load, and/or arrest and prosecute the thieves.

Those days, unfortunately, are long gone. September 11, 2001 changed all our lives in many ways.

The majority of the cargo theft investigations involve an interstate load, making the FBI the best agency to investigate these crimes. Unfortunately, investigative priorities in the FBI have changed significantly since 9/11/01.

Those days, unfortunately, are long gone. September 11, 2001 changed all our lives in many ways. Most of those changes relate to increased security practices which were put in place to protect citizens. We now have long lines at security checkpoints in airports, better screening at public facilities and events, and increased screening at border checkpoints around the country. There have also been some major changes in the transportation industry, such as a driver's hazmat credentials and CT-PAT, which is designed to attempt to address security in the transportation industry. If, however, your company does not carry hazmat loads or transport goods in or out of a port, these changes might not affect your business. Other changes have also occurred and, unless you have had a theft since 9-11-01, you might not know how this would affect a potential cargo theft investigation.

The Impact of 9/11/01

The events of 9/11/01 changed this country's perspective on almost everything. Many changes have occurred since then in an effort to prevent another attack in the future. Law enforcement agencies were forced to adopt a new emphasis on anti-terrorism investigations.

At the federal level, new agencies such as Homeland Security and the Transportation Security Agency were created. Joint Terrorism Task Forces were formed combining representatives of federal, state and local law enforcement agencies to address potential terrorism issues in every major city in the country. State and local law enforcement agencies in areas considered to be particularly vulnerable to terrorism activities, such as border towns, seaports, major transportation centers, etc., focused more manpower on protecting these assets and their community.

The top 3 priorities of the FBI are to: (1) Protect the United States from terrorist attacks, (2) Protect the United States against foreign intelligence operations and espionage, and (3) Protect the United Stats against cyber-based attacks and high technology crimes. From this it is clear, cargo theft investigations are not a high priority of the FBI.

Even though many federal, state and local law enforcement agencies have included terrorism activities as a crime they investigate, the one agency whose focus on terrorism activities has the most adverse impact on cargo theft investigations is the FBI. The majority of the cargo theft investigations involve an interstate load, making the FBI the best agency to investigate these crimes. Unfortunately, investigative priorities in the FBI have changed significantly since 9/11/01.

Seconds after the impact of the airplanes into the World Trade Center and the Pentagon, and the crash of the plane in Schwenksville, Pennsylvania, the FBI began investigating the terrorist attacks. Almost every agent in the Bureau was involved, to some extent, assisting in this effort, and other criminal investigations were temporarily suspended. As the weeks and months passed and the terrorist investigation continued, many of the agents engaged in criminal investigations returned to their cases. However, major and permanent changes were on the way.

Since the FBI investigates a limited number of cargo thefts as a matter of course, the burden of investigating falls to the state and/or local police. And, they have their own set of priorities which varies by locale depending on the major crimes occurring in their area.

On May 20, 2002 (approximately eight months after 9/11/01) Director Robert Mueller re-prioritized the FBI's mission. Director Mueller stated it was clear that the FBI needed to change from an agency primarily focused on bringing criminals to justice to one whose primary focus is the prevention of future terrorist attacks. The new mission of the FBI is to protect and defend the United States, and to provide leadership and criminal justice services to state, municipal and international agencies and partners. The top 3 priorities of the FBI are to: (1) Protect the United States from terrorist attacks, (2) Protect the United States against foreign intelligence operations and espionage, and (3) Protect the United Stats against cyber-based attacks and high technology crimes. From this it is clear, cargo theft investigations are not a high priority of the FBI.

Another issue which affects the FBI's efforts in conducting cargo theft investigations is that the United States Attorney's Offices (USAO) throughout the country have been affected by the same shifts in priorities when it comes to prosecuting cases. In the federal criminal justice system, the FBI or other federal agency conducts the criminal investigation. They then turn the results of their investigation over to the USAO to prosecute the case. Each federal statute which involves a crime where a dollar value may be involved in the crime sets the limit for the value which the crime must meet to be prosecuted federally. In each federal district, however, the USAO then decides on an "automatic declination limit", the dollar value below which they will not prosecute a case. This amount can be based on many factors including the number of cases they receive for that crime or the size of the USAO. Additionally, there are some USAO's in the country which will not prosecute a cargo theft case at all. If the USAO won't prosecute the case, the FBI cannot allocate manpower or budgetary resources to investigate the case. The result is the FBI, as a whole, is doing little work in the cargo theft investigation arena. There can, however, be some special circumstances which would entice the FBI office to investigate a cargo theft case, such as the theft of a hazardous materials load, theft of a high value pharmaceutical or high technology load, theft where there could be possible terrorist links, etc.

Since the FBI investigates a limited number of cargo thefts as a matter of course, the burden of investigating falls to the state and/or local police. And, they have their own set of priorities which varies by locale depending on the major crimes occurring in their area.

After 9/11/01, the federal government provided funds to state and local law enforcement agencies to pay for anti-terrorist work. Over time, however, those funds have decreased considerably or disappeared completely. Many state and local law enforcement agencies have also begun to realize that little terrorism related activities are occurring in their communities. Therefore, they reverted to placing emphasis on the major crimes in their area that directly affect the quality of life of their citizens such as murder, robbery, rape, etc. As a rule, interstate cargo thefts have little direct impact on the quality of life of the citizens of a community. For example, in many cases, the victim is from out of state even though the theft may occur in the community; and/or the stolen merchandise may be taken to another state to be fenced. The crime has little impact on the citizens of a particular community. Moreover, many state and local law enforcement agencies are pressed for manpower and/or funds to pay for overtime. Consequently, the state or local police will take the initial theft report but may not really investigate the theft.

The New Reality

So where does that leave you, the transportation company victim, when your load has been stolen? First of all, you still must contact the state of local police to make the theft report. You will need that for your insurance company. Secondly, if the theft is of an interstate load, you should still contact the FBI office in the area where the theft occurred to determine the following two things: (1) does that office work cargo theft matters? And (2) if so, what is the automatic declination limit of the USAO in that area, so you know whether or not your loss reaches that limit. You should also advise the FBI office if your stolen load merits special consideration due to the type of material, value, etc.

If you report the theft to the state/local police and/or FBI but get the feeling that no one is really going to investigate the theft, the burden then falls back on you, the victim, to conduct your own investigation. You have several options here. You might hire a private investigation company to work the case. You might consider using your own security people to conduct the investigation or hire some security people to conduct your own investigations. In either instance, if you are able to determine who committed the theft or where your load might be located, you will, at that point, need to contact law enforcement to continue or finish the investigation. If you approach a law enforcement agency and provide them the information they need to complete an investigation, most will jump at the chance to make the case. They turned it down in the beginning because they did not have the time or manpower to collect the evidence you were able to obtain on your own. Now that the majority of the investigation is done, they will most likely be glad to finish the case, make arrests, and prosecute the criminals. This collaborative effort is a win-win situation for everyone.

The Future of Cargo Theft Investigations

If representatives in the transportation industry feel that cargo theft losses nationally, regionally and/or locally are at a level that should merit more law enforcement attention, it is incumbent on those representatives to make their opinions known to those who have the ability to influence law enforcement agencies. At the state level, that might be the Governor of the state, the head of the State Police and/or other elected officials in the state. At the local level, the Mayor, head of the police department and/or other elected city officials should be contacted. At the federal level that means complaining to and lobbying your Senator or Congress person and/or lobbying transportation or commerce committee on Capitol Hill.

So where does that leave you, the transportation company victim, when your load has been stolen? First of all, you still must contact the state of local police to make the theft report. You will need that for your insurance company. Secondly, if the theft is of an interstate load, you should still contact the FBI office in the area where the theft occurred to determine the following two things: (1) does that office work cargo theft matters? And (2) if so, what is the automatic declination limit of the USAO in that area, so you know whether or not your loss reaches that limit. You should also advise the FBI office if your stolen load merits special consideration due to the type of material, value, etc.

At present, many of these people are unaware of the significance of the total value of losses due to cargo thefts, or how vital the transportation of goods is to the economy of the country. Nor do they realize how much these losses directly impact each and every person in the country through increased insurance costs of loads being transported, which raises transportation costs, and which ultimately raises the prices paid for the goods we purchase.

Other issues should also be raised with people in a position to change the laws, such as the fact that there is no cargo theft category in the Uniform Crime Code which makes it impossible to quantify the extent of the problem since cargo thefts can be classified as a theft, burglary, robbery, vehicle theft, etc. Another problem is the low sentences dictated in federal and state sentencing guidelines for cargo related crimes. In many instances, a convicted cargo thief may only get a few years for the crime as opposed to being convicted of a drug crime where he/she might get life in jail (even though the dollar value of both crimes is the same). Therefore, it is more lucrative for a criminal to commit a cargo theft than sell drugs because the money made can be the same but the risk of incarceration is significantly less. One thing has not changed over the years: the same few cargo thieves commit the majority of the thefts over and over again. Unless the sentences imposed increase, this situation will never change.

If representatives in the transportation industry feel that cargo theft losses nationally, regionally and/or locally are at a level that should merit more law enforcement attention, it is incumbent on those representatives to make their opinions known to those who have the ability to influence law enforcement agencies.

Conclusion

The good old days of cargo theft investigations where you reported the theft and went about your business while law enforcement investigated the crime, are over. The new reality is that you should still report the theft to the state/local police and/or FBI (if the theft is of an interstate load), but you may have to accept the burden of conducting your own theft investigation or contract someone else to do it for you. And if you don't like the fact that law enforcement is not addressing these theft cases, it is up to you, individually and collectively, as an industry, to address your concerns to the elected officials who have the ability to put pressure on the law enforcement entities to work these cases.

TRANSPORTATION CASE SUMMARIES

(November/December, 2006)

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

1. Roadmaster (USA) Corp. v. Calmodal Freight Systems, Inc., 2005 U.S. App. LEXIS 23203 (3rd Cir. 2005) **(broker liability)**. Roadmaster sued defendant Calmodal for breach of an oral agreement dealing with the interstate transportation of goods, contending that Calmodal acted as an interstate motor carrier, rather than as a broker, as defined by the Carmack Amendment. Calmodal denied liability, claiming it acted only as broker in arranging for the transportation of the goods, and counterclaimed for $238,000 in unpaid invoices it had submitted to Roadmaster. The U.S. Court of Appeals affirmed the judgment of the district court that Calmodal was not liable for the value of the goods transported because its status was that of a broker, not a carrier. The Court rejected Roadmaster's argument that its contract with Calmodal was invalid because Calmodal was unlicensed, because Roadmaster had not raised that argument in the district court. Interestingly, the Court also held that even if Roadmaster's argument had been timely made, and if Calmodal had operated illegally without a broker's license, the civil penalty for such illegal operation is prescribed by 49 U.S.C. § 14901(a) and it would be inappropriate for the Court to "add judicially to the remedies" by rendering a private contract void when a Congressional statute provides specific penalties for violation. The Court also affirmed the district court's damage award of $129,269 to Calmodal on its counterclaim on the basis that the reliable evidence at trial did not support the higher amount it had claimed.

2. AIG Aviation, Inc. v. On Time Express, Inc., 2005 U.S. Dist. LEXIS 22303 (D. Ariz. 2005) **(preemption)**. Plaintiff sued the defendant motor carrier on claims of negligence and breach of bailment contract, seeking damages of $211,000 for shipment for goods lost or damaged during interstate transportation. In granting the defendant carrier's motion to dismiss the negligence and breach of contract claims, this decision provides a concise summary of Carmack Amendment preemption law. The decision also explains that the savings clause does not preserve state common law claims (as so often argued by plaintiffs) that are not separate and apart from the loss or damage to the shipment. "Allowing a Plaintiff's state law claims to impose greater liability than under the Carmack Amendment would undermine the certainty that the legislature intended to provide." The Court also ruled that plaintiff's claims for loss of use, diminution in value and consequential damages, which may include business interruption, lost profits or other matters, are not separate and apart from Carmack damage to the goods.

3. Leprino Foods Company v. Gress Poultry, Inc., 379 F. Supp. 2d 659 (M.D. Penn. 2005) **(warehouse liability)**. The close relationship between loss and damage claims against motor carriers and those against warehousemen, together with the broad definition of interstate "transportation," should serve as an incentive to all lawyers practicing in the field of cargo loss and damage to be familiar with this decision. The decision in Leprino Foods had serious consequences for the defendant warehouseman. The warehouseman, Gress, undertook to store approximately 8.2 million pounds of cheese for plaintiff Leprino, which Leprino would later sell to its customer, Pizza Hut. In 1988, Gress had made a proposal to Leprino to store the cheese pursuant to Gress' "tariff," which provided for a limitation of the warehouseman's liability of $0.50 per pound, with optional "insurance" available at a rate of $0.04 per $100.00 of declared value. That proposal did not result in any business, but in a February 11, 1992 letter Gress made a new proposal to Leprino, whereby Gress proposed to store Leprino's cheese at certain rates, adding that it did "not cover everything in detail as standard warehousing procedures are assumed to be followed." The 1992 proposal did not mention a limitation of liability. However, the non-negotiable warehouse receipts later issued by Gress for each lot of goods contained a $0.20 per pound limitation of liability. Although Leprino claimed it was unaware of the limitation, by the time of the incident involved in this litigation (2001), Leprino was aware of the limitation of liability in the Gress warehouse receipt but did not object to it, nor did Gress enforce the limitation on at least one prior claim made by Leprino.

The loss in question occurred in 2001, when Leprino began receiving complaints from its customer, Pizza Hut, that shipments of cheese that had passed through Gress' Scranton, Pennsylvania warehouse had an off-odor and off-flavor, resulting in the rejection of the cheese. Expert witness testimony for Leprino indicated that the cheese exhibited a "sweet, fruity odor" that was traced to the chemicals limonene, xylene, toluene and alpha-pinene, flavorings related to fruit-based frozen food products also stored in the same warehouse. Leprino's experts visited the warehouses in the chain of custody and concluded that the source of the contamination was Gress' warehouse. Leprino filed a claim with Gress for the loss of 8,220,495 pounds of mozzarella cheese. After salvage ($0.4025 per pound) there resulted a net loss of $1.255 per pound.

The defendant warehouseman moved for summary judgment contending (1) that Leprino could not establish a prima facie case and, alternatively, (2) that the limitation of liability in the warehouse receipts limited Gress' liability to $0.20 per pound. In denying Gress' motion, the Court ruled that the plaintiff had submitted sufficient evidence to show that the cheese was in good condition when received by the warehouse and that the off-odor/flavor occurred while the cheese was stored at Gress' Scranton, PA warehouse, as opposed to Leprino's Waverly, NY facility. The Court also found sufficient evidence that the cheese was not damaged while it was transported to Gress' warehouse, and that it was a question of fact as to whether Gress had acted negligently in its storage of the cheese. Finally, the Court rejected Gress' argument that its liability was limited to $0.20 per pound because the limitation was not referred to in Gress' February 11, 1992 letter agreement/proposal that formed the basis of the parties' contractual relationship. The Court ruled that under Pennsylvania law a party cannot unilaterally modify the terms of a contract and expect the Court to enforce the modification without the support of an express term in the contract allowing for such unilateral modification (which it deemed the limitation to be). The Court noted that the February 11, 1992 letter stated that it did "not cover everything in detail as standard warehousing procedures

are assumed to be followed." Plaintiff's witness claimed that, in his experience, "standard warehousing procedures" do not include warehouse receipts or any limitation of liability imposed by the warehouse. The Court also found that on at least one prior claim Gress did not enforce the liability limitation and concluded that the phrase "standard warehousing procedures" in Gress' February 11, 1999 letter was ambiguous. On that basis, the Court denied the defendant warehouseman's motion for summary judgment.

4. Thomas & Betts Corp. v. Hosea Project Movers, LLC, 2005 U.S. Dist. LEXIS 22172 (W.D. Tenn. 2005) **(preemption denied; U.S. - Mexico shipment)**. Plaintiff shipper, Thomas & Betts, entered into a contract with defendant, Hosea Project Movers, for the transportation, rigging, setup and installation of several 420-ton aluminum die-casting machines from the plaintiff's Boston, Massachusetts facility to Monterrey, Mexico. The agreement required Hosea to provide transportation insurance and a certificate of insurance to Thomas & Betts confirming that it had obtained insurance on the equipment for its full market value. The agreement also provided that it would be governed by Tennessee law. Hosea transported one of the machines to Mexico, and was instructed to leave it near Thomas & Betts's facility in Monterrey until the plaintiff was ready to have it installed. Subsequently, the machine was damaged as a result of the negligence of Thomas & Betts' employees when they attempted to move it. Meanwhile, Hosea was transporting a second machine to Monterrey for Thomas & Betts. After the damage to the first machine, Thomas & Betts asked Hosea to make a claim for the loss with its insurance company, but Hosea refused. Thomas & Betts then advised that it would not make its final payment to Hosea under the agreement, so Hosea withheld delivery of the second machine as security for its payment under the contract. Ultimately, Hosea delivered the second machine after Thomas & Betts posted a $22,000 bond, and Thomas & Betts then sued Hosea alleging claims of breach of contract and breach of good faith arising from the contract related to the damage to the first machine.

In denying Hosea's motion for summary judgment based on grounds of Carmack Amendment preemption, the Court ruled that Hosea's status as a "carrier" had ended and therefore Thomas & Betts' claims against Hosea fell outside the Carmack Amendment. The Court found that the first machine "was no longer being 'shipped' when it was destroyed," and that since the agreement between Thomas & Betts and Hosea provided that it would be governed by Tennessee law, the Court would apply Tennessee law as Mexico "would have little interest in regulating what are allegedly tortious self-help measures taken by an American company to resolve a contract dispute that arose in Tennessee." The Court also denied the plaintiff's motion for summary judgment because it did not have the full text of the parties' written agreement.

5. Wenig, Ginsberg, Saltiel & Greene, LLP v. Precision Movers, Inc., 2005 N.Y. Misc. LEXIS 2298 (2005) **(intrastate prima facie case)**. This is an interesting state court decision in which the motor carrier of an intrastate shipment was found not liable for alleged moving damage because the plaintiff failed to prove a prima facie case. The plaintiff, a law firm, hired the defendant moving company to move its offices from one location in Brooklyn, New York to another. The bill of lading governing the shipment provided that the defendant's liability would be limited to $0.30 per pound per article. The move involved the transportation of a copy machine, weighing 300 pounds, that was wrapped in bubble wrap and cardboard by the defendant, then transported and delivered to the new location. The copier remained in a storage room at the new location for approximately seven weeks, whereupon it was unpacked and found to be a total loss because the toner cartridge had leaked, allegedly due to the acts or omissions of defendant. The court ruled that under both New York transportation law and the Carmack Amendment governing interstate transportation, plaintiff had failed to establish the allegedly damaged condition of the copy machine at the time of delivery. Moreover, the court found that the plaintiff had produced no evidence, expert or otherwise, to show what caused the toner spill inside the copier or that it had been turned upside down by any of the defendant's employees. The court also rejected plaintiff's argument, under New York law, that there was a presumption of conversion on the part of the carrier because plaintiff did not show that the carrier had appropriated the machine to its own use.

6. Wolfensberger v. In And Out Moving & Storage, Inc., 2005 U.S. Dist. LEXIS 24141 (**removal jurisdiction/ remand).** The defendant interstate motor carrier removed this lawsuit, originally filed in state court (Circuit Court of Cook County, Illinois), to federal court, and cited as the basis for removal jurisdiction, the minimum threshold jurisdictional amount of $50,000 required by the State of Illinois for actions filed in the Circuit Court of Cook County. In rejecting the carrier's argument and remanding the case to state court, the federal court noted that the $50,000 ad damnum specified by plaintiff's lawyer in the complaint was based on his mistaken belief that his client could recover on state law claims for relief that defendant claimed to be preempted. That argument, coupled with the fact that defendant further alleged that plaintiff's potential recovery was limited to $0.60 per pound under the interstate bill of lading, which listed the weight of the shipment as 3,640 pounds, was sufficient for the court to conclude that it lacked subject matter jurisdiction under 28 U.S.C. § 1337(a) and remand the case to state court.

7. Accu-Spec Electronic Services, Inc. v. Central Transport International, 2005 U.S. Dist. LEXIS 23575 (W.D. Penn. 2005) **(claim against motor carrier on freight forwarder shipment)**. Accu-Spec purchased an x-ray machine from a vendor in Freemont, California and hired a freight forwarder, Logistics Plus, to transport it to McKean, Pennsylvania. Logistics Plus hired defendant, Central Transport, to perform the underlying transportation. On arrival of the shipment in Pennsylvania, the x-ray machine was found to be damaged. Accu-Spec sued both Logistics Plus and Central Transport. Central Transport moved for summary judgment, arguing that where a freight forwarder is used by a shipper to transport cargo, the shipper's only remedy for lost or damaged freight is against the freight forwarder. The Court rejected that argument and denied Central's motion as to the plaintiff's Carmack Amendment claim, ruling that the Carmack Amendment is silent as to whether a freight forwarder's liability is exclusive. "[T]he few Courts that have confronted this issue have unanimously interpreted §14706 as creating a cause of action for a shipper against both a freight forwarder and the underlying common carrier." The Court found no language in the Carmack Amendment to support the proposition argued by Central that freight forwarder liability is exclusive.

8. Kirby v. Krishan Lal Mal and GTI Gursimran Transport, Inc., 2005 U.S. Dist. LEXIS 23882 (E.D. Penn. 2005) (**service on agent; untimely removable).** This was a tort action with procedural importance for loss and damage practitioners. Here, the Court remanded a lawsuit on the basis that defendants had acted untimely in removing the case from state to federal court. Plaintiff sued the defendant trucking company and its driver for injuries she received in a motor vehicle accident.

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Plaintiff effected service of process on the defendant motor carrier (a Canadian company) on March 16, 2005 by serving its designated agent for service of process, one James D. Campbell, Jr., in Harrisburg, Pennsylvania. Plaintiff submitted an affidavit executed by the sheriff of Dauphin County, Pennsylvania in which he attested that he had served a complaint on Mr. Campbell. Plaintiff served the defendant truck driver on April 24, 2005. On June 24, 2005, both defendants filed a notice of removal, following which plaintiff moved to remand, arguing that the notice of removal was untimely. In granting the motion to remand, the Court found that the sheriff's affidavit is conclusive on the issue (albeit disputed) of service of process. The Court also rejected defendants' contention that, because Campbell was no longer its agent for service of process on March 16, 2005, the process was invalid. The Court cited federal regulations providing that a carrier subject to the FMCSA's jurisdiction may change its designated agent for service of process only by appointing a new agent, unless the company has ceased its operations for one year or longer. Since the defendant trucking company had not cancelled or changed its designation of agent for service of process, Campbell continued to serve as its agent and was so at the time of service upon him on March 16, 2005. Service was good and the removal was untimely.

9. CPCI v. Technical Transportation, Inc., 2005 U.S. Dist. LEXIS 26534 (W.D. Wa. 2005) **(lost profits not speculative)**. Plaintiff had purchased 184 used plasma screen television sets for $400 each and pre-sold them to consumers for $2,800 each. The defendant carrier transported the television sets from various locations around the country to Seattle, but 63 of the sets arrived with latent transit damage. Plaintiff sought to recover its retail price for the sets, and defendant carrier moved for partial summary judgment to limit its potential liability to the $400 per set cost paid by plaintiff. Of significance was the fact that the sets were not replaceable. The Court denied defendant's motion, citing Neptune Orient Lines v. Burlington Northern & Santa Fe Railway, 213 F. 3d 1118 (9th Cir. 2000), finding that plaintiff's cost was not a proper measure of damages because it could not replace the lost property. The Court ruled that Neptune supported plaintiff's claim that the price agreed to by plaintiff's third-party purchasers, rather than its invoice price, was stronger evidence of actual value at destination. The Court denied defendant's motion and ruled that plaintiff's claim of lost profits was "not so speculative as to be illusory" and that the issue of whether the profits are sufficiently definite presented issues of fact for trial.

10. Lexington Insurance Co. v. Daybreak Express, Inc., 2005 W.L. 1515397 (S. D. Tex. 2005). (**settlement agreement removable).** The defendant motor carrier, Daybreak, agreed to pay a shipper $166,000 to settle claims for damage to shipments of sensitive electrical equipment, but subsequently refused to fund the settlement. The plaintiff, Lexington, reimbursed the shipper for its loss and became subrogated to the shipper's breach of contract claim based on Daybreak's failure to honor the settlement agreement. Lexington did not allege any other cause of action. After Daybreak filed a notice of removal, alleging federal question jurisdiction and relying on Hoskins v. Bekins Van Lines, 343 F.3d 769 (5th Cir. 2003), the Court granted the plaintiff's motion to remand, citing the fact that Lexington did not seek to impose liability on Daybreak for damages arising from the interstate transportation of property but instead sought only to enforce an agreement. "Resolution of this contract claim does not turn on the rights and responsibilities of Daybreak as a carrier in interstate commerce."

11. East Florida Hauling, Inc. v. Lexington Insurance Co., 2005 Fla. App. LEXIS 14824 (2005) **("right" versus "duty" to defend under motor truck cargo insurance policy)**. This case is particularly valuable because it addresses a seldom litigated issue, but one that is present in most motor truck cargo insurance policies: the "right" versus the "duty" to defend. In this case, the carrier, East Florida Hauling ("EFH") was transporting a container of electronic equipment (cameras and camcorders) from Miami, Florida to Laredo, Texas when it was stolen. The shipper submitted a claim for $300,000 in damages, which EFH promptly forwarded to Lexington, its motor truck cargo liability insuror. Lexington declined to defend EFH, citing policy language providing that in the event of a loss, Lexington had "the right to" settle the loss with the owners of the property or provide a defense for legal proceedings brought against EFH. The policy also had a limitation (of 10% of the limit of insurance) on Lexington's liability if a loss by theft occurred involving audio and video equipment. Since the limit on EFH's policy was $250,000 and EFH had a $5,000 deductible, Lexington calculated its maximum exposure under the policy to be $20,000. Nonetheless, it offered to resolve the claim on behalf of EFH for $25,000, but the shipper refused the offer. After EFH was sued, it filed a third-party complaint against Lexington seeking declaratory relief, alleging that Lexington had breached its insurance contract by failing to defend EFH. The Court granted Lexington's motion for summary judgment and dismissed EFH's third-party complaint, ruling that the insurance policy created only a "right" (on the part of Lexington) rather than a "duty" to defend EFH. "Since the contract terms govern the duty, an insurance policy may relieve the insurer of any duty to defend, or give the insurer the right, but not the duty to defend…[A]n insurance policy may relieve the insurer of an obligation to defend its insured by reserving a right, at the insurer's discretion, to defend an action." The Court ruled that the policy language was clear and unambiguous and did not create a duty on the part of Lexington to defend EFH. On the secondary issue of the limitation of coverage under the policy, the Court agreed with Lexington's interpretation that the stolen articles constituted audio and video equipment so as to trigger the 10% limitation clause in the policy.

12. M. Fortunoff of Westbury Corp. v. Peerless Insurance Company-Docket No. 63-7408 United States Court of Appeals for the Second Circuit (2005 U.S. App. LEXIS 27257). December 13, 2005, Decided **(BMC-32-Requirement and coverage applies only to Common carriage).** The U.S. Court of Appeals for the 2nd Circuit reversed the decision of the district court *Fortunoff V. Peerless Ins. Co., 260 F. Supp 2d 524, 2003 U.S. Dist. LEXIS 7701 (E.D.N.Y., 2003).* which had held that the mandatory minimum cargo insurance required by the BMC-32 endorsement applied to contract carriage as well as common carriage. In reversing, the Second Circuit ruled that although the ICCTA no longer distinguishes between common and contract carriers, and all carriers are now "motor carriers," that did not result in only one type of carraige. The Court discussed the differences between the two types of services and ruled that the FMCSA must be given deference in its regulations, which require a BMC-32 endorsement only for common and not for contract carriage. The Court reasoned that the transition rule under Section 13902(d) of the ICCTA did not prevent the FMCSA from differentiating between the two types of services when requiring cargo liability insurance, and that the disrection granted to the agency under Section 13906(a) (3) "was not limited as to require the agency to impose cargo liability on all of a motor carrier's functions of it wished to impose cargo liability insurance on some of them."

The View from the Rearview Mirror is not too Clear.

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

"Some men a forward motion love, But I by backward steps would move."
Henry Vaughn, *Silex Scintillans, The Night,* [1650]

The "common law" refers to court decisions that give people and their attorney's instruction about how disputes should be resolved. One looks backwards in time to a published case decision with similar facts and law applicable to the current dispute de jour to determine how a court will decide the fracas before it. Trial courts are expected to follow the decisions of the past to give some certainty and predictability to resolution of cases that come after the published decision. The fancy Latin term for this adherence to decisions from previous cases is Stare Decisis [let the decision stand.] There are a great number of published cases that clearly establish the precedent that the Carmack Amendment, 49 U.S.C. section 14706, trumps ["preempts"] any state law claims against interstate motor carriers, including household goods carriers, when loss or damage occurs during interstate transit. One recent court decision demonstrates that the court did not see too clearly when looking back at legal precedent to decide a household goods moving case.

The facts of Ducham v. Reebie Allied Moving and Storage, 372 F.Supp.2d 1076, (N.D. Ill. 2005) are quite similar to scores of cases decided in the past which hold that a moving company's client may not sue the carrier for state law tort claims when the dispute involves the loss or damage to goods in interstate commerce, including a fairly recent decision from the same court. Tokio Marine & Fire Ins. Group v. J.J. Phoenix Express, Ltd., 156 F. Supp. 2d 889 (N.D. Ill. 2001). These cases almost universally hold that the Carmack Amendment provides the sole remedy for shippers of household goods when loss or damage to their belongings occurs during interstate shipments. In addition, the claims handling procedures also are subject only to the federal law. Here, Ducham filed a suit in Illinois state court alleging state law claims and remedies against the moving company and its local agent. Plaintiff complained that the price quoted by the carrier's agent before the goods were picked up in California was substantially less than that demanded when the goods arrived in Illinois. Plaintiff sued for breach of contract, intentional misrepresentation, and breach of the state consumer fraud act.

The moving company transferred the case to federal court, and sought dismissal of all state law claims, based on the federal preemption of the Carmack Amendment. Your author has done the same thing dozens of times without any problems. Maybe you, dear readers, will attribute that to liberal California judges, but that law actually supports doing so regardless where the matter arises. In fact, that is the purpose of federal preemption: to ensure that disputes involving interstate motor carriage are resolved in the same way, regardless where the court is located. Your author is particularly interested in the question because he successfully argued for federal preemption of state law remedies against interstate motor carriers in Hughes Aircraft v. North American Van Lines, 970 F.2d 609 (9th Cir. 1992).

Plaintiff sought to return the case to State Court, and save its state law fraud remedies, by arguing that the plaintiff is "master" of its claims, and may seek redress under any legal theory it chooses. Plaintiff may, it asserted, avoid federal court jurisdiction by alleging only state law remedies. This generally is correct, and is known as the well-pleaded complaint rule. Even if a federal defense completely eliminates the plaintiff's state law claim, the matter must be tried in state court if Plaintiff chooses that forum. Courts will not allow the defendant to transfer the case from state court, for hearing in federal court, even if a federal defense completely eliminates plaintiff's state law claims. Caterpillar, Inc. v. Williams, 482 U.S. 386(1987). There is however a powerful exception to the well pleaded complaint rule: the complete federal preemption exception. That doctrine holds that if the subject matter of plaintiff's complaint is totally addressed by federal law, a defendant may transfer the case to federal court, and seek dismissal of the state law claims. There is a long line of cases that support the application of the complete federal preemption of claims involving interstate motor carriage, but this court paid little attention to stare decisis because it ignored those cases and allowed the plaintiff to return to state court, there to assert its fraud and other state law claims.

This court rested its decision to disallow removal to federal court by looking back to Gordon v. United Van Lines, 130 F.3d 282 (7th Cir. 1997), and Rini v. United Van Lines, 104 F.3d 502 (1st Cir. 1997), which held that not all claims against an interstate motor carrier are preempted by the Carmack Amendment. Some state law claims against a household goods carrier might not be preempted by Carmack if they are not related to the contract for carriage, or loss or damage to the goods. Your author has no problem

with this in concept: if the moving van is backing into a driveway and hits a shipper's car, that claim is not subject to federal law preemption. It is not related to damage to the goods, although it could be argued it is "related" to the contract of carriage. If the carrier lies about being licensed to engage in interstate carriage, that could be argued to be outside the Carmack Amendment, because a carrier must be licensed by the Department of Transportation to conduct interstate carriage.

The Ducham court however misapplied the narrow exception to complete federal law preemption of claims under the Carmack Amendment. It even cited the following from the Gordon decision:

"The court also found that Slavin's common law fraud claim, which alleged fraud both in the inducement and in the claims process, was preempted because (a) the making of the contract was so closely related to the carriage and damages were likely to be the loss or damage to the goods; and (b) the claims process is directly related to the loss or damage to the goods that were shipped."

It is apparent to your author that the contract of carriage, and the price demanded by the carrier for the shipment, is a fundamental part of the contract of carrier, and issues of price would be preempted under the Gordon decision. What could be more central to a contract than price? The plaintiff in Ducham complained that the move cost more than the contract indicated. Those claims are subject to resolution by the federal statutes that provide for resolution of such matters: not by reference to the inconsistent and unpredictable ministrations of state law theories by state court judges.

So, it appears that the Ducham court's view in the rearview mirror was obstructed, and it missed the holding of the Gordon court even after citing it as authority to send the case back to state court. The decision will contribute to the very chaos that federal preemption is intended to prevent.

Gordon McAuley is head of the Transportation and Logistics Practice Group of Hanson Bridgett Marcus Vlahos & Rudy in San Francisco. (415) 925-2102.

Recent Ohio Truck Transportation Case Which Held Company Liable for Failure to Install Reflective Tape on Truck Trailer

By Eric L. Zalud, Esq. and Frank J. Reed, Jr.
Benesch, Friedlander, Coplan & Aronoff, LLP - Cleveland, Ohio

A recent Ohio state court decision held that a company was liable for failure to install reflective tape on a truck trailer, even where Congress, in passing the regulation, specifically stated that the regulation shall not be applied retroactively.

Summary: Ms. Baldwin was driving a car along a rural state route at 2:30 a.m. early one morning in Ohio. She approached a tractor trailer that was backing up and blocking both lanes of traffic. It was very dark, and there were no street lights. Not seeing the truck until the last minute, her car crashed into the trailer, and she suffered serious injuries. Ms. Baldwin sued the truck driver, the trucking company and owner of the vehicle, Golden Hawk Transportation Company, and the manufacturer of the truck, Transcraft, Inc. The trailer was manufactured by Transcraft in 1992. In 1992, trailers were not required to have underride protection, which prevents vehicles from continuing under the trailer bed upon impact, nor were trucks required to display reflective tape along the chassis.

In 1993, Congress passed regulations that require flatbed trailers to have conspicuous retro-reflective tapes, which would have made the trailer visible to headlights. After 1993, Transcraft installed this tape on its manufactured trailers and offered "tape kits" to owners of pre-1993 trailers and recommended the owners "retrofit" the tape onto the side of the chassis. Golden Hawk did not install the tape on its trailer. The plaintiff argued that had Golden Hawk installed the tape, she would have seen the trailer sooner and would avoided the collision.

The trial court granted summary judgment for the defendant manufacturer and held that plaintiff failed to prove that Transcraft, Inc. was negligent in the manufacture of the trailer, found that the trailer met federal guidelines at the time it was manufactured, and held the fact that the trailer had no retro reflective tape on it at the time of collision "cannot be laid at the feet of Transcraft, Inc." Plaintiff appealed. The Ohio Fifth District Court of Appeals' (3-0) decision overruled the trial court. The Court of Appeals reviewed the National Traffic & Motor Vehicle Safety Act, publications from the National Highway Transportation Safety Administration, the Motor Carrier Vehicle Safety Act of 1990, and found that there was enough evidence (40 years of knowledge in the trucking industry recognizing that large vehicles needed some reflective material to increase visibility at night) that the case should be decided by a jury instead of a judge. As such, the court remanded the matter back to the trial court for a jury to decide if the manufacturer was negligent.

If your company owns or uses flatbed trailers, be sure that the side of the chassis has reflective tape-even if the flatbed trailer was manufactured prior to 1993. Your company should consider taking any such flatbed trailers out of service until the reflective tape is properly installed. Further, your company should add "check reflective tape" to the company's equipment inspection list and regularly inspect your vehicles to ensure that the tape was installed properly and is maintained so oncoming traffic can see the trailer at night. This may help prevent collisions, and hopefully, will help your company avoid lawsuits.

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Sincerely,

William D. Bierman

William D. Bierman, Esq.
Executive Director, TLP&SA

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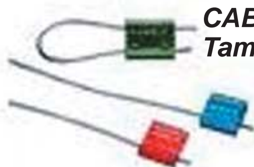

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