In Transit

Transportation Loss Prevention & Security Association Winter 2007

In This Issue...

Transportation Loss Prevention and Security Association

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Highway to Heaven

By:
William D. Bierman Esq. -
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"All that glitters is not gold" was a saying from a bygone generation. It was meant as a warning to carefully consider things that dazzle the senses, but turn out to be merely fool's gold. Recently I attended a symposium at the Voorhees Transportation Center on the campus of Rutgers University entitled Turnpike for Sale? Privatization and the Public Interest. The topic of course was the privatizing of New Jersey's toll roads. The prospect of privatization has been dangled in front of many states over the last several years. Chicago and Indiana have already signed on.

New Jersey like many other states needs new revenue. Property taxes are the highest in the nation. Costs are skyrocketing in every direction. There is mounting pressure on a new administration to take action. But where will a new revenue source come from? Enter selling or leasing publicly owned property; highways, buildings, the lottery and everything else that is not nailed down and some things that are nailed down. It is a deceptively simple argument. Sell something that has already been paid for and get a big chunk of change now to pay off debt and reduce taxes. Boy that sounds good if you are selling your house which has appreciated over the years. You pay off your existing mortgage, pocket the difference, and have no further responsibility or need for the property.

But what about that part where you have no further need for the property? The Turnpike, the Garden State Parkway, the lottery: the state and its citizens need and rely on these properties. Who will maintain these properties? Who will patrol the roads? Who will protect the reasonableness of tolls? Who will ensure jobs for our citizens? We also must question if these properties are a losing proposition, why would some foreign corporation want to pay billions for their purchase or lease.

In many cases these properties have become an integral part of the state. While there have been many jokes about the NJ Turnpike for example, nobody would deny that it is one of the premier roadways in the nation. The mere specter of riding on the Toyota Turnpike or the Petro China Parkway should send shivers down anyone's spine. How soon we forget Dubai Ports World. While the concept of "naming rights" is one thing, true ownership or control is another. In this era of heightened homeland security, how can we have a foreign company own or control any part of our transportation infrastructure? Privatization glitters, but it is not gold. Privatization is mortgaging a state's future where the interest is much too high. Privatization is not a highway to heaven.

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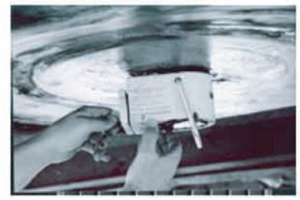

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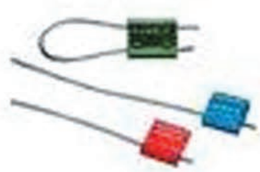

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NIPPONKOA v WATKINS: OPENING A PANDORA'S BOX

By:
William D. Bierman Esq. - Nowell Amoroso Klein Bierman, P.A.

HISTORY OF REGULATION

During the first eighty years of the twentieth century, the transportation industry was highly regulated. For all intents and purposes everyone knew where they stood. Statutes and regulations governed most actions of motor carriers and tariffs had the full force and effect of law. When the industry was deregulated in 1980 things began to change. While the Legislature sought to encourage competition and allow carriers and shippers to contract directly, the term "deregulation" may have given everyone the wrong impression.

In the area of cargo claims, much of the regulatory scheme remained the same. The statute known as the Carmack Amendment was renumbered, but it still governed loss and damage. Requirements for filing and handling claims remained the same and the case law reflected the new era with few changes such as realizing that the old ""Hughes Test"" now had three requirements instead of four since tariffs no longer had to be "filed".

The Savings Provision Section 204(a) of ICCTA provides that all orders, rules, and regulations of the I.C.C. shall continue in effect until modified, terminated, superseded, or revoked by the Surface Transportation Board (STB), other authorized official, court of competent jurisdiction, or operation of law. The Surface Transportation Board has transferred the ICC Regulations from the ICC to the STB. STB Ex Parte No. 525 (Jan. 24, 1996).

ICCTA abolished the distinction between common and contract carriage and then permitted a "carrier" to enter into a contact with a shipper other than for household goods. If the shipper and carrier then expressly waived all rights and remedies provided under the Act, the contract is not subject to the waived rights. The rights that may be waived include those rights a shipper may have for carrier liability for loss or damage to cargo under the Carmack Amendment. Of course, the parties may not waive the provisions for registration, insurance or safety fitness. 49 U.S.C. 14101(b) (1995). Thus, either by Bill of Lading or a contract where Carmack is not waived, substantial regulation still exists.

THE CASE OF NIPPPONKOA v WATKINS

So what happened in the case of Nipponkoa v. Watkins, 431 F. Supp. 2d 411 (S.D.N.Y.2006)? The facts appeared to by simple. Nipponkoa's assured, TAIS, entered into a Transportation Agreement with Watkins to ship laptop computers. The goods were lost while in possession of Watkins. Nipponkoa paid TAIS the full amount of the loss and sued Watkins for that amount. Watkins defended by stating that the Transportation Agreement incorporated Carmack and the Agreement limited liability to $25.00 per pound up to $100,000.00 per shipment.

Since the court agreed that Carmack was part of the contract, and since Carmack preempts all other causes of action, and since there was a valid limitation of liability, one would have thought that this would have been a run of the mill case applying the limitation of liability. Not so. The court came upon Pandora's Box and, for some unknown reason; the court could not help but open it up and let out the horribles.

MATERIAL DEVIATION

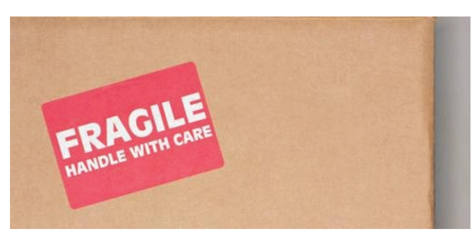
Based on plaintiff's claim of "material deviation", a term imported from admiralty law, the court in Nipponkoa perused the Transportation Agreement and came upon Appendix A which set forth Minimum Security Guidelines. The court also noticed that the Agreement provided that Watkins would obtain insurance for the benefit of TAIS with TAIS named as loss payee. Sitting as the trier of fact in a bench trial, the court found that Watkins materially breached these provisions of the Transportation Agreement and that breach constituted "material deviation" which voided the limitation of liability. The court also tried to compare the facts to Praxair, Inc. v. Mayflower Transit, Inc., 919 F. Supp. 650 (S.D. N.Y. 1996) wherein the judge found a separate risk related promise for which the shipper paid an additional charge. In Nipponkoa, the court states that each breach was a separate risk related promise. The court avoids the fact that no additional charge was made for the provisions claimed to have been breached.

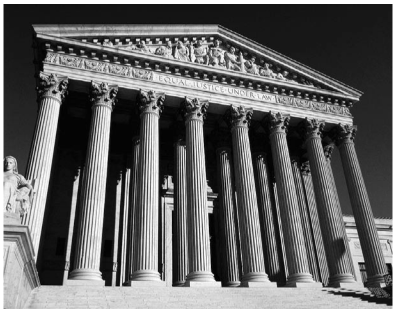
The Nipponkoa decision turns cargo claim law on its head. Since Carmack preempts all other causes of action, it stands to reason that the shipper's recovery will be limited to damages under Carmack no matter what name you give the breach. Obviously, any loss or damages could be termed a "material deviation" under the transportation contract. Where there is a written agreement to limit liability under Carmack, the shipper is bound by that limitation. As we have pointed out on numerous occasions, the insurance carrier bargained with the shipper for full liability and set its premium accordingly. The motor carrier bargained for a limitation of liability and set its freight charges accordingly. What the parties did not bargain for was that the court would misunderstand the entire situation!

Because of what we consider to be a misguided decision in Nipponkoa, many new cargo claim complaints are alleging "material deviation" as a standard separate count against carriers. Unless this matter is rectified on appeal, carriers can expect to be bogged down defending "material deviation" claims for the foreseeable future. This will no doubt impede settlements, hinder summary judgment motions and increase appeals.

CONCLUSION

By unnecessarily opening Pandora's Box, the court in Nipponkoa has destroyed expectations and hurt the transportation industry. No one can accurately plan what will come out of the box if regulations and statutes do not apply at the court's whim. The motor carrier is prejudiced because it based its freight charges on the limitation of liability. The shipper and consumers will be prejudiced because freight rates will rise to cover full liability losses and the insurance company receives an unwarranted windfall. As the story goes, what remained in Pandora's Box was hope. We hope that the Second Circuit Court of Appeals reverses the trial court and closes Pandora's Box for good.





Recent Court Cases

as analyzed by the Conference of Freight Counsel

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

Thank you to the CFC for their contribution.

A. Carrier Liability

1. NipponKoa Insurance Company, Ltd. v. Ozark Motor Lines, Inc., 2006 U.S. Dist. LEXIS 74440 (M.D. Tenn. 2006).

In this subrogation action NipponKoa sued Ozark, a motor carrier, to recover $171,000 for the theft of two trailer loads of televisions stolen from the facilities of NipponKoa's insured, Toshiba. Toshiba had contracted with Ozark to transport the shipments from Toshiba's Lebanon, Tennessee facility to Reading, Pennsylvania. Ozark signed bills of lading for the shipments when they were loaded at Toshiba's facility but they were stolen before Ozark's driver could return to pick up the shipments. NipponKoa sued Ozark for claims under the Carmack Amendment, breach of bailment and negligence. Ozark denied liability and asserted, among other affirmative defenses, that the freight was stolen before Ozark ever took possession of it, comparative negligence on the part of Toshiba and its security service, and failure to join indispensable parties. Ozark also moved to add a third-party claim against Toshiba for indemnification and a claim for the loss of its trailers. NipponKoa opposed the motion to add Toshiba as a third party defendant on the grounds that NipponKoa was already subrogated to Toshiba's rights and that Toshiba was a de facto party anyway. NipponKoa claimed that any claims that Ozark had against Toshiba were more appropriately asserted as a defense to the plaintiff's action, which Ozark had already done, and that Ozark's motion to add third-party claims against Toshiba was futile because the Carmack Amendment governed all rights and duties between motor carriers and shippers. The Court held that Rule 14 was not the proper basis on which to add Toshiba as a third-party defendant in order to assert Ozark's defenses. However, the Court went on to hold that under Rule 21, Ozark's claims against Toshiba, to the extent Ozark sought to recover for the damage or loss of its trailers, was in the nature of a compulsory counterclaim and under Rule 21 it had the discretion to add Toshiba as a party so as to complete the resolution of all matters in controversy. The court rejected NipponKoa's objections to the joinder of Toshiba as without merit and rejected NipponKoa's claim that the damages allegedly suffered by Ozark were for purely economic losses and therefore barred by the economic loss doctrine. The Court ultimately permitted Ozark to file a third-party complaint against Toshiba (as well as the security company) but added that "the claim against Toshiba shall not include claims more properly characterized as affirmative defenses to the claims asserted against Ozark by NipponKoa as Toshiba's subrogee."

2. Atlantic Mutual Insurance Company v. Napa Transportation, Inc., 2006 U.S. App. LEXIS 25539 (2d Cir. 2006).

The Second Circuit Court of Appeals affirmed the judgment of the District Court holding the defendant motor carrier liable for $94,743, representing the total loss of a shipment of Johnson & Johnson over-the-counter pharmaceuticals and other consumer products damaged by a fire during transportation. On appeal, the defendant carrier attempted, unsuccessfully, to have the District Court judgment overturned on the basis of an internal Johnson & Johnson risk management employee's email that suggested that the cargo may have been unaffected by the fire. The court rejected the argument, ruling that the stipulated facts in the District Court were sufficient to support the District Court's finding that the shipment was a total loss as a result of the fire.

3. Central Transport International, Inc. v. Alcoa, Inc., 2006 U.S. Dist. LEXIS 71788 (E.D. Mich. 2006).

Plaintiff Central Transport International ("CTI") was hired by defendant Alcoa to transport a gearbox from Messina, NY to Alcoa's customer in Turlock, CA. Although CTI claimed to have delivered the shipment on November 24, 2004, Alcoa claimed that it was a shipment of saw blades that were delivered in error. Alcoa ultimately filed a claim with CTI for $100,000 for the alleged value of the gearbox. In response, CTI commenced an action for declaratory judgment seeking a declaration that Alcoa's claim was limited to the actual value of the freight (allegedly $35,000) and that it was not liable for the loss because the freight was not lost while the gearbox was in CTI's possession. In its answer, Alcoa asserted three counterclaims: an allegation that CTI was liable under the Carmack Amendment, a conversion claim, and a breach of contract claim based on a contractual agreement between Alcoa and CTI. CTI then moved to dismiss Alcoa's state law counterclaims. The Court granted CTI's motion to dismiss based on Carmack Amendment preemption. In addition, the Court noted that the Alcoa/CTI contract contained no express waiver of the Carmack Amendment, as required by 49 U.S.C. § 14101(b)(1), and that its contract claim was therefore preempted. As to the conversion claim, the Court ruled that that was also preempted in the absence of Alcoa's presentation of any evidence of "true conversion."

B. Limitation Period

4. Hansen v. Wheaton Van Lines, Inc., 2006 U.S. Dist. LEXIS 81996 (S.D. Fla. 2006).

Plaintiff sued defendant Wheaton for damage to her household goods shipment transported from Tennessee to Florida. Plaintiff had moved several times previously and understood that the bill of lading was the contract governing the move. Wheaton picked up plaintiff's shipment from her home in Washington, DC and other articles from a storage facility and delivered the shipment on August 17, 2004. Plaintiff had purchased third party insurance for the move from Tennessee to Florida from Baker International Insurance Agency. Following delivery of her household goods in Florida, plaintiff submitted a claim to Baker for various lost or damaged articles, for which Baker paid her $1,655. Plaintiff then filed a claim with Wheaton alleging numerous lost or damages articles, but she never provided a monetary amount for the articles claimed in the lawsuit. The Court, granting Wheaton's motion for summary judgment due to plaintiff's failure to have filed a timely written claim, cited the bill of lading requirement for filing a timely claim and the FMCSA's claim filing rules. Noting that the plaintiff's claim lacked the degree of specificity required by the rules and governing case law, and the fact that plaintiff had assigned her claim to Baker, the Court granted Wheaton's motion for summary judgment. The Court also noted that at her deposition, plaintiff acknowledged receiving defendant's "conversion" letter indicating that goods stored in transit would convert to permanent local storage at the end of January 2004, following which Wheaton's liability terminated and the warehouseman's liability commenced.

5. M.I.S. Engineering v. U.S. Express Enterprises, 438 F. Supp. 2d 1056 (D. Neb. 2006).

Shipper contracted for transportation of equipment from Minnesota to Nebraska and alleged the equipment was damaged on arrival. The claim was denied. Three years later, the shipper filed suit in state court in Nebraska. The carrier removed the case to federal court and moved for summary judgment based on preemption and the statute of limitations. The Court held the negligence claim of the shipper was preempted. As to the statute of limitations, the Court held that the limitation period prescribed by §14706(e)(1) must be incorporated into the shipping documents in order to be effective. The Carmack Amendment does not prescribe a limitation but restricts carriers from fixing a period in which suit can be brought to a period shorter than two years. Therefore, the Court was forced to analyze what other statute of limitations might apply. In a federal question case where there is no federal statute of limitations, the court may borrow from the forum state's statutes of limitations, if not inconsistent with federal law or policy. After some discussion, the Court held that the two-year statute of limitations provided by state law for bringing a civil action for freight damage was consistent with federal law even though the two year statute of limitations under state law runs from the date of delivery, not the denial, of the claim. Therefore, the Court dismissed the case and granted summary judgment to the defendant carrier.

C. Limitation of Liability

6. Sompo Japan Insurance v. Union Pacific Railroad Company, 456 F. 3d 54 (2nd Cir. 2006).*

The district court's decision granted partial summary judgment in favor of UP and limited UP's liability to $500 per package or $16,000 for 32 tractors damaged in a train derailment on a Japan to Georgia shipment. UP relied on the ocean bills of lading for the limitation of liability and, following Kirby, the district court agreed because the shipment was transported under through bills of lading.

However, the Second Circuit reversed and held that the contractual provision extending COGSA's terms inland had to yield to Carmack and Staggers; that the ocean bill of lading provision which gave the shipper the opportunity to declare the full value of the cargo instead of the $500 per package limit did not satisfy Carmack since liability under COGSA is based on negligence and Carmack is grounded in strict liability. It remanded the case to the district court "to consider any other potential arguments that UP might raise that it complied with the requirement of Carmack and Staggers."

The case was remanded to Judge Casey and the parties are briefing the issue whether UP complied with Carmack and Staggers; if the contract between UP and MOL qualified as a § 10709 contract, and that Carmack rates did not have to be offered; and that although not required to provide Carmack rates in a § 10709 contract, UP did offer such rates in its Exempt Circular.

In UP's Opposition to Plaintiff's Renewed Motion for Partial Summary Judgment on the Remand, UP revisited Kirby and discussed the conflicting decision by the Eleventh Circuit in Altadis v. Sea Star Line et. al., 458 F. 3d 1288 (August 7, 2006), decided about one month after Sompo. Altadis did not refer to Sompo and plaintiff recently filed a Petition for Certiorari to the U.S. Supreme Court.

*See also, Piloting in Post-Kirby Waters: Navigating the Recent Circuit Split Over Whether the Carmack Amendment Applies to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading, by Raymond T. Waid, Tulane Law School, to be published (late Spring/early Summer 2007) in Volume 34 of the University of Denver Transportation Law Journal, and included as Agenda Item No. 52.

7. Diamond Transportation Group, Inc. v. Emerald Logistics Solutions, Inc., 2006 U.S. Dist. LEXIS 42918 (E.D. Penn. 2006).

The plaintiff motor carrier, Diamond, filed a preemptive action against the defendant freight forwarder, Emerald, seeking a declaration that its liability to Emerald for the theft of four shipments of Sony computers was limited to $100 per shipment pursuant to certain terms and conditions that Diamond had sent to Emerald at the outset of their relationship. Emerald counterclaimed for the full value of the stolen computers ($227,000) and asserted a number of state law claims including negligence, misrepresentation and warehouse liability. It was undisputed that the four shipments originated in California, were transported by truck to Philadelphia and delivered to Diamond, who was then to make the deliveries to the respective consignees. The parties had been doing business with each other for about six weeks (150 or so shipments), and before tendering each shipment to Diamond, Emerald would fax an alert Manifest and a delivery receipt for each shipment on which Emerald specified "DEC. Value: $0" and each shipment was identified as "EE" or "Electronic Equipment." Diamond received the four shipments from Emerald on a Friday, too late in the day to make deliveries to the consignees, so it held the shipments over the weekend intending to deliver them the following week. Since it was having problems with its fire/burglar alarm system on that Friday, Diamond shut the system off and, surprisingly, the shipments were stolen over the weekend. On Diamond's motion for partial summary judgment seeking to limit its liability to $100 per shipment, the Court granted the motion insofar as it sought to dismiss all of Emerald's state law counterclaims, but denied the motion insofar as it sought to limit Diamond's liability to $100 per shipment, finding that it was a question of fact for trial as to whether Diamond's $100 per shipment limitation was reasonable under 49 U.S.C.

§ 14706(c)(1)(A). The Court denied Diamond's subsequent motion for reconsideration of the latter ruling on the grounds that the reasonableness of a limitation was a question of fact for trial. See 2006 U.S. Dist. LEXIS 49113.

8. Atkins Machinery Inc., v. C.H. Powell Company, Inc., 2006 U.S. Dist. LEXIS 63624 (D. S.C. 2006).

One of the defendants, Cooper, a stevedoring company, moved for partial summary judgment to limit its liability to plaintiff Atkins based on the $500 per package limitation contained in the standard ocean bill of lading of American President Lines ("APL") on a shipment of textile machinery during transportation from Atkins' facility in Landis, North Carolina to the consignee in Bangkok, Thailand. The freight forwarder, Powell, made the arrangements for the transportation of the shipment from plaintiff's facility to the Port of Charleston, where it arrived in good condition. The machinery was damaged while Cooper was attempting to load the container onto the vessel. The damaged container was not shipped to Thailand although other undamaged containers were shipped pursuant to the bill of lading of another ocean carrier. In denying Cooper's motion for partial summary judgment, the Court distinguished this case from the holding in Caterpillar Overseas S.A. v. Marine Transport, Inc., 900 F.2d 714 (4th Cir. 1990) and ruled that Cooper failed to make the requisite showing that the parties intended that the contract of carriage would be that as stated in APL's bill of lading. The Court also distinguished the holding in Norfolk Southern Railroad v. Kirby, 543 U.S. 14 (2004) and ruled that Cooper had failed to show that it was the parties' intention that the transportation was to be controlled by the APL bill of lading and not another bill of lading such as the one issued for the transportation of the undamaged container.

9. Marisa v. M/V CMA CGM LA TOUR and P&O Nedlloyd Ltd., 2006 U.S. Dist. LEXIS 62222 (S.D. N.Y. 2006).

Plaintiff sued defendant steamship line for $120,000 in alleged water damage to her household goods shipment sustained during transportation from England to Chicago, Illinois. Plaintiff claimed that her household goods were consolidated into cartons or otherwise protectively wrapped before being loaded into the container. The shipment was identified on the defendant's ocean bill of lading as "1 x 20 FOOT GP CONTAINER SAID TO CONTAIN 74 ITEMS, HOUSEHOLD GOODS." Defendant Nedlloyd filed a motion for summary judgment seeking to limit its liability to $500 pursuant to COGSA, 46 U.S.C. § 1304 (5). The district court identified and analyzed the principles to determine whether a shipping container should be treated as the relevant "package" for purposes of the $500 COGSA limitation and noted that the Second Circuit has refused to treat containers as COGSA packages "absent a clear agreement between the parties to that effect, at least so long as [the shipping containers] contents and the number of packages or units are disclosed." The court noted that goods placed in containers and described as not separately packaged on the bill of lading will be classified as "goods not shipped in packages" under Section 4(5) of COGSA and the $500 limitation will be applied per the "customary freight unit." In applying this Second Circuit precedent, the Court construed Nedlloyd's bill of lading as ambiguous since "1 x 20' GP Container" and "74 items household goods" both appeared below the heading entitled "number and kind of packages" and the latter descriptor could refer to the number of packages. The Court also rejected defendant's argument that the terms "items" and "household goods" do not suggest packaging at all, holding that "as a matter of common sense, it is difficult to believe that any carrier would think that '74 items household goods' referred to unpackaged goods." Under the circumstances, and because of the bill of lading's ambiguity, the Court concluded that defendant's motion should be denied.

10. Polesuk v. CBR Systems, Inc., 2006 U.S. Dist. LEXIS 71098 (S.D. N.Y. 2006).

This is an unusual Carmack Amendment case arising out of a shipment of placenta cord blood destroyed during interstate transportation. The Polesuks were expecting the birth of their child when they saw an advertisement by defendant CBR, a clinical-state biotechnology company in the business of collecting and preserving umbilical cord blood. Umbilical cord blood contains neonatal stem cells used to treat disease, and CBR's service was to help the family collect and preserve the cord blood. Following the birth of their child, the Polesuks contacted CBR to transport their infant's cord blood from New York to Arizona. CBR then arranged for defendant Quick to transport the shipment to an American airlines flight bound for Arizona. At the time of shipment, plaintiff Jonathan Polesuk signed a bill of lading form which provided for "basic $200 insurance" with an area allowing for the shipper to declare a monetary value for the shipment, which Polesuk left blank. While en route to Arizona, the shipment was destroyed when it fell from a luggage cart at an airport in Texas and was subsequently run over by a truck. The plaintiffs filed suit against Quick, CBR and American Airlines seeking damages of at least $2 million. American Airlines subsequently settled out of the lawsuit. The present decision addressed Quick's motion to dismiss plaintiff's claims on grounds of Carmack Amendment preemption and to limit its liability to $200 pursuant to the bill of lading. Quick also sought dismissal of CBR's cross claims for indemnification, and CBR moved to dismiss plaintiff's claim under the theory that it was an "implied carrier" or a "third-party beneficiary" of Quick's bill of lading.

In addressing Quick's preemption argument, the Court first determined that cord blood was "property," notwithstanding its lack of economic value. The Court observed that "property" was intended to refer generally to any interstate shipment of a tangible item under a bill of lading or receipt, as opposed to denoting a particular type or category of property. The Court cited a number of cases construing the definition of "property," considered the exemptions from Carmack Amendment jurisdiction expressly identified at 49 U.S.C. § 13506(a) and concluded that the cord blood did in fact constitute "property" for purposes of the Carmack Amendment. The Court rejected the plaintiff's argument that the Carmack Amendment was inapplicable because they were not "shippers" and held that the lack of contractual privity did not render the Carmack Amendment inapplicable. The Court then granted Quick's motion to dismiss on grounds of Carmack Amendment preemption with leave to the plaintiffs to amend to allege a Carmack Amendment cause of action.

As to Quick's motion for summary judgment seeking to limit its liability to $200, the Court recognized the recent reiteration, in Emerson Electric Supply Co. v. Estes Express Lines Corp., 451 F. 3d 179 (3rd Cir. 2006), of the limitation criteria and observed that the released value doctrine did not require that the alternative liability limit offered by the carrier be the full value rate. However, the Court denied Quick's motion on the $200 limitation, finding there were disputed factual issues pertaining to whether Quick had satisfied the legal prerequisites necessary to entitle it to limit its liability. As to CBR's motion seeking to be a third party beneficiary of Quick's bill of lading, the Court observed that the Carmack Amendment applies only to carriers and freight forwarders and there was no basis on which to find that CBR was an intended third-party beneficiary.

11. Mitsui Marine & Fire Insurance Company Ltd. v. Hanjin Shipping Co. Ltd., 279 Ga. App. 689; 632 S.E. 2d 467 (2006 Ga.).

In this subrogation action, plaintiff Mitsui sought to recover $267,710 it had paid to its insured, Toray International, who had shipped 330 bobbins of acrylic yarn from Japan to Decatur, Alabama, Tauray engaged a freight forwarder to handle the arrangements and the freight forwarder booked the shipment on defendant Hanjin. Hanjin, in turn, hired Norfolk Southern to handle the inland rail lag of the journey from Savannah to Alabama. After delivery, Tauray claimed that 89 of the pallets, containing 267 bobbins, were damaged due to humping. The bobbins had been packaged on steel pallets holding three bobbins each. Hanjin's bill of lading reflected its receipt of five intermodal containers, the number of pallets received, and the number of bobbins in each container. Both Hanjin and Norfolk Southern filed motions for partial summary judgment, contending their liability was limited to $500 per package and that the "package" constituted the five intermodal containers. On appeal, the Court of Appeals of Georgia first addressed whether Hanjin and Norfolk Southern should both benefit from the $500 per package limitation. The Court followed the Supreme Court's decision in Kirby v. Norfolk Southern and ruled that the Hanjin bill of lading constituted a maritime contract, that the shipper's freight forwarder intermediary bound the shipper to Hanjin's bill of lading terms and conditions, even though Mitsui's insured was not a party to the bills of lading, and that Norfolk Southern was entitled to the protection of Hanjin's bill of lading as in Kirby. On the issue of defining and identifying what constituted a "package" under the five bills of lading, the Court of Appeals affirmed the trial court's finding that rejected the defendant's argument that the intermodal containers constituted the "package" and affirmed its finding that a "package" consisted of each pallet onto which the bobbins had been packed. The Court relied on the fact that the shipper had prepared the bobbins for transportation by securing them to specially made steel pallets and on the Eleventh Circuit's rules for interpreting bills of lading.

12. Shielding International, Inc. v. Harbor Freight Lines, Inc., 2003 U.S. Dist. LEXIS 54121 (D. Ore. 2006).

Shipper tendered a shipment of protective garments (to guard against radiation exposure) for transportation from Oregon to Florida with the bill of lading identifying the freight as Class 55. The carrier admitted liability for damage to the shipment but asserted a liability limitation of $2.00 per pound contained in the carrier's tariff. Shipper was apparently presented with a pricing agreement, but had never signed the agreement and there was no choice of rates for different liability levels under the pricing agreement. The Court held that the carrier had failed to limit its liability pursuant to the four-part Hughes test. Merely having procedures in place to provide the choice to the shipper was insufficient without bringing those procedures to the shipper's attention. The Court also rejected the argument that the established course of dealings between the shipper and carrier was an adequate basis on which to enforce the limitation, but offered very little analysis of what course of dealings might have existed.

D. Preemption

13. Intermed Ultrasound Services, Inc. v. FedEx Freight, 2006 U.S. Dist. LEXIS 86216 (D. Fla. 2006).

Plaintiff hired defendant to transport medical equipment from Massachusetts to Florida, and the shipment was damaged in transit. Plaintiff filed suit in state court and defendant removed the case to federal court under 28 U.S.C. §§ 1337 and 1441. Plaintiff then moved to remand and defendant moved to dismiss. In granting plaintiff's motion to remand, the Court bought into plaintiff's argument that removal "would improperly convert its state-common law claims (breach of contract, breach of duty of care and negligence) into federal claims. Such conversion occurs only under the 'complete preemption' doctrine." The court ruled that the Carmack Amendment falls "within the ambit of the 'ordinary preemption' doctrine" which was not a proper basis on which to remove a case.

14. Lee v. Atlas Van Lines, 2006 U.S. Dist. LEXIS 77940 (D. Ariz. 2006).

Court granted defendant's motion to dismiss on the basis of Carmack Amendment preemption of state law claims in action by household goods shipper. Leave to amend granted. The Court, however, denied the motion to dismiss Atlas' agent "because plaintiff has yet to assert a federal claim."

15. MidAmerican Energy Company v. Start Enterprises, Inc., 437 F. Supp. 2d 969 (S.D. Iowa 2006).

Shipper contracted with carrier to move an EMC Clarion CX700 storage array from Nebraska to Iowa. While moving the machine, it was dropped to the floor, causing approximately $210,000 of damage. Prior to beginning work on the project, the carrier had entered into a personal services contract which required it to disassemble, pack, transport, and reassemble the machine. The contract contained no waiver of the Carmack Amendment, pursuant to 49 U.S.C. § 14101(b). Accordingly, the Carmack Amendment preempted all state law claims. The Court held, as to the existing claims, "[t]hrough the magic of 'jurisdictional alchemy' state law claims morph into federal Carmack Amendment claim[s]." The Court did, however, allow the plaintiff leave to file an amended complaint setting forth a Carmack cause of action.

E. Insurance

16. Airborne Freight Corporation v. St. Paul Fire & Marine Insurance Company, 2006 U.S. App. LEXIS 22261 (9th Cir. 2006).

This case involved an insurance coverage dispute between the carrier, Airborne, and its insurer, St. Paul. Airborne sought indemnification from St. Paul after it settled lawsuits by two shippers, one for $255,000 and one for $25,000, involving thousands of underlying loss and damage claims by the respective shippers. St. Paul had denied coverage on two bases: (1) because the shipments had been transferred from Airborne to the U.S. Postal Service, coverage allegedly was excluded under the "care, custody and control" provision in St. Paul's policy and (2) the $2,500 deductible applied on a "per-package basis." The district court granted St. Paul's motion for summary judgment, but the Ninth Circuit reversed, finding that the term "care, custody and control" was subject to the interpretation and determination by a reasonable jury and that Airborne remained liable while the USPS was in physical of a shipment, just as it would be liable if it had delivered a shipment to another carrier for delivery. The Ninth Circuit also ruled that the term "claim" in the policy was subject to ordinary interpretation and, applying Washington law, agreed with the District Court that the term "claim" would be applied to the aggregate amount of each lawsuit and not on a per-package basis.

F. Damages

17. American Pacific Enterprises, LLC v. Celadon Trucking Services, Inc., 2006 U.S. Dist. LEXIS 55236 (S.D. N.Y. 2006).

American Pacific (shipper) purchased approximately 3,000 cartons of cotton sheets at a price of roughly $88,000. The shipper contracted with Celadon (carrier) to transport the goods from Laredo, Texas to Grove City, Ohio. During the shipment, the trailer overturned and caught fire. The fire was extinguished, but the cargo sustained smoke and water damage. Shipper retained an inspector who determined that the shipment had been damaged too extensively to distribute to retail outlets. Shipper then sought competitive bids for salvage. Carrier was invited to participate in the process but did not offer any objection or other recommendations. Prior to the sale, only 2,400 cartons of sheets could be located. Carrier claimed that 140 of these cartons were actually delivered to another shipper customer. Shipper sought $72,000 in damages, which was the invoice value of $88,000 minus the salvage sale of $19,000, plus the fees for the salvage.

Carrier raised no defenses as to liability. As to damages, carrier claimed that shipper had failed to mitigate. The burden to prove mitigation rests on the carrier. The Court dismissed the carrier's arguments that any of the missing sheets were delivered to another shipper customer because carrier had done nothing to object to the salvage procedure. Summary judgment was granted in favor of the shipper for the amount requested.

G. Jurisdiction/Venue/Remand

18. Regal-Beloit Corporation v. Kawasaki Kisen Kaisha, Ltd., 2006 U.S. Dist. LEXIS 85993 (C.D. Calif. 2006).

Four plaintiffs sought damages from Union Pacific, "K" Line and others for cargo damage following a derailment in Tyrone, Oklahoma. Judge Dale Fischer granted "K" Line's motion to dismiss the cases based on the forum selection clause in "K" Line's through bill of lading specifying that suits are properly filed only in Tokyo, Japan. Union Pacific's joinder in that motion was also granted and the four cargo cases filed by plaintiffs were dismissed.

An earlier order by Judge Fischer denied Union Pacific's alternative motion to transfer the cases to the Southern District of New York (where eight related cases were already proceeding). The transfer motion was denied based on the Court's bizarre finding that although 49 U.S.C. section 10709 governed the contract between Union Pacific and "K" Line (which takes all such contracts entirely outside of the Carmack Amendment's purview) there were yet "non-contract Carmack" claims surviving the section 10709 contract! Based on that incorrect premise, the judge ruled that the Carmack Amendment's venue provisions applied to the case. She denied the motion to transfer since the cargo neither originated in, was bound for, nor was damaged in New York, as required for proper venue under the Carmack Amendment's venue provisions. Union Pacific filed a motion for reconsideration of the denial of the transfer motion advising the court of the inescapable conclusion that the Carmack Amendment preempts all claims including torts and that therefore, had this been a Carmack Amendment case, there could not have been a "non-contract Carmack claim" and that, by the way, and with all due respect, there is no such thing as a "non-contract Carmack claim."

When considering the motion to dismiss based on the forum selection, it is believed that Judge Fischer must have read and taken to heart Union Pacific's motion for reconsideration since, in dismissing the four plaintiffs' consolidated cases, she implicitly reversed herself by stating that the Carmack Amendment does not govern the cases since the contract between Union Pacific and "K" Line was made under 49 U.S.C. section 10709. She further ruled that since the goods moved under "K" Line's through bill of lading, that bill of lading (with its Tokyo forum selection clause) governs. Although the Sompo case was briefed by counsel opposing dismissal, Judge Fischer did not refer to it in her order but clearly did not follow it - a result which bodes well for through bill application in the Ninth Circuit.

H. Freight Charges

19. Canadian National Railway v. Unistar Plastics LLC, 2006 U.S. Dist. LEXIS 59524 (E.D. La. 2006).

Plaintiff, Canadian National Railway, sued defendant, Unistar Plastics, to recover $123,000 in demurrage charges on rail shipments delivered to Unistar pursuant to Canadian National's tariffs circulars and contracts. Unistar moved to dismiss the action under Rules 12(b)(1) and 12(b)(6), claiming the Court lacked subject matter jurisdiction in that a consignee who is not an agent cannot be liable for demurrage charges under 49 U.S.C. § 10743(a) and that the Court was without subject matter jurisdiction. The Court noted it derived jurisdiction from 28 U.S.C. § 1337(a) and 49 U.S.C. § 10743(a), as well as Supreme Court cases holding that where a common carrier sued to recover under its duly filed tariff, federal question jurisdiction existed over the claim. The Court also rejected Unistar's allegation that § 10743(a) did not apply because it was a consignee who was not an agent and had no contractual relationship with the plaintiff. Noting that "other established case law supports that liability for demurrage charges may arise if a party is 'a consignee or if it contractually assumed liability for the demurrage charges,'" and that plaintiff had alleged defendant was "liable because it is a consignee subject to plaintiff's published tariffs and because a contractual relationship" existed, the Court denied the defendant's motion to dismiss.

20. Patriot Logistics v. Contex Shipping (NW), Inc., 2006 U.S. Dist. LEXIS 72671 (N.D. Ohio 2006).

Patriot, a broker, arranged to transport shipments for defendant Contex Shipping. They were transported and delivered to defendant Robbins Company as consignee. After Patriot was not paid for its services, it sued both the shipper, Contex, and the consignee, Robbins. Robbins moved to dismiss under Rule 12(b)(6) for failure to state a claim on the basis that 49 U.S.C. § 13706 does not permit recovery for transportation brokers against the consignee/beneficial owner, citing to S&B Transportation, Inc. v. Allou Distributors, Inc., 41 F. Supp. 2d 388 (E.D. N.Y. 1999) and Servicemaster v. FTR Transport, Inc., 868 F. Supp. 90 (E.D. Pa. 1994), which held that contracts between a broker and a shipper are not subject to federal regulation. The court denied Robbins' motion on the basis that it did not have enough information regarding the relevant terms and obligations of the parties to find that plaintiff Patriot might not have been acting as a motor carrier, in which case it might be entitled to recover under 49 U.S.C. § 13706 if Patriot accepted and legally bound itself to transport the goods.

J. Miscellaneous

21. Frey v. Gainey Transportation Services, Inc., 2006 U.S. Dist. LEXIS 59316 (N.D. Ga. 2006). (spoliation)

This is a decision in a tort action which has interesting ramifications for anyone defending a motor carrier in any civil lawsuit. Plaintiff, Frey filed suit for injuries she suffered in a November 10, 2003 accident. Ten days after the accident Frey's lawyer sent a letter to defendant Gainey demanding that Gainey preserve a constellation of records ranging from driver's trip reports to Gainey's "QualComm" satellite tracking data. Gainey turned the letter over to its insurance company, and its witness testified that he did not believe the accident was serious because the plaintiff got out of her vehicle at the scene and was yelling at Gainey's driver. Plaintiff filed a motion to strike Gainey's answer or in the alternative provide a jury instruction as a sanction due to Gainey's failure to have preserved the documents and electronic records requested in plaintiff's counsel's early letter. The Court denied plaintiff's motion, noting that she had not suffered any prejudice from Gainey's failure to preserve the QualComm documentation. The Court identified five factors to be considered in determining whether spoliation has occurred: prejudice to the non-spoliating party, whether the prejudice is curable, the practical importance of the evidence, whether the spoliator acted in good or bad faith and the potential for abuse of expert testimony. The Court noted plaintiff's admission that the QualComm satellite tracking data was not crucial for her claims and was irrelevant as to the allegedly unsafe practices of Gainey's other truck drivers. Interestingly, the Court also noted that plaintiff's counsel "served the equivalent of interrogatories and request for production of document on Gainey 10 days after the accident and before any lawsuit had been initiated. "Such an extensive request for materials certainly would lend itself to an effort on any plaintiff's part to sandbag a defendant in the event that any of those materials were not preserved. The legal system does not permit discovery to begin in lawsuit until after a party has been served with a complaint and answered, so it is difficult to allow a potential plaintiff to make an end run around the Federal Rules of Civil Procedure by filing a preemptive 'spoliation' letter."

22. Udani v. Benny's Moving & Storage, Inc., 2006 U.S. Dist. LEXIS 44614 (E.D. Wis. 2006) (Attorney's fees)

The dispute in this case concerned the amount of attorney's fees to which plaintiff household good shippers would be entitled on a loss and damage claim arising from a Massachusetts to Wisconsin move. Although plaintiffs had signed a bill of lading addendum releasing their goods to a value of 60¢ per pound per article, the defendant HHG carrier had otherwise failed to comply with virtually all of the consumer-friendly household goods regulations at 49 C.F.R. § 375, and had drastically increased the freight charges (which plaintiffs paid) to boot. Plaintiffs' initial loss and damage claim was for $17,000, which grew over time to exceed $30,000. At 60¢ per pound per article, plaintiffs would have been entitled to $1,900. Plaintiffs' initial attorney's fee demand was for $17,000 and that, too, continued to increase as negotiations and time wore on. The parties then stipulated that plaintiffs' actual damages were $6,500, with only the amount of plaintiffs' attorney's fees to be determined by the Court. Of significance was the fact that no discovery of any kind was served or conducted in the case, with virtually all of the legal work consumed by negotiations and wrangling over damages and the amount of plaintiffs' attorney's fees. Plaintiffs were seeking over $30,000 in attorney's fees by the time of summary judgment and defendant maintained that the most it should be liable for was $10,301 in attorney's fees. Ultimately, the Court concluded, based on its determination of the various lodestar factors, that plaintiffs should be awarded $16,307 in attorney's fees, plus costs, in addition to their $6,500 in damages,

23. Synfuel Technologies, Inc. v. DHL Express (USA), Inc., 463 F. 3d 646 (7th Cir. 2006.) (Class Action)

Plaintiff filed a class action claiming that DHL's practice of charging customers a $5 per pound default rate if they failed to identify the weight of a package violated federal common law. The case was then settled to compensate class members with a small cash payment on prepaid shipments, with class counsel to receive over $600,000 in attorney's fees. Several class members appealed. The first issue addressed was whether federal subject matter jurisdiction existed for the class. The District Court had entertained argument by class counsel that jurisdiction was appropriate under federal question jurisdiction 28 U.S.C. § 1331 because of the "federal common law." The Appellate Court held this was wrong and that federal jurisdiction could not be based on the Carmack Amendment as none of the class members claimed loss or damage to goods. The Court also rejected an attempt to argue federal common law over the carrier's freight billing practices. The Court did conclude that the parties were completely diverse and concluded that at least one of the class members met the jurisdictional minimum. The Court did not address the named class member's meeting the jurisdictional amount in controversy through the addition of numerous small claims for damage and ultimately reversed the lower court's approval of the settlement because it had failed to evaluate the fairness to the class members.

24. APL Co. PTE Ltd. v. UK Aerosols LTD, Inc., 2006 U.S. Dist. LEXIS 70704 (N.D. Cal. 2006). (Carrier recovers cleanup expenses)

APL sued UK Aerosols and Kamdar for cleanup expenses it incurred as a result of a "leaking, dangerous and hazardous" discharge of cargo (hairspray and mousse) which occurred sometime during transportation from Istanbul to California. APL spent $700,000 to clean up and dispose of the sticky mess. APL alleged that the defendants, who had all accepted and endorsed the bill of lading, were liable under its terms. Clause 13 of the BOL stated that the Merchant must indemnify the Carrier for inadequate descriptions or checking of the particulars relating to the cargo. Clause 19 of the BOL stated that the "Merchant" must obtain the express consent of the carrier to carry hazardous goods and absent such consent, the carrier may dispose of the cargo with impunity and the Merchant must indemnify the Carrier for the same. The Court held that COGSA does not prevent the imposition of strict liability under Clause 13 against the Merchant unless the Merchant also qualifies as a "shipper." It also held that COGSA did not preclude the enforcement of Clause 19 relating to hazardous cargo unless the carrier itself had knowledge of the hazardous nature of the cargo. Finally, the Court held that the negligence claim failed as a matter of law because, under maritime law, a plaintiff cannot maintain a tort claim where the basis of that tort is the very conduct the contract proscribes.

Removal of State Court to Federal Court

By James A. Wescoe, Esq. – Rawle & Henderson, LLP – Philadelphia, PA

The Removal of state court litigation to federal court provides significant procedural and substantive advantages to the removing party, particularly in cases arising from the interstate transport of goods. However, since there is a strong presumption against removal, defendants must be aware of potential obstacles which preclude removal. This is particularly true in freight claim cases, which typically involve multiple defendants conducting business in different jurisdictions, each with different procedural rules regarding service and notice. Unlike diversity cases, where it is usually clear whether a case is eligible for federal jurisdiction on the face of the Complaint, removal in freight claim cases may be affected by a variety of less-than-obvious factors, including the consent of codefendants and rules regarding service in a particular jurisdiction. This article briefly addresses these issues and recent rulings which may affect removal strategies.

1. Removal in Cases with Multiple (non-carrier) defendants

In general, all defendants must join in the notice of removal. 28 U.S.C. 1446(b). Since the right of removal is jointly held by all of the defendants, the failure of a single defendant to join in the notice generally precludes removal. In the majority of federal circuits, the "first served rule" means that service upon the first of multiple defendants starts the § 1446(b) thirty-day period for removal. If all served defendants do not join the notice of removal within that thirty-day period, no defendants served after the first-served, regardless of when they are served, may remove the case to federal court. This is the case even if the last-served defendant obtains the consent of all other previously served defendants and files a notice of removal within thirty days of its service. See, e.g., Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254 (5th Cir. 1988); Brown v. Demco, Inc. 792 F.2d 478 (5th Cir. 1986);

Recently however, a trend has emerged which permits each defendant thirty days to remove after being served regardless of whether or when the previously served defendants filed removal notices. See, e.g., Marano Enterprises of Kansas v. Z-Teca Restaurants, 254 F.3d 753 (8th Cir. 2001); Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527 (6th Cir. 1999), cert. denied, 528 U.S. 1076 (2000). Under the emerging "minority" rule, the last-served defendant may remove a case even if served well after the earlier-served defendants, so long as all defendants consent. How much time can pass before removal in such a manner is disallowed? In Brown v. Demco, the court ruled that a defendant served four years after the complaint was filed could not, even with the consent of the other defendants, remove the case. The Brown court ruled that the four year period provided defendants a "second opportunity to forum shop" and denied removal. 792 F. 2d at 482. However, the Marano court, in a footnote, disagreed and stated that "the unfairness is arguably to the last-served defendant who is not allowed thirty days to remove the case, and not to the plaintiff." 184 F.3d at 755. A review of similar cases suggests that the courts are shifting the burden back to plaintiffs to ensure proper service upon all defendants and, in cases where service is delayed, are granting exceptions to the thirty day period for removal.

The general rule is that if the notice of removal does not contain the consent of all defendants, it is defective unless it fails to explain the absence or non-consent of a codefendant. However, there are a few exceptions to this rule, such as nominal parties who are neither necessary nor indispensable to the case. Of course, the determination of whether a party is nominal is subject to the discretion of the trial court and is very fact sensitive. Fraudulently joined parties or parties named in an effort to defeat federal jurisdiction, are also exempt from the unanimous consent requirement.

In addition, the consent of all defendants is not required where removal is based on the presence of a separate and independent claim, pursuant to 28 U.S.C. §1441(c). In those situations, only those defendants who are defendants to the removable claim must join in the removal notice. In other words, if a claim giving rise to federal jurisdiction is applicable to only one of several defendants, the single defendant may assert this rule and remove the case without the consent of the other defendants. The majority of cases which address this issue concern the appropriateness of removal by a sole defendant pursuant to a statute which gives rise to a federal claim. These include claims under federal housing and financial laws.

We recently attempted to remove a case under this theory by contending that 49 U.S.C. § 14706 provided such authority. In that case, we represented a motor carrier which was sued in state court with a "packing" store and a storage facility. In the Complaint, plaintiffs claimed that an antique light fixture was damaged at some point after they dropped it off at a packing store in Pennsylvania. The fixture was secured inside several large crates at the store in Pennsylvania and tendered to the carrier. The carrier delivered the crates to a storage facility in Colorado. The storage company then delivered the crates intrastate to plaintiffs' new home in Colorado.

Plaintiffs filed a Complaint against the packer, carrier and storage company in Pennsylvania state court, wherein they demanded damages of more than $25,000. We removed the case to the U.S. District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1445(b) because the loss arose from a state court action against a common carrier to recover damages for delay, loss or injury of a shipment and the amount in controversy exceeded $10,000, exclusive of interest and costs, under a single bill of lading.

The co-defendants (packer and storage company) refused to consent to removal. We nevertheless filed the Notice of Removal, wherein we contended that the consent of the co-defendants was not required because plaintiffs' claims against the packer and storage company were not independently within federal question jurisdiction. We argued that plaintiffs' only federal cause of action, based on 49 U.S.C. § 14706, was against the defendant motor carrier, since only it transported the fixture in interstate commerce. In support of our position, we cited case law in other federal circuits. See, e.g., Moscovitch v. Danbury Hospital, 25 F.Supp.2d 74 (D.Conn. 1998); Parisi v. Rochester Cardiothoracic Assocs., P.C. 1992 WL 47051 (W.D.N.Y. June 29, 1992); Constantini v. Guardian Life Insurance Co., 859 F. Supp 89, 90 (S.D.N.Y. 1994). The court disagreed with our position and ruled that since the loss arose from a "generally contiguous shipment," the shipper's claims against the motor carrier were not sufficiently separate and independent.
Thus, while there are indications that the presumption against removal in cases with multiple defendants may be easing, motor carriers sued with other defendants will most likely find it challenging to remove such cases. Prompt action upon receipt or notice of a lawsuit with multiple defendants is required to determine the timeliness and validity of service, the legitimacy of the other defendants, and their respective positions regarding removal. Without this information, attempts to remove may fail, with considerable cost to the client.

2. Attorney's Fees

In the recent case of Martin v. Franklin Capital Corp., 126 S.Ct. 704 USLW 4034 (2005), the U.S. Supreme Court issued a ruling which was very favorable to carriers attempting to remove a case to federal court. In this case, plaintiffs filed a class action against a finance company and its insurer, wherein they alleged that the finance company overcharged consumers for required insurance coverage. Defendants removed the case to the U.S. District Court for the District of New Mexico. The District Court initially denied plaintiffs' motion to remand and granted defendants' motion to dismiss. Plaintiffs appealed and the U.S. Court of Appeals for the Tenth Circuit reversed and remanded with directions that the case be returned to state court. Plaintiffs sought attorney's fees incurred as a result of the removal. On remand, the District Court denied plaintiff's motion for attorney's fees, and plaintiffs appealed.

The U.S. Court of Appeals for the Tenth Circuit affirmed. On Certiorari, the U.S. Supreme Court affirmed and held that 28 U.S.C. § 1447(c) does not create a strong presumption in favor of attorney fee awards. On the contrary, the Court ruled that attorney fee awards on remand are appropriate only if the removing party had no objectively reasonable basis for removal.

Defendants' removal was based on case law which suggested that federal jurisdiction thresholds for the amount in controversy could be met if plaintiffs' compensatory, punitive and attorney fee claims were aggregated. However, after defendants removed, the cases upon which they relied were overturned.

The Supreme Court's ruling clarified a split in the federal circuits regarding the award of attorney fees in remanded cases. The ruling abrogated cases from the Seventh Circuit and the Ninth Circuit, which held that plaintiff is presumptively entitled to attorney's fees on remand and that fees may be awarded even if the defendant's position on removal is fairly supportable. The Supreme Court rejected this position and adopted a literal reading of 28 U.S.C. § 1447(c). In other words, the Supreme Court ruled that attorney's fees "may" be awarded in certain cases, and it rejected the Seventh and Ninth Circuit's holdings that attorney's fees "shall" be awarded.

The Supreme Court rejected a narrow interpretation of 28 U.S.C. §1447(c), as presented by the Solicitor General's office. It refused to limit the award of attorney's fees only when the unsuccessful party's position was found frivolous, unreasonable or without foundation. Rather, it adopted a "just costs" standard, which it articulated as follows:

"The appropriate test for awarding fees under § 1447(c) should recognize Congress' desire to deter removals intended to prolong litigation and impose costs on the opposing party, while not undermining Congress' basis decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied."

In other words, attorney's fees may be awarded when the facts reveal that the removing party had no objectively reasonable basis for removal.

The case is significant because it removes the threat of attorney's fees in cases where the grounds for removal may be subject to reasonably differing legal interpretations. As the Supreme Court stated, if fees were "automatic," defendants "might choose to exercise this right [to remove] only in cases where the right to remove was obvious." This is particularly significant in cases involving uncertain and nebulous damage claims, and in cases where plaintiff's Complaint includes punitive damage claims. In these cases, the amount in controversy may be uncertain, but a reasonable objective basis for removal will protect the removing party from an award of attorney's fees if the case is remanded in light of the Supreme Court's ruling. Moreover, in light of the Circuit Court's split on the "complete preemption" doctrine as a basis for removal, the ruling should protect removing defendants from "automatic" awards of attorney's fees if their cases are remanded.

3. Notice-related Issues

In the Commonwealth of Pennsylvania, a plaintiff may preserve his cause of action by filing a Writ of Summons within the time provided by the appropriate statute of limitations. In most cases, the Writ of Summons provides no information about the nature of the claim or the amount of damages sought.

The U.S. Court of Appeals for the Third Circuit recently considered whether service of a Writ of Summons provides sufficient notice to the removing defendant to start the 30-day removal period. In Sikirica v. Nationwide Insurance Co., 416 F.3d 214 (3rd Cir. 2005), the Court ruled that the 30-day period under 28 U.S.C. § 1446(b) did not begin when defendant received the Writ of Summons, regardless of whether the Writ contained sufficient notice of federal diversity jurisdiction. The Court rejected plaintiff's argument that the second paragraph of 28 U.S.C. § 1446(b), which addresses when removal may be appropriate beyond the initial 30-day period, applies to a Writ of Summons.

The Court of Appeals relied upon the U.S. Supreme Court's ruling in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S.Ct. 1322 (1999), wherein the Court ruled:

"...a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service."

526 U.S. at 347-48. Relying upon Murphy, the Third Circuit stated:

"We therefore hold that Murphy Bros. implicitly overruled Foster, and a writ of summons alone can no longer be the 'initial pleading' that triggers the 30-day period for removal under the first paragraph of 28 U.S.C. §1446(b)."

The Supreme Court's ruling in Murphy strongly suggests that defense counsel's receipt of a "courtesy copy" of the Complaint, with or without a demand letter attached thereto, does not provide sufficient notice to trigger the 30-day removal period. However, post-Murphy rulings have narrowly interpreted its holding and have ruled that the case applies only to situations where a Complaint is sent without a formal Summons. For example, the U.S. Court of Appeals for the Second Circuit has ruled that "initial pleading" does not necessarily mean "complaint" so 28 U.S.C. §1446(b) does not require the receipt of a Complaint to trigger the removal period. Whitaker v. Am. Telecasting, Inc., 261 F. 3d 196 (2d Cir. 2001). In Whitaker, the appellate court ruled that a Summons with notice "may serve as an initial pleading under 1446(b)." Id., at 205. A review of decisions in other federal Circuits reveals a patchwork of rulings regarding the sufficiency of a particular form of pleading which provides notice. Thus, while the U.S. Supreme Court has reemphasized the singular importance and significance of formal service for the purposes of establishing a standard of "timeliness," it appears that the federal circuits will continue to create exceptions to Murphy's seemingly strict rules regarding service. Knowledge of these exceptions is necessary in order to file timely removals and avoid costly practice related to remand motions.

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Temperature, Fire, Theft,
Shortage & Overages & Time sensitive freight

Our services include:

Inspections
Cargo Damage Assessments
Salvage Sales
Inventory
Reclamation
Storage

Trust in CSC for all your salvage needs:

Toll Free: 800-654-7629 **Phone: 317-781-9014** **Fax: 317-781-1714**

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: ____

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)

Please enclose payment with application form.

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

Please send completed application and payment to:

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

William D. Bierman, Executive Director

Dues $450.00 per year per corporation

Your Password to our website ____________________

Date: ______________ Signature of Applicant: ______________________________