In Transit

Transportation Loss Prevention & Security Association

February 2008

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Application for Membership *Back Cover*

8th Joint Conference of the TLP & SA and the TLC in

San Diego, California

April 21 – 23, 2008

at the

Catamaran Resort Hotel

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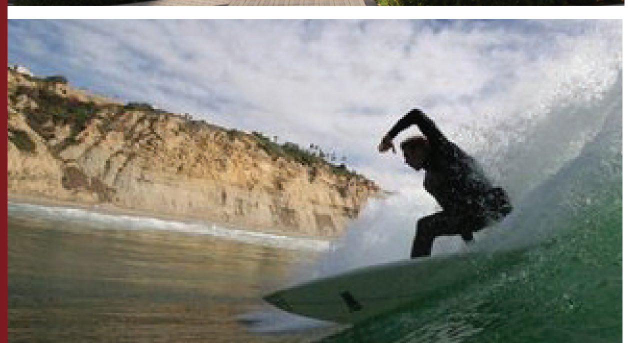

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GIBBS AND ROTUNDA RETIRE

By: William D. Bierman, Esq., Executive Director

Two of TLP&SA's most loyal and hard working Board members are retiring. I have known John Gibbs and Tom Rotunda for more years than I care to remember. I have worked with them; I have served on industry groups with them; I have represented their companies; and I have broken bread with them. And to be honest, I admit to having more than one drink with them. They are friends.

On the one hand, it does not do them justice to notice their retirements together. I could write volumes on each of them. On the other hand, both John and Tom represent what is best in our industry: intelligence, loyalty, practicality and a desire to do the best job possible. If John or Tom took on a task, you knew it would get done, no matter what. You could always rely on them.

With his deceptive southern drawl, John is as savvy as any "northern" businessman. He would resolve claims with a combination of wit and reason. Before you knew it, you would be asking if you could pay him money. Nevertheless, he was fair and treated adversaries with that well known southern charm. He always had a good story to tell which ended with a point or moral. Spending time with John over the years was a joy. Once the business was over, John would wax poetic about his family, his wife Marilyn and his grandchildren were a topic of conversation which came slightly ahead of his golf game. John is one of those rare people who incorporates his faith in his every day life and makes us all better for it.

Tom Rotunda is the no nonsense executive with an eye toward the bottom line. He can analyze a budget; evaluate staff; deal with attorneys and make a department run with the efficiency of a military operation. What Tom does not want many people to know, and what I will reveal today, is that he has the proverbial "heart of gold". You would only have to see him with his wife Diane and his daughter Maddie to know that.

Tom realized before most industry experts that transportation loss prevention and claims management would become part of the overall business strategy of transportation companies. With the advent of "partnering" and the establishment of long term relationships through contracts with customers, Tom understood that loss prevention and claims had to be less adversarial and more a function of amicably working out differences with our shippers.

As a long time Director of Transportation Loss Prevention & Security Association, Tom was the prime mover in establishing a Joint Conference with the shipper's group now known as the Transportation & Logistics Council. Looking forward to its Eighth Joint Conference, these two groups have worked together to foster a better understanding between shippers and carriers. As a result, the shippers and carriers in these organizations are able to foster continuing relationships between their companies.

Both John Gibbs and Tom Rotunda have been the recipients of the TLP&SA Board of Directors' Award FOR EXEMPLARY PROFESSIONALISM, ACHIEVEMENT AND CONTRIBUTION TO THE ASSOCIATION AND ITS MEMBERSHIP .

Their retirement will certainly leave a void which will be hard to fill at TLP&SA and our industry as a whole. Nevertheless, Tom and John have blazed a trail for others to follow. Anyone who wants to succeed in the transportation industry does not have to look far for an example. John Gibbs and Tom Rotunda created the standard by which others will be judged. They will be missed.

CERTIFIED CLAIMS PROFESSIONAL ACCREDITATION COUNCIL, INC. (CCPAC), announced the election of officers for the 2007-2008 term as follows:

President -
Marcus Hickey, CCP, Forward Air, Inc.;
Vice President Membership –
Wally Dammann, CCP, MSI (USA) Claims, Inc.;
Vice President Certification -
Roy A. Pietras, CCP, FedEx Custom Critical;
Secretary -
Brenda Baker, CCP, Landstar RMCS, Inc. ;
Treasurer -
Jean Zimmerman, CCP, Risk Management Claim Services, Inc.,
Board of Governors-
Immediate past president Teresa Jones, CCP, FedEx Freight, Inc. and past president Cindy Carey, CCP, TSI Logistics.

The Board of Directors named Jim Barber, Forward Air, Inc. as editor of ProClaim, its quarterly publication and John O'Dell as Executive Director replacing retiring Administrator, Dale Anderson. William D. Bierman, Esq., and partner in the law offices of Nowell Amoroso Klein & Bierman, P.A. was appointed to serve the as General Counsel. CCPAC relocated its headquarters from Port Washington, MD to Jacksonville, Florida earlier this year. CCPAC was established in 1981 and is a nonprofit organization that seeks to raise the professional standards of individuals who specialize in the administration and negotiation of freight claims for all modes of transportation worldwide. Specifically, it seeks to give recognition to those who have acquired the necessary degree of experience, education and expertise in domestic and international freight claims to warrant acknowledgment of their professional stature. Additional information or inquiries can be obtained from their web site at www.ccpac.com

CCPAC will hold a Exam Primer on Sunday, April 20, 2008 at the Conference in San Diego.

They will have a CCPAC Exam test on Wednesday afternoon (after the Conference ends), so be sure to send your 'WANNABE' people and get them to be a CCP (Certified Claims Professional).

Get ready for the next TLP & SA // TLC Joint Conference

It will be held April 21 – 23, 2008 in San Diego, CA. It is NOT TOO SOON to make reservations (1-800-422-8386) at the Catamaran Resort Hotel. You should also make arrangements to EXHIBIT at this Conference as soon as possible, since we only have room for 20 booths. Send an e-mail to Ed Loughman of the TLP & SA at Eloughman@nakblaw.com to get your booth.

On The Passing of Paul Sorkin

By: William D. Bierman

On January 14, 2008 I received a sad email advising of the passing of Saul Sorkin. I had just returned from a meeting of the Conference of Freight Counsel where I had inquired as to Saul's well being. Saul was the gentle scribe of our industry. There was hardly a significant decision or brief involving goods in transit that did not cite Saul's work. All I have to do is turn and look at my book shelf to see those eight blue volumes with the gold letters and I know my answer will be within those covers.

But Saul was so much more than a name on a treatise. He was a "mensch" in every sense of the word. Leo Rosten, author of The Joys of Yiddish" defines "mensch" this way:
"Someone to admire and emulate, someone of noble character. The key to being 'a real mensch' is nothing less than character, rectitude, dignity, a sense of what is right, responsible, decorous."

That is how I think about Saul. I was fortunate to have been in Saul's company on many occasions. We discussed law and children…transportation and family. He was kind and gentle and giving.

Saul always liked when I told him the story of a case I had in the Federal Court. Of course I had cited Saul's Treatise in my brief. But to be honest with you, there was a part of the dissertation which was not completely clear and might have been subject to several interpretations. I caught Saul at a CFC meeting in Toronto and I offered to take him and his wife Ellen to lunch for the ulterior motive of clarifying the issue. I paid.
Several weeks later in court, the Judge questioned me on that very issue. I told him that I had discussed it with Saul and he agreed with my position. The Judge became incredulous and chided me for attempting to joke with the Court. I did not understand until I realized that the Judge thought that the writer of the Treatise was like "Corbin on Contracts" and had been dead for many years. When I explained to the Judge that Saul was a practicing attorney and that I could get him on the phone, the Judge turned to my adversary and said, "What do you think of that, he actually knows Sorkin!" Needless to say Saul carried the day for me once again.

Saul loved the law and he loved lawyers. He was always available to help in any way he could. He embodied all that is good and right in our profession. He will truly be missed, but he won't be forgotten. As long as there are goods in transit, Saul will be cited and remembered. More importantly, Saul will be remembered by his family, his friends and all those that knew and respected him.

Transborder Trucking at the Outset of 2008

By: Jeremy Kahn, Esq., Kahn and Kahn Washington, D.C.

The Growing Irrelevance of Government Security Requirements

Since September 11, this Report (as has other observers) has annually stressed the significance of "security," because "everyone" knew government security requirements became more onerous month-after-month and served to impose additional costs, administrative burdens, and delays on transborder trucking and that carriers must spend time focusing on this subject. A more careful look this year suggests that "everyone" might be wrong, and that too many are wasting far too much time and effort worrying so much about "security." Instead, it is likely that in the year to come "security" will no longer be the defining feature of transborder trucking, but instead will become just one more regulatory nuisance – bothersome, but not much more. This downplaying of security's future importance comes from observing some diverse developments.

The 2007 theme "Securing and Facilitating Trade" comes from CBP's mission to do both, even though "security" and "facilitation" are inherently in conflict with one another. Whatever the catchy slogan, the reality is that seven years after September 11, there is no greater coordination among government agencies than existed then, and today's agencies – many under Homeland Security's umbrella – are as bureaucratic, turf grabbing and defending, out of touch with commercial reality, and driven by politics rather than "mission" as they ever were.

Is CBP – which one would think is the lead agency on trade and security – even relevant? Example. The Trade Symposium's program called for a "to be announced" Member of Congress to speak, but the moderator announced Congress was in session and so busy that no Congress-man could attend. Symbolism is significant in Washington, and it says much about the agency's stature when, having assembled a room full of several hundred representatives of some of the country's largest manufacturers and trade companies at a site a five minute cab ride from the Capitol, not even one Congressmen could tear himself away to talk for 30 minutes!

Indeed, as September 11 fades into memory, "security" increasingly is issuance of government directives of one sort or another, which one might say are most concerned with the preservation of individual bureaucracies. Presidential Executive Order 13416, "Strengthening Surface Transportation Security," issued during the last days of 2006 calls for the Homeland Security Secretary to implement studies and consultations and cooperation among agencies, but with great care that he not infringe on the jurisdiction of the other Departments.

As to the new emphasis on "Import Safety," November saw issuance of the "Action Plan for Import Safety" issued by the bureaucratically named "Interagency Working Group on Import Safety" created by the President. The Action Plan's "14 broad recommendations and 50 action steps . . . provide a road map for better protecting American consumers and enhancing the safety of the increasing volume of imports entering the U.S.," based on the use of a "risk-based prevention with verification" model that allocates import safety resources according to risk.

To use an Action Plan example, apparently it is common for importers whose food is refused entry at one port to try to enter it through another. The Action Plan calls for a rule that would require such food to be marked "United States: Refused Entry" to avoid such "port shopping." Looks like a problem with a ready solution. So why does the Action Plan suggest that

FDA begin a rulemaking months later in mid-2008 to begin to study the issue? If there is an imminent danger, shouldn't the government act with a sense of urgency? That it doesn't is one more reflection of its focus on bureaucracy and procedure, not safety. There is another nuance for transborder carriers. At least once during 2007, shrimp from China, deemed safe for import by Canada, was imported into that country, but when it was transshipped by truck to the U.S., it was stopped at the border as inadmissible, with the hapless carrier caught in the middle!

There is talk of steps to get carriers to sit up and take notice. In the "import safety" arena,
there is talk of changing the law to allow for seizure of vehicles used in criminal activity to import food or consumer products in violation of the various federal laws, in much the same way trucks can be seized now if used to further immigration violations. There is talk of increasing Customs fines in general, and no longer "mitigating" so much of the penalties imposed. There's talk CBP should make even more rules for advance notice of cargo entry for all modes. But at the end of the day, it remains talk and bureaucracy, and so many rules requiring so much paperwork that no one, not even the most conscientious, could ever comply fully.

The examples are seemingly endless, but the lesson is clear. Like any "mature" industry which becomes more intent on enhancing the status quo than on innovation and focus on its mission, "security" goes a long way in creating rules and bureaucracies, but only in such a way as to protect turf and establish new administrative rules and procedures. As is so often true, where the private sector has embraced the new scheme, it has done so by considering its return oninvestment – a concept apparently still alien to the government. Supply chain "security" improvements have been accepted by carriers, mainly because they have reduced cargo loss and claims. To the extent security leads to cost reductions, it's an element for international carriers to consider; to the extent it is one more set of bureaucratic rules, it's an element to be shunted to the carrier's government-rule compliance department without a second thought.

Transborder Trucking Remains a Regulated Activity

While it is undoubtedly important to try to view the "big picture" (i.e., not to lose sight of the forest for the trees), at the same time it's important to remember that transborder trucking remains a regulated activity. It's worth a look at some of 2007's random regulatory developments to appreciate that although market entry may be deregulated, other aspects of the industry are not. It's also worth keeping in mind that for transborder carriers, although laws of Canada and the U.S. are similar, they are not identical. A few examples beyond the "big" FMCSA regulatory rules with which all in the industry are already familiar suggest the trend.

FMCSA accepts few requests for making new rules, but in 2007 it opened a two-part proceeding, prompted in part by a request from Canada to have FMCSA accept regulatory insurance endorsements issued by Canadian insurance companies for Canadian carriers now operating into the U.S. and in part by the U.S. insurance establishment to have FMCSA make clear that an insurer's obligations under the MCS-90 do not extend beyond the U.S. border. As to the former, today a Canadian insurer must have a U.S. correspondent insurer make that filing. While the Canadian request speaks of additional costs, the issue is likely more one of the image that the promise of a Canadian insurer is not good enough for the U.S.! As to the latter, insurers are more concerned with Mexico than with Canada, but this is pretty much a legal non-issue since the courts have uniformly ruled that insurers' obligations in such circumstances end at the border. Yet insurers, being insurers, get worked up about it anyway. Both illustrate the "more symbolism than substance" sort of irritating issues characteristic of remaining transborder regulation, but they are the issues which the government deals with. At the same time, they serve as a helpful reminder that carriers need to keep in mind that risk management concerns and issues when crossing the border may be subtly different from those for purely domestic moves.

The end of 2007 brought two separate requests to FMCSA to waive its rules for "original" signatures on driver logs and for employment applications (the former request was by Verigo, a Canadian software developer), so long as there were equivalent electronic signatures. It's a sign that however much FMCSA's safety requirements have lagged behind modern technology used for administrative records (and the efficiencies which flow from it), it is at least now finally moving in the proper direction. At the same time, Verigo's request highlights remaining inconsistent transborder regulation; the company brags its hours of service compliance software automatically shifts from Canadian HOS rules to U.S. HOS rules when the truck crosses the border; in 2008 why should such two different sets of rules even be necessary?

Earlier years' Reports have commented on industry consolidation, and deals continue to be made, even in a tightening credit market. Though not technically an acquisition, on the last day of 2007 a handful of regional carriers filed an application with the STB for approval of a pooling arrangement, allowing them to retain their identities but pool their resources and efforts better to compete with nationwide carriers (yes, such pooling arrangements require government approval, even if mergers and acquisitions don't). One of the applicants was Canadian Freightways, so this was likely the first ever pooling application involving a Canadian and U.S. carriers, reflecting if nothing else further regulatory integration of the transborder market.

Transborder "Trucking," R.I.P.

Each year this Report talks about Transborder "Trucking" but adds an admonition not to be blind to the evolving transformation of "trucking" into "logistics." If the evolution is not yet already complete, it will be soon. Goods will continue to be transported across the border, but as is true with most every aspect of transportation, shippers will seek out "logistics" providers rather than "trucking" services to meet their needs.

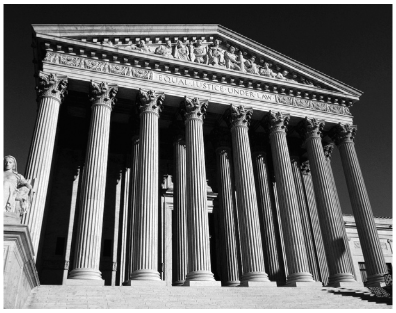
Admittedly, to some degree, the change in terminology is cosmetic (like racing stripes on a teenager's hot rod, which make it seem to go faster); for several years, users have looked to carriers to perform a "complete service" providing whatever transportation-related services necessary to move freight from one point to another, not just "trucking." To that extent, the carriers need only change their perspective slightly to be more open to seeing the "big" picture.

However, from the legal perspective, there is one important aspect of the evolution which many carriers seem to ignore. Those with a trucking background have internalized the historic stability brought about by a well established, uniform body of trucking law, which has the effect of spelling out in some detail which party bears what responsibility for problems arising in connection with any move. Even when disputes arose, the law was clear, even if the facts were not. Carriers have taken for granted that their liability (at least in the U.S.) was defined by Car-mack, and they have structured their risk management accordingly. But as "carriers" become "logistics providers," they find the traditional legal standards for "carriers" may not apply. What is the legal role of an arranger of transportation for cargo damage caused by the actual "carrier" of the freight, for personal injury caused by the "carrier," for business harm caused by the "carrier"?

As transborder entities are increasingly "logistics" providers and no longer mere "carriers," they need to understand that the legal environment in which they operate, and which allocates duties and responsibilities among all the parties to the transportation transaction, is an amor-phous one. Carriers need to exhibit the samethought and care to assuring they are comfortable with their legal posture as they are with their new promotion of "logistics" in lieu if "trucking."

Finally, in the same way carriers are only service providers within the context of a global economy, so too are they but one cog in the "transportation" wheel. Beyond transportation-specific regulations, the North American community must deal with issues of infrastructure, land-use planning, energy dependence, and more. Transportation providers have a seat at the table, but the table is a large one. During the year to come, carriers must speak up and voice their concerns as important members of the commercial community to be sure transportation gets its due.

This is an excerpt from Jeremy Kahn's article. If you would like the entire article, please contact Mr. Kahn at jkahn@erols.com.



Recent Court Cases

as analyzed by the Conference of Freight Counsel

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

A. Carrier Liability

1. Corning, Inc. v. D.H.L. Holdings (USA, Inc.), 2007 U.S. Dist. LEXIS79415 (E.D. Ky. 2007).

Pursuant to a Transportation Agreement, defendant DHL issued Master Air Waybills for a shipment of glass moving from plaintiff Corning's Harrodsburg, Kentucky facility to Japan. DHL hired motor carrier subcontractors to transport the glass to DHL's Kentucky facility where it was loaded into another truck which was then transported by another subcontracting motor carrier to Chicago's O'Hare International Airport. The truck was involved in an accident in Indiana, and the subcontractor (Ideal Deliveries) admitted its driver was 100% responsible for the accident. The shipment was deemed a total loss and Corning's subrogated insurer, CNA, sued DHL, who sued its subcontractors for approximately $275,000. On cross-motions forsummary judgment, Corning asserted its claim was not governed by Carmack, Warsaw or COGSA, which DHL did not dispute. Rather, DHL claimed that under the parties' Agreement and the air waybills, a finding of negligence on its part was required before any liability could attach. The court, applying federal common law, ruled that even though Ideal admitted it was 100% at fault for the damage to the shipment, that did not preclude a finding of liability on DHL's part. The court ruled that under federal common law Corning had established a prima facie case of liability against DHL for damage to the cargo and rejected DHL's argument that Corning was contributorily negligent for improperly packing the glass.

Submitted by Eric Benton

2. Danzas AEI Intercontinental v. Container Connection of Southern California, Inc., 2007 Cal. App. Unpub. LEXIS 4436 (2007).

Defendant Danmar, an NVOCC, issued a through bill of lading for ocean carriage of a shipment of VCRs of the shipper, Sensory Science, from Korea to the US. Danmar, through its agent, Danzas, hired Gateway Transportation to handle the drayage of the container from the port of Los Angeles to Gateway's warehouse. Danzas faxed a delivery order to Gateway instructing that the shipment was to be delivered by defendant CCSC to Gateway's warehouse. Gateway instructed CCSC to transport the three containers from the terminal and bring them to Gateway's warehouse. CCSC did as it was instructed but Gateway refused delivery because there was no room at its warehouse and instructed CCSC to store the container over the weekend. Gateway had not previously asked CCSC to store containers of Sensory goods overnight, but it nonetheless prepared a warehouse receipt which listed a storage rate of $15 per day, and faxed it to Gateway. CCSC's facility had no professional security guards, cameras, guard dogs or motion detectors outside. Although CCSC had no prior thefts at its yard, the container of Sensory's electronic goods was stolen overnight. Sensory filed a $383,000 claim with Danzas, who, in turn, claimed that Gateway was responsible and a copy of the claim letter was sent to CCSC. After Danzas settled Sensory's claim for $203,440, it sued CCSC alleging six causes of action for loss of cargo, breach of contract, negligence, breach of duty of care, bailment, conversion and equitable indemnity and contribution. The parties then engaged in an exchange of correspondence debating whether and to what extent the carriers' liability was limited under the bill of lading. CCSC filed a motion for summary judgment claiming its liability was limited pursuant to the terms of its warehouse receipt to $96.40, or alternatively, that Danzas was not entitled to recover more than $50 because Danzas' own liability to Sensory was limited to that amount by its bill of lading and standard conditions of service ("STCs"). Following the trial court's entered judgment in favor of Danzas against CCSC and CCSC appealed, contending it was not liable due to Danzas' voluntary payment without regard to legal liability, that it was not notified of Danzas' settlement with Sensory, that the trial court erred in applying motor carrier law rather than warehousemen law, and that its liability was limited by its warehouse receipt. The court of appeal reversed on the ground that there was no evidence that CCSC was negligent and that its status as a motor carrier or warehouseman therefore was inconsequential. The court of appeal found that CCSC really had no choice but to agree to store the container in the face of Gateway's refusal to accept delivery and that CCFC was not negligent.

Submitted by Bill Taylor

3. Great West Casualty Company v. CareyTransportation, Inc., 2007 U.S. Dist. LEXIS 61325 (W.D. Mich. 2007).

Plaintiff sought to recover $74,400 it had paid to its insured, the thirdparty defendant, February Fourteen, Inc. ("FFI"), for the loss of certain cargo ($48,750) and its trailer that were damaged in a fire during transportation by the defendant/third-party plaintiff, Carey. In its third-party complaint against FFI, Carey alleged that the fire was FFI's fault due to poor maintenance of the trailer. In denying the parties' cross-motions for summary judgment, the court ruled that genuine issues of material fact existed as to the cause of the fire and whether the driver or FFI were negligent in maintaining the vehicle. The court also noted that the fact that the tractor disappeared after the accident posed a significant concern as to FFI due to spoliation of evidence.

Submitted by Dirk Beckwith

4. Mazik v. Starving Students, CGC 423065 (Superior Court of California, 2007).

This case is an example of a disaster of a fact pattern on the liability side nonetheless resulting in a defense verdict. Plaintiff, an elderly gentleman, along with his life partner, had purchased a number of antiques and semi-antique pieces. When his partner died he decided to have the house renovated for sale and took the advice of his designer to store the antiques during that period. Defendant, who did not have a storage locker available, accepted the goods for storage and kept them in an abandoned van in its yard which, among other things, had no doors. To secure the load, the assistant manager had the bright idea to hire a local homeless couple to live in the van and keep and eye on it "because some of this stuff is worth a lot of money." Surprisingly, the furniture disappeared, save for a leg that had been intended for kindling.

Plaintiff, who had declared the value of the shipment at $20,000, filed a police report and this lawsuit, claiming it was worth $107,000. Plaintiff was forced to admit he had no particular knowledge entitling him to offer an expert opinion. He never retained an expert, in part because in the middle of the litigation the photographs he had of the lost items disappeared. His homeowner's insurer, however, had hired an appraiser who valued the furniture at $32,500 and an offer from his insurer in that amount was accepted. No subrogation action was filed, but the plaintiff filed an individual action to recover the entire $107,000, claiming, among other things, that the insurance payment was inadmissible because a substitute expert (who had never testified before) adopted her findings. He died the night after testifying and before the decision was rendered. A defense verdict was rendered due to insufficient proof of damages. The arbitrator ruled that the $32,500 was not collateral because this was a breach of contract and that no competent evidence was presented to show it was worth more.

Submitted by Dale Allen

5. Ward v. Passport Transport Ltd., 2007 U.S. District LEXIS 50696 (W.D. Ken. 2007).

Plaintiff hired defendant Passport to transport to transport six antique vehicles from Louisville, Kentucky to Scottsdale, Arizona. In route to Arizona, a fired occurred inside the enclosed trailer damaging all of plaintiff's vehicles. Plaintiff moved for summary judgment as to liability and Passport moved for summary judgment as to both liability and limitation of liability. As to the issue of liability, the court ruled that although Passport's experts were able to opine generally as to where the fire ignited, they were unable to opine as to how the fire ignited. Therefore, the court ruled that "it cannot be shown that the fire started due to the inherent vice or nature of the goods" and ruled that Passport was liable to Ward for the damage to her vehicles. As to the issue of limitation of Passport's liability, the bills of lading provided that the released value was $100,000 per vehicle unless a higher value was declared, and Ward's shipping agent had left blank the declaration of value box. The court, applying the old "four point" test in following the bad law articulated in Toledo Ticket v. Roadway,ruled that Ward,bby leaving blank the declaration of value section, had not affirmatively agreed toabide by Passport's lower valuation limit. In a subsequent decision dated November 2, 2007, 2007, U.S. Dist. LEXIS 81939, the court denied Passport's motion to reconsider.

Submitted by Bill Bierman

6. PNS Jewelry, Inc. v. Dunbar Armored, Inc., 2007 Cal. App. Upub. LEXIS 9694 (Court of Appeal of California, 2007).

This case involved the theft by an imposter of a $1.5 million shipment of jewelry, intended to be transported from Los Angeles, California to Phoenix, Arizona. After the shipper scheduled pick up of its shipment with the defendant carrier, Dunbar, an imposter, wearing a Dunbar uniform and following the usual Dunbar procedures, showed up at the shipper's, PNS's, facility to receive the shipment and gave the shipper a multi-page air waybill typical of the type Dunbar normally provided to PNS. Shortly thereafter, when the real Dunbar pickup driver showed up, the parties realized what had happened, but Dunbar nonetheless told PNS not to contact the police until Dunbar could review its security tape. The police were not called until 2 ½ hours after the scam was discovered. The plaintiff filed a negligence lawsuit against Dunbar which was dismissed on Dunbar's demurrer on the basis of Carmack Amendment preemption. Court of Appeal reversed on the basis that the Carmack Amendment was not applicable because Dunbar had issued an air waybill and was neither a receiving nor a delivering carrier. "No case law supports the conclusion that Carmack applies when goods are stolen from an interstate carrier before it takes delivery of them." The court went on to uphold plaintiff PNS's right to assert its negligence claim, finding that Dunbar had a duty of care to protect its customer's cash and valuables during transportation and its failure to have implemented various security protocols to prevent such an incident.

Submitted by Hillary Booth

7. Cargill Ferrous International v. M/V Medi Trader, 513 F. Supp. 2d 609 (E.D. La. 2007).

In this COGSA case, a bench trial was held on claims by plaintiff against the defendant ocean carrier, vessel, and charterers for damage to six shipments of steel coils from Turkey to points in the United States via the Port of Houston, Texas. Ocean bills of lading were issued in Turkey on December 31, 2002 for each of the shipments which identified the coils as "clean on board," and with additional notations that some strips were broken/loose with damage to packing material. Plaintiff Cargill commenced the action against defendant M/V Medi Trader after issuing a letter of undertaking in lieu of the arrest of the vessel. All the bills of lading identified the carrier as defendant Seafarers. Seafarers then filed multiple third-party actions against the charterers, one of whom was thirdparty defendant Western Bulk. The court first noted that COGSA applied, and that the clean bills of lading constituted prima facie evidence of good origin condition of the cargo in Turkey, notwithstanding the fact that there were exception notations on the ocean bills. Accordingly, the court concluded that the plaintiff had met its burden of proving that the goods were loaded in good condition at origin. The court next analyzed the evidence of damage to each of the six shipments, including surveys and photos, and concluded that the plaintiff had sustained damages totaling $787,222. The court rejected the ocean carrier's "peril of the sea" and "inherent vice" defenses because the carrier had failed to prove that the rough weather voyage was unforeseeable or inevitable and because the cargo had been improperly stowed as a result of which the goods were damaged due to moisture and condensation. The court concluded that the vessel was liable to the plaintiff for $733,514, subject to the $500 per package limitation under COGSA. The court ruled that each coil was a package and that the vessel was liable for $264,452. The court ruled that COGSA did not apply to the claims against the thirdparty defendant charterer, Western Bulk, and that Western Bulk could be liable to the plaintiff in negligence. The court ruled that it was liable to the plaintiff for $787,222 in damages.

Submitted by Monroe Whitesides

8. The Babcock & Wilcox Company v. The Kansas City Southern Railway Company, 2007 U.S. Dist. LEXIS 92298 (D.N.J. 2007).

Plaintiff sued defendant railroads to recover $42,814 in damages suffered by a shipment of steam boilers moving from Mississippi to New York. The railroads moved to dismiss on the grounds that the federal court lacked subject matter jurisdiction, claiming that the parties' relationship was governed by a §10709 contract, not Carmack, and hence there was no federal question jurisdiction. Plaintiff filed a cross-motion for summary judgment. The court denied the railroads' motion on the basis that there was "no evidence suggesting that the parties had any intention of invoking §10709". The Court deemed the Carmack Amendment applicable and found that it had appropriate jurisdiction

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enforcer@transportsecurity.com www.transportsecurity.com under 28 U.S.C. § 1337(a). The court then granted plaintiff's cross-motion for summary judgment, finding, over the railroads' argument to the contrary, that plaintiff's correspondence to defendants constituted sufficient written notice of claim in accordance with applicable claim filing regulations.

Submitted by Paul Keenan

B. Limitation Period

9. Emmert Industrial Corporation v. Artisan Associates, Inc., 497 F.3d 982 (9th Cir. 2007).

In this landmark decision, the United States Court of Appeals for the Ninth Circuit held that the 18-month statute of limitations period contained in the ICCTA, 49 U.S.C. § 14705(a), is not restricted to claims seeking charges under a filed tariff, nor is it restricted to claims arising under federal law. In 1996, plaintiff and defendant entered into an agreement whereby plaintiff would transport the major components of several industrial presses. Approximately one year later, defendant terminated its relationship with plaintiff. However, plaintiff did not file suit until 2003, when it alleged breach of contract and quantum meruit claims under state law. Subsequently, the federal district court granted the defendant's motion for summary judgment as to both claims on the basis of the statute of limitations period in the ICCTA, 49 U.S.C. § 14705(a), under which a carrier must bring a claim against a shipper "to recover charges for transportation or service" within 18 months of the claim's accrual. [See district court decision on our January 9, 2006 Agenda in Sonoma, California.] On appeal, the Ninth Circuit upheld the grant of summary judgment in favor of the defendant and held, for the first time in any federal circuit court, that the 18-month statute of limitations is not restricted to claims seeking charges under a filed tariff, or to claims arising under federal law. In addition, the Court held that §14705(a) necessarily preempts any state law providing for a longer limitations period. The Court also concluded that according to the plain language of the statute, "charges" include any price, cost, expense, or debt owed under contractual obligation. Therefore, there is no tariff requirement in order for the statute to apply to a particular case. The Court further reasoned that Congress intended "transportation" within the meaning of the ICCTA to be interpreted broadly. The Court found that each of the services for which the plaintiff sought reimbursement, including engineering, research, and operational costs, were directly related and incidental to the actual transportation of the press components, since each was aimed at furthering that purpose, and hence, any claim seeking recovery for these services was also barred by the ICCTA. Plaintiff's breach of contract and quantum meruit claims were dismissed as timebarred, despite the fact such claims arise under state law. This decision will have a broad impact upon any entities engaged in transporting goods in interstate commerce as it may shorten the applicable statute of limitations period within which a party must bring its claim. Importantly, the ICCTA applies to any "civil action to recover charges for transportation and services provided." "Transportation" under the statute is broadly interpreted; therefore, claims for any services performed incidental to the actual transportation will also be covered, and potentially time-barred, by the ICCTA.

Submitted by Kathleen Jeffries

C. Limitation of Liability

10. Eli Lilly Do Brazil, LTDA v. Federal Express Corporation, 502 F.3d 78 (2d Cir. 2007).

In this case the court enforced a limitation of FedEx's liability which, under Brazilian law, would have been invalid if gross negligence were shown. The shipper, Lilly, shipped a shipment of drugs worth $800,000 from its factory in Brazil to Japan via FedEx's hub in Memphis, Tennessee. FedEx's waybill for the shipment limited its liability to $20 per kilogram. After FedEx received the cargo, it consigned it to a subcontractor for transportation by truck to Viracopos, Brazil but it was hijacked and the cargo was stolen. Lilly did not declare a higher value or pay for additional valuation on the waybill and FedEx did not dispute that if the limitation applied, its exposure for the loss was approximately $28,000. Lilly, a Brazilian company, filed suit in the U.S. District Court for the Southern District of New York which ruled that substantive federal common law, not Brazilian law, applied, as a result of which FedEx's liability was limited. The District Court concluded that federal common law, which accords primacy to vindicating the parties' justified expectations, trumped Brazilian law and that the United States was "the jurisdiction with the most significant relationship to the transaction and the parties." Lilly appealed and the Second Circuit affirmed. The Second Circuit went through a choice of law analysis and noted that the sophistication of the parties was a significant factor in enforcing choice of law issues consistent with their expectations. The court ruled that under federal common law, the limitation in FedEx's waybill was valid and that the parties reasonably expected or certainly should have expected that their contract would be enforceable. See also, dissenting opinion of Circuit Judge Meskill.

Submitted by Mike Tauscher

11. Sompo Japan Insurance Company v. Union Pacific Railroad-Company, 03 Civ. 1604 (CM), S.D.N.Y. October 22, 2007).

This is the amended decision of the District Court (see 2007 U.S. Dist. LEXIS 58162, dated July 30, 2007, for preceding decision) following remand by the Second Circuit at 456 F. 3d 54 (2nd Cir. 2006), as reported on our January 7, 2007 Agenda. The Sompo v. UP Saga continues, following remand, and the plot thickens with a second decision, Sompo Japan Insurance of America v. Union Pacific Railroad Company, 02 Civ. 9523 (DAB); order dated September 26, 2007. Barry Gutterman will explain the effect of these decisions and the Second Circuit's rulings as to whether the Carmack Amendment or COGSA applies to the inland sub-contracting carrier on a through bill of lading. Originally Judge Batts granted UP's motion for summary judgment limiting its liability to $500 per package. However, Judge Batts vacated her decision after the Second Circuit issued its ruling in a separate Sompo case with similar legal issues. Initially, the Judge ruled that the K-Line ocean bill of lading was a through bill of lading covering the entire shipment and that COGSA, not Carmack, applied. However, the Second Circuit held that Carmack applied, which is in conflict with decisions from four other Circuit Courts of Appeal. UP will move to consolidate this case with Sompo Japan v. Union Pacific Railroad, 03 CV 1604 (S.D.N.Y. October 22, 2007), decided by Judge McMahon, Second Circuit, Docket 07-5190-CV. With regard to Judge McMahon's decision, UP filed its Notice of Appeal on November 19, 2007. This decision was on the remand to the District Court from the Second Circuit's decision in Sompo cited above. Judge McMahon followed the decision by the Second Circuit in holding that Carmack applied, disregarded Kirby, and concluded that UP did not offer Carmack rates pursuant to its exempt circular so that UP was not entitled to the package limitation in the ocean bill of lading. Both Sompo cases involved the same UP Exempt Circular, with different ocean bills of lading, but the bills of lading in each instance extended the package limitation to UP. No separate domestic bills of lading were issued in either case and UP contends that COGSA and not Carmack applies.

Submitted by Barry Gutterman

12. Interested Underwriters v. SeaFreight Line, Ltd., 2007 Fla. App.LEXIS 18747 (Court of Appeal of Florida, Third Dist. 2007).

In this case the Court of Appeal of Florida considered what constitutes a "package" for COGSA limitation purposes and reversed a trial court ruling that had favored the ocean carrier. Defendant SeaFreight transported certain cargo from Venezuela to Miami. The cargo consisted of 1,175 cartons of perfume worth $183,573. The shipment was lost in transit and plaintiff Underwriters paid its insured and brought this subrogation action against SeaFreight. The original bill of lading described the freight as "8 pallets with 1,120 cartons, 55 loose cartons, perfume." SeaFreight convinced the trial court to grant summary judgment on the basis that the total shipment consisted of only 63"packages" for purposes of COGSA's $500 per package limitation. On appeal this was reversed, as the Court of Appeal of Florida considered another bill of lading referencing "1,175 pcs." The appellate court, following a discussion of the meaning of "packages" for purposes of COGSA, determined the evidence sufficient to support a finding that there were 1,175, not 63 packages and reversed the ruling of the lower court.

Submitted by Richard L. Furman

D. Preemption

13. Fayard v. Northeast Vehicle Services LLC, 490 F. Supp. 2d 134 (D.Mass. 2007).

Plaintiffs, the owners of a 17-acre farm, sued the defendant railroads alleging state law claims of nuisance, misrepresentation and civil conspiracy because of the railroad's operation of their adjacent rail yard allegedly in violation of state laws and local permitting restrictions. Plaintiffs alleged the defendants failed to operate the facility in conformity with their earlier representations and that they were denied the peaceful use and enjoyment of their home and lifestyle because of the 24-hour-per-day, seven-day-per week, rail operations. Defendants removed the case from state to federal court on federal question grounds and plaintiffs moved to remand. The court recognized the complete preemption exception to the well-pleaded complaint rule and held that the ICCTA completely preempts claims such as those of plaintiffs, rendering them removable to federal court. Although plaintiffs contended that ICCTA did not completely preempt all regulations that affect railroads, but only those that interfere with interstate rail operations, the court rejected that argument and ruled that even assuming congress intended ICCTA to be the exclusive cause of action only as to those claims that interfere with interstate railroad operations, plaintiffs' claims would nonetheless fall under the ICCTA's preemption scope. Although plaintiffs also attempted to narrow their requested relief through a stipulation in their motion, the court rejected that strategy as well, ruling that the claims on the face of the complaint at the time of removal were not so limited. The court also went on to determine that the ICCTA sets forth a remedy in procedures before the STB governing the regulation of rail carriers allowing a person to file a complaint with the Board. The court ruled that the ICCTA set forth procedures and remedies sufficient to satisfy the second prong of the Beneficial National Bank analysis, that the plaintiffs' claims were completely preempted and therefore removable to federal court.

Submitted by Brad Singer

14. Harris v. Crown Moving, 2007 U.S. Dist. LEXIS 43111 (E.D. Wash. 2007).

The court granted defendants' motion to dismiss plaintiff's complaint, which alleged only violations of state law, in connection with their household goods move from Washington to Arizona on Carmack Amendment/complete preemption grounds, after the case was removed from state to federal court.

Submitted by John Anderson

15. Kuehne v. United Parcel Service, Inc., 868 N.E. 2d 870 (Ind. 2007).

This case addressed the extent and scope of FAAAA preemption in a personal injury setting. Plaintiff sued UPS, claiming she was injured when she tripped over a package that a UPS driver had left on her doorstep. The trial court had granted summary judgment in favor of UPS on the basis of FAAAA and Carmack Amendment preemption. However, the Court of Appeals reversed because it viewed the purpose of the FAAAA to address loss or damage to property as opposed to personal injury. The court noted that plaintiff's claims "nonetheless sound in a common-law-based personal injury action, which concerns health and safety-- an area that is traditionally regulated by the states pursuant to their police powers."

Submitted by John Alden

16. Moore v. LaHabra Relocations, Inc., 2007 U.S. Dist. LEXIS 61569 (C.D. Cal. 2007).

This lawsuit arose from an August 2003 household goods move wherein plaintiff hired Wheaton Van Lines to transport her furniture from California to points outside California. Wheaton allegedly refused to deliver the shipment until the plaintiff paid additional fees. Plaintiff filed a complaint in state court against Wheaton and its agent, LaHabra. After the court dismissed plaintiff's state law claims as preempted by the Carmack Amendment, LaHabra then moved for summary judgment on the Carmack claim on the grounds that (1) plaintiff had failed to file a written claim within 9 months of delivery and (2) LaHabra, as a disclosed household goods agent for Wheaton, could not be independently liable to plaintiff. The court granted LaHabra's motion on the basis of its status as a disclosed household goods agent pursuant to 49 U.S.C. §13907.

Submitted by Heather Paraino

17. Oliver v. Atlas Van Lines, Inc., 2007 U.S. Dist. LEXIS 65577 (N.D. Ala. 2007).

Plaintiff claimed she was victimized by an alleged "bait and switch" tactic on the part of the defendants in connection with her household goods move. Defendant Atlas, through its agent, White's, had given plaintiff an estimate of $6,000 for her move from Georgia to Alabama. On delivery, plaintiff paid Atlas $6,259, which she believed to be payment in full. Subsequently, as a result of an audit, Atlas demanded payment of an additional $3,200. When the plaintiff unpacked her goods and found some were lost or damaged, she sued Atlas and White's, alleging numerous state law claims, including fraud and misrepresentation, and a claim for damages under the Carmack Amendment. The court granted defendants Rule 12(b)(6) motion to dismiss all the state law claims on the basis of Carmack preemption, citing Eleventh Circuit precedent upholding preemption principles. Moreover, the court ruled that plaintiff's fraud ("bait and switch") claim was preempted, citing Hall v. North American Van Lines, Rini v. United Van Lines, Gordon v. United Van Lines and American Eye Way v. Roadway. Finally, the court dismissed plaintiff's claims against White's as an agent for disclosed principal pursuant to 49 U.S.C., §13907.

Submitted by Ken Bryant

18. York v. Day Transfer Company, 2007 U.S. Dist. LEXIS 86351 (D.R.I. 2007).

Major Jason York, USMC, arranged through the Dept. of Defense (DOD) for the interstate transportation of his family's goods from San Antonio, TX to Newport, RI. A Government Bill of

Lading (GBL) was issued with a $1.25 released valuation listing Day Transfer as the motor carrier. As is typical with DOD shipments, Day Transfer had a waiver agreement with Williams Moving under which Williams arranged for other entities to perform packing, loading, hauling and destination storage-in-transit (SIT) services with sharing of the DOD revenue. The goods were delivered in good condition by Apollo Van Lines to Andrews Express in Newport for SIT, but became severely water and mold damaged in Andrews' warehouse. Andrews delivered them to plaintiffs two months later. Plaintiffs sued all parties involved in the ha dling and storage alleging Carmack and tort claims for damage to their goods, physical injuries and consequential financial loss resulting from mold damage to their rental home, emotional distress and career damage with respect to which plaintiffs alleged $600,000 in lost earnings. They argued that because of their bad move, Major York was forced to cancel his studies at the Naval War College for several months, which in turn caused him to miss a joint command assignment, which in turn diminished his prospects for promotion to Lieutenant Colonel, which in turn would cause him to lose 20 years of pay at the higher rank. On defendants' motions for summary judgment, the court held:

(1) The action was properly removed to the District Court based on the complete preemption analysis of Hall v. N. Am. Van Lines and Hoskins v. Bekins Van Lines;

(2) All state law claims against defendants were held preempted by Carmack under the Smith v. UPS analysis of carrier conduct instead of the alleged harm. The court further held that under the First Circuit's decision in Rini v. United Van Lines, all alleged injuries and damages flowed from the damage to the goods and handling of the claim and no claim for intentional emotional harm was alleged in the complaint. As to the claims for physical injury from mold contamination, the court followed Glass and Tayloe cases which held that healthrelated claims arising directly from delivery are preempted;

(3) The tort counts against Day Transfer and Williams Moving for negligent remediation were held preempted as part of the claim process and the counts for broker liability were also preempted because the arrangements among the co-defendant carriers fall within the definition of "transportation" under Section 13102(23)(B);

(4) The tort counts against Andrews Express for negligent bailment and contamination of plaintiffs' dwelling were dismissed because they were based on the GBL contract and not a general duty of care;

(5) The GBL's $1.25 per lb. per article valuation

19. Craft v. Graebel-Oklahoma Movers, Inc., 2007 Okla. LEXIS 110 (Okla. 2007).

This was a personal injury lawsuit involving preemption issues under the Motor Carrier Act. Plaintiff worked as a packer for a sub-contractor of defendant Graebel and was injured in a motor vehicle accident in the course of her work. She filed a workers compensation claim and was adjudicated permanently and totally disabled by the workers compensation court. Plaintiff then filed a claim directly against Graebel in state court, contending that Graebel was liable at common law in spite of the fact that Graebel was deemed to have been her principal employer for workers compensation purposes. Plaintiff argued that the safety standards for commercial motor vehicles prescribed by the Federal Motor Carrier Act, 49 U.S.C., §31101-31162, preempted the state's workers compensation act. The Supreme Court of Oklahoma ruled that although federal law did not preempt the exclusive remedy provisions of Oklahoma's workers compensation statute, the plaintiff nonetheless had presented sufficient evidence to raise a question of whether Graebel's actions took it outside the exclusive remedy provision of that statute and that she had presented sufficient evidence towithstand summary judgment. The court vacated the lower court's decision and remanded for further proceedings.

Submitted by Clark Monroe

E. Jursidiction Removal

20. Best Van Lines, Inc. v. Walker, 490 F.3d 239 (2nd Cir. 2007).

Defendant Tim Walker, an Iowa resident, operates the website MovingScam.com on which he posts consumer complaints and his own comments about household goods carriers. In his "Black List Report," Walker advised the world not to use the plaintiff because it allegedly had no FMSCA authority or cargo insurance. Plaintiff filed suit against Walker in a New York federal court for defamation. The Second Circuit upheld the District Court's dismissal of the suit based on lack of personal jurisdictional over Walker. New York's long-arm statute requires a court to find (1) the defendant has transacted business within the state and (2) the cause of action arises from the transaction. New York's "transacting business" test requires that the defendant do more than merely send allegedly defamatory statements into the state. The Court held it could not exercise personal jurisdiction over Walker based solely on his operation of a website that can be visited by New Yorkers. The Court further held that even if Walker's solicitation of contributions on the website amounted to transacting business, the plaintiff's defamation claim did not arise from a solicitation. This case contains a useful review of federal and state court precedents involving personal jurisdiction based on internet activity.

Submitted by George Wright

21. Solectron USA, Inc. v. FedEx Ground Package System, Inc., 2007 U.S. Dist. LEXIS 77333 (W.D. Tenn. 2007).

Plaintiff Solectron and its insurer sued defendant FedEx Ground in state court seeking to recover $580,000 for the loss of certain DVDs, digital cameras and printers from a shipment FedEx was transporting from Solectron's LaVergne, Tennessee facility. Solectron alleged that the goods were stolen from two Solectron employees who were in cahoots with a FedEx truck driver who worked out of FedEx's Murfreesboro, Tennessee terminal. Apparently, the shipments were consigned to various consignees around the United States. Plaintiff's complaint alleged that FedEx was vicariously liable for the actions of its truck driver. The court denied plaintiff's motion to remand, ruling that even though the goods had not yet left the State of Tennessee, they were, nonetheless, moving in interstate commerce and hence were subject to the Carmack Amendment. "The general rule is that a shipment does not lose its interstate character until it arrives at its destination and is there delivered…. The controlling intent, for purposes of determining the interstate character of goods, is that of the rightful owner and not of the thief…. The intrastate theft and resulting local movement of these goods does not change the interstate character of the shipments." The court also upheld removal of the case on the basis of federal question jurisdiction.

Submitted by Matt Grimm

22. Paz v. Castellini Company, L.L.C., 2007 U.S. Dist. LEXIS 83028 (S.D. Tex. 2007)

This case is useful in testing the propriety of personal jurisdiction against a motor carrier. The plaintiff was injured in a motor vehicle accident in Kentucky by a tractor-trailer owned and operated by defendant Castellini. However, plaintiff sued Castellini in Texas, contending that Castellini was subject to personal jurisdiction in Texas because it had filed a blanket Designation of Agent for Service of Process Form pursuant to the Motor Carrier Act, which included an agent in Texas. Castellini filed a motion to dismiss for lack of personal jurisdiction, contending it did not have any ties to Texas and the mere act of registering an agent under a blanket designation did not reflect its consent to be sued in Texas. The court analyzed Eight and Fifth Circuit precedent on the issue and concluded that a motor carrier's filing of a designation of agent Form BOC-3 does not automatically confer personal jurisdiction over the carrier unless the carrier actually operates in the forum state. Since Castellini did not operate in Texas, the court ruled that there was no personal jurisdiction in Texas merely by virtue of Castellini's blanket Form BOC-3 designation of an agent in Texas. The court went on to analyze whether there was personal jurisdiction over the defendant based upon Texas' long-arm statute and concluded that it had no minimum contacts with Texas and hence no jurisdiction over the defendant. The court ultimately granted the plaintiff's request to transfer the action to the Kentucky.

Submitted by Jeff Simmons

23. Ambraco, Inc. v. M/V Clipper Faith, 2007 U.S. Dist. LEXIS 38460 and 2007 U.S. Dist. LEXIS 82802 (E.D. La. 2007).

By decisions dated May 24, 2007 and November 5, 2007 respectively, the court addressed the enforceability of a form selection clause in an ocean bill of lading and the subsequent motion to dismiss a third-party complaint against the original defendants whose forum selection clause defense was originally upheld. The case arose out of damage to shipments of several thousand bails of twine from Brazil to Houston, Texas and New Orleans, Louisiana under ocean bills of lading. Following the issuance by defendant Clipper Faith of a $2 million letter of undertaking to secure plaintiffs' claim, plaintiffs filed suit in the Eastern District of Louisiana in November 2006. On March 3, 2007 plaintiffs filed an amended complaint adding Pacorini Holding as a defendant, and on March 29, 2007 plaintiffs filed suit in the High Court of London, identical to the action filed in the Eastern District of Louisiana. Defendants moved to dismiss for improper venue, alleging there was a valid and enforceable form selection clause requiring that all disputes be heard by the High Court of Justice in London, England. The district court granted the motion, following federal court precedent holding that forum selection clauses are generally enforceable unless the opposing party demonstrates the clause is unreasonable under the circumstances of the case. The court discounted plaintiffs' argument that enforcement of the forum selection clause would cause them a grave inconvenience, found that there was no evidence of fraud, that the parties were sophisticated foreign companies in the business of the transportation of goods and international commerce and that plaintiffs had not met their burden to establish that they would be deprived of their day in court. The court also rejected the plaintiff's argument that it did not negotiate the terms of the bill of lading, finding that although a bill of lading is a contract between a shipper and a carrier, there was ample precedent for binding a consignee to the bill of lading contract. In its second (November 5, 2007) decision, the court granted defendants' motion to dismiss a third-party complaint filed by Pacorini Holding which sought to bring the defendants back into the case as third-party defendants. "Rule 14(c) cannot be used as a 'back-door' to tender Original Defendants to Plaintiffs." Since Pacorini's third-party complaint asserted a claim against the same parties that were already involved, i.e., the "Original Defendants," the court found Rule 14(c) inapplicable as it only applies to third-party defendants. Interestingly, the court reminded "the parties that in federal civil practice, one defendant's claim against another defendant is a 'cross-claim.'" Since defendant Pacorini could not prove a plausible set of facts in support of its claim under Rule 14 (c), the court found that dismissal of the third-party complaint was proper.

Submitted by Bruce Spitzer

F. Freight Charges

24. CSX Transportation v. Novolog Bucks County, 502 F.3d 247 (3rdCir. 2007).

In this precedential decision by the Third Circuit, the Court reverses the Eastern District of Pennsylvania's holding that " the consignee-agent" provision of the ICCTA 49 U.S.C. § 10743(a)(1), governs this dispute as to the demurrage charges assessed against the defendant Novolog as the consignee. Under this provision, a transloader or other such entity named on the bill of lading as a sole consignee is presumptively liable for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status in writing prior to delivery. The Court also found that the court below did not abuse its discretion when it refused to refer an issue to the STB, where the party moving for referral did not invoke the doctrine of primary jurisdiction until after the District Court had already decided an issue and the question was not one on which the expertise of the STB was crucial to a decision. The case involves defendant Novolog, who served as a private port withnaccess to a rail serviced industrial facility on the Delaware River, and CSX Transportation, who was the carrier for steel products to and from the port loading on vessels from and to foreign destinations. According to CSX's tariff, a person receiving its railcars for unloading or ordering empty railcars for loading had two days to do so and return the cars to service. If the cars were kept beyond that time, demurrage charges would be assessed. In particular, the tariff provided that unless otherwise advised, the consignor at origin or consignee at destination will be responsible for demurrage rates.

During 2003 fluctuations in the price of steel caused a significant increase of steel delivered for export to the Novolog facility. As a result, Novolog was unable to perform loading and unloading operations with the two day framework established by the tariff and demurrage fees in the amount of $260,304.00 accrued to CSX. Although having been listed as consignee on the bills of lading for inbound shipments, Novolog contended that it had never consented to be named consignee of record nor had executed any bill of lading to any carrier. The District Court found that by Novolog merely accepting the freight as the named consignee did not make it a party to any contract of carriage. When CSX admitted that no other agreement to pay demurrage existed, the court below found for Novolog. CSX appealed and BNSF and Norfolk Southern joined the appeal as Amicus Curiae. The Third Circuit found that liability for freight charges including demurrage charges may be imposed against a consignor, consignee or owner of the property, or on others by statute, contract or prevailing custom. It also cited to the classic Supreme Court case of L&N Ry. Co. v. Central Iron & Coal Co. 265 U.S. 59 (1924) for the proposition that "if a shipment is accepted, the consignee becomes liable as a matter of law for the full amount of the freight charges whether they are demanded at the time of the deliver or not until later." The Court also found, however, that if the consignee was known to be an agent or factor, the consignee would not be liable for demurrage. This notice could be given because the bill had language such as "care of" "or "account of" or if they had a longstanding relationship known to the parties beforehand. The Court found that the ICCTA at 40 U.S.C. § 10743(a)(1) provides by statute the same common law principles. That statute provides, however, that the consignee must give written notice to the delivering carrier before delivery of the property to the agent and in the absence of beneficial title, AND the name and address of the beneficial owner of the property. The Third Circuit, completely contrary to the court below, found that this provision addressed precisely the case before it, where the consignee is a middleman. It found that the statute adds precision to the common law by clearly laying out what a consignee must do to avoid liability. The court found that demurrage rates were "rates for transportation" under ICCTA, that consignee could mean any named consignee not necessarily the ultimate received of the shipped property.

The Third Circuit also completely disagreed with the Seventh Circuit case of Illinois Central v. South-Tec Warehouse, 337 F.3d 813 (7th Cir. 2003), which held that the fact that a party was named consignee did not presumptively make it consignee for purpose of that shipment and that more evidence was required. The Novolog Court found that the Seventh Circuit approach frustrated ICCTA in two ways: (1) it requires a designation-plus approach (named consignee plus some other factor to be liable) and (2) that the notification provisions only apply when the carrier does not have, through some other means like previous shipments, some notice of possible agency. The Third Circuit found that a far more effective system is to treat each bill of lading as a separate instance, and it thereupon reversed the district court and vacated the judgment.

Submitted by John Fiorilla

25. Southern Freight, Inc. v. L.G. Electronics, U.S.A., Inc., 2005-2007 Federal Carrier Cases, ¶84,500 (Superior Court, Gwinnett County, Georgia 2007).

This case presents the classic example of a motor carrier's attempt to collect freight charges directly from the shipper after the broker, whom the shipper already paid, filed for bankruptcy leaving the motor carrier holding the bag. Here, plaintiff Southern Freight, the motor carrier, was handling shipments from the facilities of the defendant shipper, L.G. Electronics, that were arranged by the broker, USA Motor Express ("USAM"). Defendant LGE had previously paid USAM for 69 shipments at issue, and the non-recourse clause was executed on only 2 of the 69 bills of lading. After USAM failed to pay Southern Freight and its subsequent bankruptcy, Southern Freight billed LGE directly and this lawsuit ensued. The court rejected LGE's argument that Southern Freight's failure to have billed it within seven days of delivery barred its recovery and instead followed Southern Pacific v. Commercial Metals and rejected the affirmative defense based on the carrier's violation of the credit regulations. Finding that "there is a presumptive right of the carrier to collect directly from the shipper unless there is an express waiver by the shipper…even if the result is double payment by the shipper," the court concluded that Southern Freight was entitled to recover $68,750, plus prejudgment interest of $7,900 from the shipper.

Submitted by Vic Henry

26. Exel Transportation Services, Inc. v. Sigma Vita, Inc., 2007 Ga. App. LEXIS 1247 (Court of Appeals of Georgia, Third Div. 2007).

Sigma Vita, a motor carrier, had sued Exel Transportation, a broker, to recover freight charges for transportation services rendered on October 14, 2004 in delivering 3 shipments that originated in China, were imported via the port of Savannah, Georgia, and were then delivered by Sigma Vita to points in Georgia, Florida and South Carolina. Sigma Vita filed its complaint against Exel on April 19, 2006, 18 months and 5 days after the final delivery, seeking to recover freight charges of $35,181. The trial court granted Sigma's motion for summary judgment and Exel appealed, claiming that Sigma Vita's suit was barred by the 18-month statute of limitation in 49 U.S.C., §14705(a). The Court of Appeals of Georgia agreed and reversed the trial court's judgment. The Court of Appeals ruled that the transportation provided by Sigma from Savannah to points in Georgia, Florida and South Carolina constituted interstate or foreign commerce subject to the application of §14705(a). The court also rejected Sigma's argument that longer state court limitations applied and that the limitations in the Carmack Amendment applied, the latter applicable only to actions against motor carriers. The court also rejected Sigma's argument that §14705(a) did not apply to an action brought against a broker, ruling that the federal statute did not limit recovery for transportation charges against any particular type of defendant.

Submitted by Rob Spears

27. Con-way Transportation Services, Inc. v. Auto Sports Unlimited, Inc., 2007 U.S. Dist. LEXIS 75451 (W.D. Mich. 2007).

Con-way sued to collect $102,538 in unpaid invoices for transportation services it provided to defendant Auto Sports. The claim involved freight charges on numerous shipments Con-way handled for Auto Sports pursuant to a pricing agreement which provided for the application of certain tariff provisions and a 68% discount. Con-way's bills of lading referenced its applicable tariff items including the requirement that any charges billed in addition to the original charges had to be billed within 180 days of the date of the original bill. After Auto Sports' delinquency in paying Con-way's bills, Con-way referred the matter to a collection agent who notified Auto Sports that Con-way would seek to collect "the full undiscounted freight charges on 379 disputed invoices totaling $102,538." Following a bench trial, the court first ruled that Con-way's reprinted invoices were admissible as adequate representation of the original invoices in accordance with the Federal Rules of Evidence. However, the court rejected Con-way's argument that its invoices were subject to the "filed rate doctrine," and, following Transit Homes and Central Transport, ruled that its tariff provisions were a nullity and had no effect apart from their status as contracts. Applying Michigan state contract law, the court ruled that Con-way had failed to comply with the 180-day provision in its bills of lading to properly remove the discount and that the defendant, after application of adjustments and credits on the original invoices, was liable to Con-way for only $18,156.

Submitted by Dan Fulkerson

28. J & P Trucking Company, Inc. v. USA Motor Express, Inc., 2007 U.S. Dist. LEXIS 79698 (N.D. Ala. 2007).

In this case plaintiff motor carriers J & P Trucking and Nussbaum Trucking sued a shipper to recover freight charges on shipments brokered by the bankrupt broker, USA Motor Express ("USAM"). Two shipping agreements had been in effect: one between USAM and the defendant's shipper LG Electronics, and a second between USAM and plaintiffs. The facts unfolded along familiar lines: LG paid the broker and the broker filed for bankruptcy before it paid the motor carriers. Consequently, plaintiff motor carriers sued LG, the shipper, directly, even though their claims would result in LG double-paying for the transportation. The court, relying heavily on the two different agreements, ruled that LG should not be required to pay twice for the transportation provided by the motor carriers. The court looked to the contracts entered into and noted that under the agreement between LG and USAM, USAM had agreed that all obligations it assumed would apply to the same extent as if it actually had performed the transportation directly. The court noted that LG had no knowledge of the fact that USAM had a completely separate contractual arrangement with the plaintiff motor carriers, found that the contracts were unambiguous, clearly stated the intentions of the parties and that plaintiffs knew that they were to be paid by USAM regardless of who the shipper was. "To allow plaintiffs to proceed directly against LG renders not one, but two contracts meaningless." While the court expressed its sympathy for the plaintiffs, it concluded nonetheless that they were bound by the contracts they entered into and granted defendant LG's motion for summary judgment.

Submitted by Rob Moseley

G. Freight Forwarder/ Broker Liability

29. Hotan Corporation v. Prater, 2007 U.S. Dist. LEXIS 80859 (N. D. Cal. 2007).

Plaintiff Hotan sued defendant BAP Logistics, a logistics provider, for loss of a shipment of CD/ROM discs. The complaint alleged both actual damages and punitive damages. Defendant moved for summary judgment, claiming that the Carmack Amendment did not apply to brokers and therefore it could not be liable. In denying BAP's motion, the court noted that there was a question of fact as ton whether the BAP was operating as a "carrier" under Carmack or as a broker. The court also noted that if Carmack did not apply, the defendant/broker would be exposed to the plaintiff's punitive damages claim, which otherwise would not apply to a motor carrier under Carmack.

Submitted by Julie Maurer

30. KLS Air Express, Inc. v. Cheetah Transportation LLC, 2007 U.S. Dist. LEXIS 62161 (E.D. Cal. 2007).

This case presents another analysis of the circumstances under which a broker may be subject to Carmack Amendment or common law liability. Here, plaintiff KLS had hired defendant Cheetah, a broker, to transport a shipment of flat panel monitors from Pennsylvania to California. Cheetah arranged for Sonko Trucking to handle the transportation and Sonko, in turn, hired a third entity, Hemi-Express to deliver the shipment. The shipment was stolen while in Hemi-Express' possession, and KLS sued Cheetah for $275,540 for the loss of the shipment. Cheetah denied liability, asserting that its role was only that of a broker, and submitted the claim to Sonko. As it turns out, Sonko had only $100,000 of insurance coverage. KLS sued Cheetah alleging several claims, including that Cheetah was liable under the Carmack Amendment or, alternatively, in common law negligence as a broker for failing to provide adequate insurance (since Cheetah's policy had a $250,000 deductible), breach of contract and negligent hiring (of Sonko). The court found that there were factual disputes as to whether Cheetah acted as a broker or motor carrier based on conflicting evidence as to the parties' representations and agreements. The court also denied Cheetah's motion for summery judgment on KLS' negligence claims, focusing on Cheetah's false representation that it had $250,000 worth of cargo insurance. The court also found that there were material issues of fact in dispute as to KLS' breach of contract claim, and denied summary judgment as to that claim. Finally, as to KLS' negligent hiring claim, the court, citing Chubb Group, found that there was no legal duty on a broker to hire a carrier with specific insurance coverage and therefore granted Cheetah's motion for summary judgment on the negligent hiring claim.

Submitted by Kathleen Jeffries

31. Delta Leasing, LLC v. American Fast Freight, Inc., Superior Court for the State of Alaska, Third Judicial District at Anchorage, Case No. 3AN-07-10226 (2007).

This is an excellent memorandum on behalf of a defendant freight broker in support of its motion for entry of judgment on the pleadings to dismiss a complaint alleging state and common law causes of action, in addition to a breach of contract claim, against a freight broker. The attached memorandum focuses on FAAAA preemption under 49 U.S.C. §14501(c)(1) on an intrastate shipment brokered by defendant American Fast Freight.

Submitted by Eric Zalud

E. Miscellaneous

32. Source Food Technology, Inc. v. United States Fidelity and Guaranty Company, 465 F.3d 834 (8th Cir. 2006).

Source Food, based in Minnesota, produced and sold cholesterol-free cooking oil and shortening to end users in the United States. Its sole supplier of beef product, which was the primary ingredient in its cooking oil and shortening, was located in Canada. Source Foods provided its Canadian supplier with a patented method for removing cholesterol from its beef product. In May, 2003, the USDA banned the importation of beef, ruminants and ruminant products from Canada due to the threat of mad cow disease. The ban included the beef product which Source Foods received from its supplier in Canada. Just before the ban went into effect, Source Foods placed an order from its Canadian supplier. The beef product was manufactured, packaged and loaded onto a truck for delivery to Minnesota. The embargo occurred immediately thereafter and the shipment was not made. Source Foods was unable to fill orders and had to find a domestic supplier of the unique beef product found in its cooking oil and shortening. Its largest customer unilaterally terminated its supply contract due to Source's inability to supply product. Source Foods then filed a claim with its insurance carrier, USF&G, which included property and business interruption coverage. Source Foods claimed damages for extraordinary operating expenses, loss of profits and costs associated with finding a new U.S. supplier. USF&G denied the claim on the basis that its policy provided coverage only "where there is direct physical loss to the insured's property." Source Foods filed suit in Minnesota against USF&G and its parent company, St. Paul. The case was removed to the U.S. District Court for the District of Minnesota, which granted USF&G's motion for summary judgment. The Court of Appeals for the Eighth Circuit affirmed the District Court's ruling, finding that the "direct physical loss" requirement under the policy was unambiguous and enforceable. The Court also distinguished the case from other cases where product was destroyed because of the threat of contamination. In this case, the product was neither lost nor destroyed. Thus, no coverage existed.

Submitted by James Wescoe

33. New York Warehouseman Liability, Bill No. A06571/S-2462--A, August 1, 2007.

The enactment of this bill by the State of New York will effectively establish a negligence burden of proof standard as to goods lost by a warehousemen, in commercial transactions, in lieu of the former presumption of conversion, which had been in effect since the 1980 decision in I.C.C. Metals. Inc. v. Municipal Warehouse Co.

Submitted by George Wright

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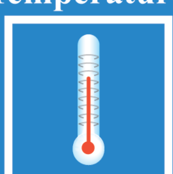

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William D. Bierman, Esq.
Executive Director, TLP & SA

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