In Transit

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In This Issue...

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ARE THE WHEELS FALLING OFF CSA 2010???

Mark calendars for conference April 3–6, 2011

CSA 2010—A RECIPE FOR DISASTER

By: William D. Bierman — EXECUTIVE DIRECTOR TLP&SA

It seems like every day for the past year or so there has been some article; seminar; webinar or discussion on CSA 2010. One would think the industry knows all there is to know about this sweeping new program. *One would be wrong!* Our informal polling indicates few small carriers have even heard of CSA 2010 and most shippers and brokers are not aware of the potential catastrophic consequences vicarious liability may visit upon them.

My colleague Hank Seaton and I together with some interested industry folks recently sat down with Administrator Anne Ferro of the FMCSA and a group of her minions to express our deep concern regarding the problems and unintended consequences of CSA 2010. We were grateful for the meeting, since we had been writing to the agency for some time setting forth substantial problems with the proposed Program.

We posed the following questions:

1. Why would the Agency rush ahead with implementation of CSA 2010 before subjecting it the formal rule-making process as required by the Administrative Procedure Act wherein the industry would get full disclosure of all aspects of the proposed rule, including the algorithms and formulas the agency intends to utilize in determining grades and classifications?
2. Is the Agency aware shippers, brokers, factors and others in the industry will rely on the CSA 2010 numbers and may refuse to deal with carriers even though the FMCSA may eventually declare the carrier satisfactory thus putting a carrier out of business before the final rating is determined?
3. Why has the Agency not revealed its formulas and algorithms so the industry can test them for accuracy?
4. Why does CSA 2010 assign safety ratings based on citations and warnings which a motor carrier has no effective way to challenge?
5. Does the Agency realize public release of these preliminary and flawed numbers will create fertile ground for vicarious liability lawsuits against shippers and brokers based on alleged negligent selection of carriers?

Unfortunately, we did not receive answers to these questions.

Based on the industry's growing understanding of these problems and a host of others, the FMCSA has now grudgingly started to make minor changes to CSA 2010. They have dropped the word "deficient" from their vocabulary and replaced it with "alert". They have changed the color used to highlight carrier "alerts" from red to orange. They have "recalibrated" one of the BASIC categories.

Nevertheless, the Agency has refused to discontinue the publishing of all questionable preliminary data to the public or to include a strong WARNING with the effect of law advising the public and the courts that these numbers are preliminary and cannot be used to either disqualify a carrier or in any court of legal proceeding.

Based on the position of the Agency, trucking groups have sued to delay implementation of CSA 2010. The carriers, represented by three industry groups, filed suit at the U.S. Court of Appeals in Washington, D.C. to block the release of carrier safety data proposed to start on December 5, 2010. (See copy of carrier lawsuit at http://www.tlpsa.org/open/CSA_2010_Legal_Action.pdf).

No one in the transportation industry disagrees with a program to promote safety. In fact, last year was the safest year for trucks since record keeping was initiated without CSA 2010. There is no reason to believe next year will not follow suit with or without the CSA 2010.

[1]Macbeth Act 4, scene 1, 10-11, etc.

TLP&SA does not disagree with the concept of CSA 2010. We only ask for a fair and equitable system that has been subjected to formal rule-making so that the important issues raised above can be addressed and resolved.

Double, double, toil and trouble
Fire burn, and cauldron bubble.

As things stand right now there are some foul ingredients in the stew called CSA 2010.

* * * * * *

NOTE: Since the writing of this article and partially in response to the lawsuit, FMCSA has made additional changes to CSA 2010. They have added luke warm warning language concerning the use of CSA 2010 numbers and made some additional minor changes to their computations. While the court did not stop the publishing of CSA 2010 numbers, it did order briefing of the issues raised and will eventually render an opinion.

TLP&SA's CONVERSATION WITH CargoNet

Earlier this year, the Insurance Services Office (ISO) and the National Insurance Crime Bureau launched CargoNet, a database designed to prevent cargo theft and increase recovery rates through secure and controlled information sharing between victims, and their business partners and law enforcement.

TLP&SA is interested in this new concept so we recently interviewed CargoNet's Managing Director, Maurizio Scrofani to find out more about how CargoNet works.

TLP&SA: *Maurizio, thanks for spending some time with us as our membership is curious to know more about CargoNet. Can you give us a general idea as to what CargoNet is all about?*

Maurizio: We appreciate TLP&SA's interest in CargoNet and we look forward to working closely with your organization to help the industry as a whole.

CargoNet's goal is to be the clearinghouse for cargo theft incident data by aggregating information from existing public and private databases as well as law enforcement crime reports. By capturing this data, CargoNet is able to successfully recover stolen cargo, as well as provide preventative analytics to our members which helps them mitigate their cargo theft risk. Preventative analytics can be defined by to identifying trends, such as which transportation lanes or commodities are being targeted by thieves, or what techniques they are using.

TLP&SA: *How did CargoNet get started?*

Maurizio: In 2009, after noticing a consistent rise in cargo theft claims, ISO decided that something needed to be done to help prevent cargo theft as well as help recover cargo in the event that it is stolen. In collaboration with the National Insurance Crime Bureau (NICB), ISO was able to create a national information-sharing system to combat cargo theft. We designed a system that enables more efficient, accurate, and timely sharing of cargo theft information among theft victims, their insurers, and law enforcement.

TLP&SA: *What services does CargoNet offer?*

Maurizio: CargoNet is centered on a national database and information sharing system managed by crime analysts and subject-matter experts. CargoNet applies an integrated, layered approach that exploits the weakness of cargo thieves at multiple points and includes integrated databases, a theft alert system, task force and investigations support, a tractor/trailer theft deterrence program, the TruckStopWatch® program, driver education and incentives, secondary-market monitoring and interdictions, crime trend analysis and loss control services, and training and education.

TLP&SA: *Other than physical security procedures, what types of measures can companies take to mitigate cargo theft risk?*

Maurizio: There are many things that companies can do to lower their cargo theft risk other than making sure that the trailer is locked/sealed properly. Most notably, companies should have protocols surrounding choosing "approved" carriers, driver and employee education, historical theft-trend data analysis, and post-theft procedures.

TLP&SA: *What's the average cargo theft loss? Are there specific commodities and/or locations that are usually targeted?*

Maurizio: The FBI estimates that the overall loss due to cargo theft inside the United States each year is approximately $30bn. CargoNet is reporting that the most targeted commodities in 2010 were "Apparel/Accessories" (10% of total US cargo thefts), "Food & Beverage" (20% of total US cargo thefts), and "Electronics" (21% of total US cargo thefts.

18% of all US cargo theft in 2010 took place at a truck/rest stop, 15% of thefts occurred in miscellaneous parking lots, and 39% of US cargo thefts occurred at carrier terminals, warehouses and distribution centers.

62% of all US cargo thefts occurred in California, Florida, Georgia, Illinois, New Jersey, and Texas. California and Texas accounted for 30%.

TLP&SA: *Let's say that a tractor/trailer is stolen, what can a company do to effectively get the cargo recovered?*

Maurizio: The best thing that a company can do in this situation is to notify local law enforcement of the theft and then report it to CargoNet immediatley thereafter. Companies have a better chance of recovering their cargo if there is aggressive and timely notification within 2 hours of the incident. Once the CargoNet command center confirms the incident, a bulletin is then communicated (geo-target specific or national) through various channels including the National Law Enforcement Telecommunications System (NLETS). When police agencies and cargo theft taskforces receive the theft bulletin, they then have the ability to push that bulletin directly down to the patrol cars within the region where the theft occurred.

Companies should also prepare for a theft by recording as much information as possible about the driver, tractor, and trailer carrying their goods before the trailer leaves their facility. The more information recorded prior to a theft; such as, description of the driver, license plate number, etc., the easier it will be for law enforcement to locate the trailer in the event that it is stolen.

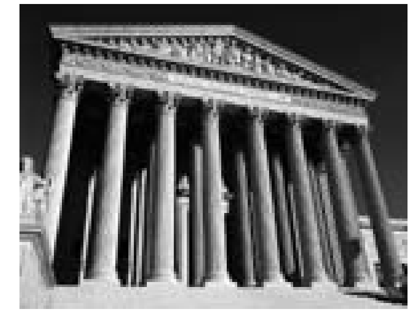
TLP&SA: *How can CargoNet help a company make sure that they are using "best practices" to help prevent cargo theft?*

Maurizio: CargoNet is staffed by professionals with backgrounds that blanket the supply chain industry. From logisticians to insurance claims specialists to telecommunications specialists, CargoNet has a staff dedicated to educating their members on industry "best practices".

CargoNet assists some members in designing protocols and procedures surrounding all aspects of supply chain security; from educating clients on the aspects of best-in-class carriers, to outlining specific physical security needs.

Using historical cargo incident data, CargoNet can also help its members determine how they wish to manage their lanes.

TLP&SA: *Thanks for spending some time educating our members and we look forward to seeing you and your team at our Joint Conference in St. Louis from April 3–6 2011.*



Recent Court Cases

as analyzed by the Conference of Freight Counsel

William D. Bierman, Esq., Chairman • Marian Weilert Sauvey, Esq., Vice-Chairman

A. Carrier Liability

1. Pacific Indemnity Co. v. Pickens Kane Moving & Storage Co.; Atlas Van Lines, Inc., 2010 WL 1875517 (D. Ariz. May 6, 2010)

This case relates to the summary judgment order presented at the January 2010 CFC meeting in Austin, Texas (Case No. 9) (the "Summary Judgment Order"). After Pickens Kane Moving & Storage Company ("Pickens Kane") appealed the Summary Judgment Order, where it is currently pending before the Ninth Circuit Court of Appeals, the District Court entered the May 6, 2010 Order, granting Pickens Kane's motion for reasonable expenses in the amount of $74,402.35 against Atlas Van Lines, Inc. ("Atlas").

In the underlying action, Pickens Kane, as the originating carrier, sought indemnity under 49 U.S.C. § 14706(b) in the amount of $1 million against Atlas as "the carrier over whose line or route the loss or injury occurred.…" In its Summary Judgment Order, the District Court ruled that Atlas was only liable to Pickens Kane in the amount of Atlas' limitation of liability: $5.00 per pound or $52,500.00.

Atlas objected to Pickens Kane's entitlement to reasonable expenses because Pickens Kane could not be the "prevailing party" when it recovered a mere 1/20 of the $1 million indemnification it sought from Atlas. Moreover, Atlas argued that Pickens Kane was not an "innocent carrier" because it was the only party that knew that the householders desired $1 million in coverage, yet it chose not to declare any valuation with the downstream intermediary or the downstream carrier, Atlas.

In ruling against Atlas, the Court observed that no case law exists to apply the "prevailing party" analysis to the indemnification provisions of § 14706(b). Looking at the policy behind Carmack, the Court noted that Carmack imposes strict liability on even a faultless originating carrier and that § 14706 merely ameliorates the harshness of the rule by entitling the faultless carrier to recover its reasonable expenses from the carrier which caused the loss. The District Court added that, even if a traditional prevailing party analysis is applied, Pickens Kane obtained "some of the relief it sought" (i.e., $52,500.00) and therefore it is entitled to its reasonable expenses.

Atlas filed a notice of appeal of the May 6, 2010 Order. The issue on appeal is whether the District Court erred in granting Pickens Kane its reasonable expenses under the indemnification provision of § 14706(b), where Pickens Kane was neither the prevailing party nor an innocent carrier.

2. Bishop v. Allied Van Lines, Inc., 2009 WL 5066786 (M.D.Fla. 2009).

Shipper Bishop stored valuable household goods in a purportedly air conditioned warehouse operated by Sanders Moving in anticipation of a move to Florida. The in turn inventory noted minimal damage. The goods stayed in the warehouse for approximately 15 months. Sanders Moving's letters and literature identified Sanders Moving as an agent of Allied Van Lines. Bishop testified that she chose Sanders Moving in part because of the affiliation with Allied.

At out turn from the warehouse the loaders noted extensive damage to the antiques. The out turn inventory had written on it in block capital letters "DO NOT GIVE TO CUSTOMER." At delivery, the crew unloaded the goods in 2 hours. Bishop identified the damage to her goods days or weeks after delivery. Bishop submitted a claim to Allied that included 11 damaged items by no values for the damaged goods. Allied denied the claim and Bishop sued. After discovery, Allied moved for summary judgment, arguing that Bishop lacked evidence to support a prima facie case under the Carmack Amendment, Sanders Moving was not its agent and Bishop failed to meet the claims requirements in 49 C.F.R. § 1005.

The court rejected each argument. It held that Bishop had presented evidence of good condition at origin, bad condition at delivery and damages. Specifically, the court found the out turn report prepared by Sanders Moving, which noted lots of damage, to be evidence of bad condition at delivery. As for agency, the court stridently rejected Allied's argument because Allied had stated in other pleadings that Sanders Moving was its agent and because Allied and Sanders Moving had actually entered into an express agency agreement. Finally, the court applied a very liberal interpretation of 49 C.F.R. § 1005, holding that the only thing the claim notice has to do is put the carrier on notice so it can start an investigation. The court again pointed to the out turn report and observed that the carrier had ample information to investigate the claim.

3. Fortis Corporate Insurance, SA v. Viken Ship Management AS, 597 F.3d 784 (6th Cir. 2010)

Maritime cargo damage case to a shipment of steel coils from Poland to Toledo, Ohio.
Sea water entered the cargo hold and caused rust to the steel. Fortis, the insurance company of the owners of the goods, paid $375,000.00 and filed this subrogated cargo damage case against the ship's owner, Viken Lakers and the ship's manager, Viken Ship Management ("VSM").

The question is whether a ship manager charged with the responsibility to provide a Master, officers and crew and other ship-related functions qualifies as a "carrier" under the COGSA definitions. The District Court found and the Sixth Circuit (retired Supreme Court Justice O'Connor sitting by designation) affirmed, the ship manager was not a "carrier" under COGSA and therefore the COGSA 1 year period of limitation did not bar the lawsuit.

The case was initially dismissed for lack of personal jurisdiction. The Sixth Circuit reversed and remanded. *Fortis Corporate Ins. v. Viken Ship Mgmt.*, 450 F.3d 214 (6th Cir. 2006).

On remand, the Defendant, VSM, moved for summary judgment on the basis the suit was time barred by the 1 year period of limitations pursuant to COGSA. The Court held the ship's owner, Viken Lakers, was a carrier but that the ship's manager, VSM, was not. VSM was not a "carrier" because it was not the "owner" or "charterer" of the ship pursuant to COGSA. VSM argued for a more expansive approach to the define "carrier" to include whether the entity in question performs functions traditionally carried out by a carrier. Citing *Robert C. Herd & Co. v. Krawill Mach. Corp.,* 359 U.S. 297, 301, S. Ct. 766, 3 L.Ed.2d 820 (1959), the Sixth Circuit rejected VSM's argument to expand the definition of "carrier" under COGSA.

The Sixth Circuit also rejected VSM's argument unless VSM qualified as a "carrier" it would be subject to the liability of a carrier without the protections of COGSA. Instead, VSM would have the status of an allegedly negligent tortfeasor and the Plaintiff would have to prove the elements of its negligence claim against VSM.

Justice O'Connor also pointed out the parties were free under COGSA to extend coverage to agents or independent contractors through a Himalaya clause. Simply put, if the parties wanted the ship's manager, VSM, to be governed by COGSA, they could have so contracted but chose not do so. Under the backdrop of *Kirby* and noting the need for uniformity in maritime law, Justice O'Connor found it telling the parties chose not to extend COGSA by contract to the ship's manager, VSM.

Finally, the Sixth Circuit affirmed the District Court's finding of negligence against VSM and that it was not clearly erroneous.

4. Maxine Company, Inc. v. Brinks Global Services USA, Inc., 2010 WL 1856019 (N.Y. Sup. 2010), 27 Misc. 3d 1221(A), 2010 N.Y. Slip. Op. 50821(U)

This is a breach of contract action filed in New York State Court alleging $713,900.00 in compensatory damages, lost profits and reasonable attorneys fees for damage to 157 items of fine jewelry. The shipper Plaintiff declared the value on the Airbill at $2,000,000.00.

After the Defendant carrier answered, the Plaintiff filed a second lawsuit alleging the same facts against the Defendant but adding an additional Plaintiff (the Italian manufacturer). The Court dismissed that second lawsuit as filed outside of the one (1) year contractual period of limitations.

In the instant lawsuit, the Defendant sought and was granted summary judgment dismissing the Complaint. The shipment was made pursuant to a written contract between the parties, which "contracted out" of Carmack. Instead, the laws of the State of Connecticut was agreed to by the parties.

Plaintiff contended the contract was a contract of adhesion to be construed against the motor carrier. The Court rejected that argument because Plaintiff failed to set forth any proof or indicia of a take-it-or-leave-it negotiation.

The contract terms were comprehensive and basically stated that the Plaintiff shipper accurately described the property and its value. Plaintiff breached that provision because it admitted it undervalued the property at $2,000,000.00 when, in reality, the value was over $6,000,000.00. Plaintiff admitted as such and said it was customary to declare a value in the Bill of Lading that was less then the true value and to insure for the difference. Plaintiff also breached its obligation to advise the carrier pursuant to the contract if the shipment was fragile.

This Court read the contract as written, charged the Plaintiff with knowledge of the contract, as written and based upon the facts, found the Plaintiff breached the contract. The Court then granted the Defendant's motion for summary judgment and dismissed the complaint.

5. Amerigas Propane, LP v. Landstar Ranger, Cal Court of Appeals No: E048536

This case is only complicated if you read it. It stands for proposition that under California law a joint tortfeasor does not need to obtain an assignment from the plaintiff to pursue actions for equitable indemnity and contribution. (Which presumably would apply in a Carmack apportionment setting.) It also holds that an owner operator has a right of action against his lessee under 49 USC 14101 and 49 CFR 390.1 et. seq. for personal injuries caused by violation of those regulations.

The original plaintiff, Mr. King, who apparently had some trucking experience was a newcomer to pulling drop decks. He qualified for the driver program at Landstar and purchased both a tractor and a flatbed. The lease to Landstar contained all the standard "exclusive use" and "complete responsibility" language mandated at 49 CFR 376.12. For some reason, Landstar did not enroll him in its load securement class. Landstar matched him to an intercompany movement of heavy propane tanks for Amerigas. At destination, while an Amerigas employee was fetching a forklift, King began to unsecure the load along with the help of a bad Samaritan who just so happened to be there. You can guess what happened next.

King sued Amerigas and the bad Samaritan's employer for negligence, premises liability, and loss of consortium. He did not sue Landstar. Amerigas cross-complained against Landstar under alternative theories, including employer negligence and for equitable indemnity and contribution. It then settled with King for $3,375,000.00 and continued on with the cross-complaint.

The Court ruled that because Amerigas' cross-complaint against Landstar did not seek recovery for the entirety of King's loss, it was not an action in subrogation requiring an assignment. Rather, it was an original action seeking restitution for that portion of King's damages attributable to Landstar's actions as a joint tortfeasor. No assignment was required.

Then, after examining a supposed split between the Circuits against the backdrop of the specific facts, the Court held that under *Johnson v. SOS Transport* 926 F 2d. 516 (6th Cir. 1991) an owner operator can sue his lessee for injuries resulting from violations of the safety provisions of the CFRs. Specifically, it held that the safety rules were enacted not only to protect the general public, but specifically to protect the driver as well. It understood that the statutory employee status of an owner operator extends to public liability only and does not preempt state law interpretations of issues that normally fall within state jurisdiction, such as worker's compensation.

Amerigas also made a nondelegable duty argument, which the Court ignored on grounds it had not been pleaded.

6. Spence v. The Esab Group, Inc., Middle District of Pennsylvania (07-CV-00583)

Plaintiff Spence was injured while driving a tractor trailer loaded with welding supplies. Spence was present while the cargo was loaded, and he placed load stars into the bottom of the trailer to secure the load. On this occasion, however, Spence did not secure the cargo with a load lock because he did not have one with him. After leaving the shipper/defendant's facility, Spence's tractor trailer overturned while negotiating a turn. Spence was injured and sued the shipper. The shipper, ESAB, filed a motion for summary judgment, arguing that plaintiff could not establish that the shipper had a duty to secure the load.

U.S. District Judge Sylvia Rambo granted the motion. She first looked to the FMCSR and found that the regs "squarely place the duty on the driver and carrier of the load to ensure that cargo loaded onto its trailer is adequately secured." She ruled that, taken together, Sections 392.1(a) and 393.100 of the Regs impose a duty on the driver to properly distribute and adequately secure the cargo "to prevent shifting upon or within the vehicle to such an extent that the vehicle's stability or maneuverability is affected."

Judge Rambo rejected and distinguished plaintiff's common law arguments under Pennsylvania law. She noted that the primary case cited by plaintiff was decided before the promulgation of the FMCSR. Moreover, the Court distinguished the duty of loading from the duty of securing cargo. Judge Rambo also found it important that the plaintiff in the instant case was inside the trailer when it was loaded and took measures to secure the load by placing load stars on the trailer floor. Thus, since plaintiff was arguing that the shipper negligently *secured* the load, and his own expert determined that the cargo was *properly loaded,* summary judgment was appropriate.

Judge Rambo also relied upon the prevailing common law duties of the shipper and carrier as set forth in *United States v. Savage Truck Lines, Inc*. 209 F.2d 442 (4th Cir. 1953), which holds that when a shipper assumes the responsibility of loading, the shipper is liable for latent or concealed defects that cannot be discovered by ordinary observation of the carrier. Judge Rambo, while noting that the Savage case has not been formally adopted in the Third Circuit, ruled that its consistency with the terms set forth in the FMSCR "mitigate heavily in favor of adopting this standard."

B. Limitation Period & Notice

7. Ewanchew v. Bekins Van Lines, LLC, 2008 WL 4642614 (M.D. Fla. 2008)

Plaintiffs, Ewanchew ("Plaintiffs"), filed suit against defendant, Bekins Van Lines ("Defendant"), alleging damage to their household goods during interstate movement, pursuant to 49 U.S.C. § 14706. Further, Plaintiffs argued in a motion that they were entitled to recover their attorney's fees, because Defendant did not notify them of the possibility that their claim could be resolved by arbitration, pursuant to 49 U.S.C. § 14708(d).

Defendant argued that Plaintiffs were not entitled to attorney's fees because they failed to submit their claim within the time limits prescribed by 49 U.S.C. § 14708(d), and because they knew of their right to arbitration, but chose to proceed with a civil suit.

49 U.S.C. § 14708(d) states in pertinent part that reasonable attorney's fees may be awarded if:

> (1) the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later;
> (2) the shipper prevails in such court action; and
> (3) (A) the shipper was not advised by the carrier during the claim settlement process that a dispute settlement program was available to resolve the dispute….

The court decided that, the Plaintiffs having missed the 120 day claim deadline, they were not entitled to recover their attorney's fees from Defendant. Therefore, the court denied the Plaintiffs motion for attorney's fees.

The court reasoned that there is no authority establishing that the statutory 120-day claim deadline applies only where a shipper is informed of it. Nor would lack of notice of the potential for arbitration relieve Plaintiffs of the timeliness requirement. Therefore, Plaintiffs were not entitled to attorney's fees.

8. Paladino v. Atlas Van Lines, Inc., 2010 U.S. Dist. LEXIS 43606 (E.D. Va. May 4, 2010)

Plaintiff Michael Paladino sued Atlas for damages in the amount of $15,000 associated with the transportation of Paladino's household goods from Tennessee to Richmond, Virginia in September of 2005. Atlas moved for Summary Judgment on the grounds that Paladino's cause of action was not timely filed within 2 years and 1 day of denial of Paladino's claim as set forth in Atlas' bill of lading and tariff.

In response, Paladino asserted Atlas never gave clear, final and unequivocal disallowance of Paladino's claim. Further, Paladino contended that Atlas should be estopped from asserting a contractual limitation defense because Atlas allegedly made representations that misled Paladino.

The Court granted Atlas' Summary Judgment, holding that Atlas had unequivocally denied Paladino's claim and found that the bill of lading set forth a 2 year and 1 day limitation. Likewise, the Court held that Atlas never told Paladino not to file his suit and nothing in Atlas' denial letter could have misled an individual to believe that filing a suit was unnecessary.

C. Limitation of Liability

9. A. Rashtian Corp. v. United Parcel Service, Inc., 2008 N.Y. Misc. LEXIS 9124, 2008 N.Y. Slip Op 32329U (N.Y. Sup. Ct. 2008)

This is a limitation of liability case involving transportation of a rug, which Plaintiff values at $75,000.00, from New York to California. Plaintiff alleged the rug was not delivered.

Plaintiff avers he told the UPS driver the rug was worth more than $50,000.00 and perhaps as much as $75,000.00. UPS' tariff permits UPS to transport goods valued at $50,000.00 or less. According to the Plaintiff, the UPS driver advised Plaintiff to declare the value in the Bill of Lading at $50,000.00 in order to comply with the tariff. The freight rate was calculated and paid based upon the $50,000.00 declared value.

Both sides cross-moved for summary judgment on liability. UPS also moved to cap the damages at the $50,000.00 declared value.

The Court first outlined the Carmack Amendment, the reasoning behind the limitation of liability, the UPS tariff and noted the Plaintiff knew the shipment was subject to the tariff by signing the Bill of Lading. The Court stated, "[t]he parties have failed to provide a single instance in which a court invalidated a lawfully imposed limitation of liability where the shipper appeared to be reasonably sophisticated and a declared value was stated."

There was no evidence the Plaintiff was misled by the driver.

Finally, the Court denied that part of UPS' motion for summary judgment on the basis the rug was an item of "extraordinary value" under the tariff because of questions about the value of the rug.

10. Stevens Van Lines, Inc. v. Don's Moving & Storage, 2009 N.Y. Misc. LEXIS 3692, 2009 N.Y. Slip Op 30539U (N.Y. Sup. Ct. 2009)

Cargo theft case involving a shipment of household goods from New York of North Carolina. The Plaintiff and the shipper/consignor agreed the value of the goods was $75,000.00. Plaintiff then contracted with the Defendant to pick up the goods in New York from the shipper and to store them at the Defendant's warehouse located in Albany, New York. The Defendant's Bill of Lading, which was signed by the shipper, limited the Defendant's liability to $2,500.00. The goods were stolen while in the Defendant's possession.

As a result of the loss, Plaintiff paid the shipper $75,000.00. Shipper released the Plaintiff and the Defendant. Plaintiff, as subrogee, brought the instant lawsuit against Defendant for breach of contract, negligence and Carmack.

Defendant moved to dismiss and moved to limit the damages to the $2,500.00 in its Bill of Lading with the shipper. The Court denied the motion to limit the damages on the basis if discovery revealed the Defendant was reckless, and not merely negligent, the limitation of liability would not be enforced. *Downstate Medical Center v. Purolator Courier Corp.,* 138 Misc. 2d 714, 525 N.Y.S.2d 120 (Civ. Ct. Kings County 1988).

Secondly, the contract sued upon is between the Plaintiff and the Defendant and that contract contains no limitation of liability.

Thirdly, the Court examined the Carmack cause of action and stated no New York Court addressed a Carmack case involving facts where, as here, the breach occurred during the intrastate leg of and interstate shipment. The Court indicates neither side fully addressed the Carmack Amendment's impact on the case in their motion papers. The Court then cites *Roberts v. Levine*, 921 F.2d 804 (8th Cir. 1990) and *Atlantic Independent Union v. Sunoco, Inc.,* ____ F.3d _____ , 2006 U.S. Dist. LEXIS 11223 (E.D. Pa. 2004) for the proposition the parties' intent to make the transportation interstate is determinative and for that reason held the Plaintiff stated a valid cause of action pursuant to Carmack.

11. Lang v. Frontier Van Lines Moving And Storage, Inc., 2009 P. Dist. & Cnty. Dec. LEXIS 234 (2009).

Limitation of liability case denying enforcement of the motor carrier's limitation.

This is a household goods move from Pennsylvania to Arizona. The Bill of Lading contained a released rate of $0.60/lb. up to a maximum of $1.25/lb. and that if the shipper fails to declare the value in the Bill of Lading, the released rate will be $1.25/lb.

The Plaintiff signed the Bill of Lading and declared "600 per pound" on the Bill of Lading.

A dispute arose as to the amount of the freight charges. The Defendant carrier eventually had to schedule a public auction sale. Plaintiff attempted to then pay the disputed amount to the carrier by personal check to release the goods. The personal check was rejected because the "General Agreement" between the parties called for payment by cash or certified check. Plaintiff then sued for repleven and breach of contract and for an emergent stay of the sale. The Court issued a stay but the Plaintiff's personal household goods were sold by the Defendant at auction anyway, netting $3,618.00.

The Court held a hearing on Order to Show Cause to hold the Defendant in contempt of Court and, further, heard testimony on the value of the Plaintiff's goods. Finding the Defendant in breach of the Stay Order and ruling Defendant's conduct was "outrageous," the Court held the Defendant in contempt of Court and sanctioned the Defendant by precluding Defendant from challenging the value assigned to the goods by the Plaintiffs at the Show Cause Order hearing ($69,750.00).

The Complaint was then amended to assert additional state-created causes of action such as conversion, unfair trade practices and consumer fraud protection legislation and further alleging a separate conversion count based upon Defendant's violation of the Stay Order.

A trial on liability was scheduled and the Defendant argued (apparently for the first time) that Carmack preempted the Plaintiff's Amend-

(continued on page 9)

ed Complaint and that the damages were limited to $9,168.00 pursuant to the $0.60/lb limitation in the Bill of Lading.

The Court outlined Carmack preemption but, because of the facts of the case, the Court focused on the cases stating Carmack does not preempt state-created causes of action which allege damages separate and distinct from the underlying property loss. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377 (5th Cir. 1998); *Smith v. United Parcel Service*, 296 F.3d 1244 (11th Cir. 2002); and *Jones v. USA Express Moving*, 2008 U.S. Dist. LEXIS 54385 (E.D. Pa. 2008).

"There is no question that Courts are very reluctant to find that a shipper's state law claim survives Carmack preemption and, therefore, they have imposed a very difficult burden on a plaintiff to establish outrageous, intentional, or willful misconduct on the part of the carrier in order to avoid liability limitation provisions." In this case, the Court found the facts "uniquely disquieting" and found the Defendant's sale of the Plaintiffs' household goods was willful and directly contrary to the Stay Order. The Court pointed out the goods were not lost or damaged in an accident. Instead, they were intentionally sold by the Defendant to third-parties in direct contravention of the Court's Order to Stay the sale.

The Court ruled a separate and distinct cause of action for conversion has been plead and denied the Defendant's motion to dismiss based upon Carmack preemption and/or to limit the damages by application of Carmack to $0.60/lb. and entered Judgment in the amount of $69,750.00, plus an additional $10,000.00 for loss of Plaintiffs' personal and sentimental goods, for a total Judgment amount of $79,750.00.

12. Royal Sun Alliance Insurance, PLC v. National Consolidation Services, LLC and Roadco Transportation Services, Inc., USDC, DNJ (Trenton)

Royal Sun Alliance, the subrogated insurer of Johnson & Johnson subsidiary Lifescan, Inc., sued 3PL NCS and motor carrier Roadco for $4.3 million for theft of truckload of diabetes testing kits during transit from Pennsylvania to a Walgreens DC in Chicago.

The loss occurred in August, 2008. In May, 2005, NCS and Lifescan signed a pricing list setting forth rates by which NCS would distribute and transport product from the Lifescan DC in Mechanicsburg, Pennsylvania to the Walgreens DC in Chicago and onward to Walgreens retail locations in the United States.

The pricing list contained a one-year expiration and it stated: "All shipments governed by NCS Rules Tariff 100 series, including liability coverage." The NCS Tariff contained a $100,000 per truckload limitation.

The bills of lading for the subject shipment were prepared and issued by Lifescan. The bills incorporated and specifically referenced the carrier's tariff. All bills of lading were blank as to declared value.

During the discovery period of the case (after the exchange of Rule 26 Disclosures, and written discovery but before any depositions were even scheduled) plaintiff filed a motion for partial summary judgment, wherein it sought to strike our limitation defense. Plaintiff argued that the pricing agreement had expired after one year and, consequently, the NCS tariff did not apply to the subject shipment.

We argued in response that there was an issue of material fact as to whether the pricing agreement remained in effect. We demonstrated to the Court that thousands of shipments had been made subsequent to the purported "expiration date" of the agreement, with no changes in pricing or shipping terms or conditions.

The Court found that sufficient issues of material fact existed as to the expiration of the pricing agreement. Although it cited the *Emerson* case as the prevailing law of the Third Circuit, the Court's analysis seemed to suggest a more pragmatic and commercially practicable approach to the issue.

D. Preemption

13. Huntington Operating Corp. v. Sybonney Express, Inc., (2010 WL __ (S.D. Tex. May 11, 2010))

Plaintiff Huntington employed Transport Direct, a transportation broker, to arrange a shipment of perfume from Florida to Texas. Transport Direct hired Sybonney Express to transport the shipment from Miami to Houston. The shipment was stolen at a truck stop in Florida. Sybonney's carrier denied coverage for the loss because the vehicle used to transport the cargo was not specifically scheduled on Sybonney's cargo policy. Huntington sued Transport Direct for failing to ensure that Sybonney had adequate insurance to cover the cargo, alleging violations of the Texas Deceptive Trade Practices Act ("DTPA"), negligent misrepresentation, fraud, negligence, negligent entrustment, breach of fiduciary duty and breach of contract. Transport Direct initially moved for summary judgment on all of Huntington's claims, arguing that its actions as a broker were not a producing cause of the shipper's damages. The court granted that summary judgment as to the fraud and negligent entrustment claims, but found fact issues precluding summary judgment as to the DTPA, negligence, negligent misrepresentation and breach of contract claims (2009 WL 2423850 (S.D. Tex. Aug. 3, 2009)).

Via a second summary judgment motion, Transport Direct sought to dismiss all of Huntington's remaining claims, except for breach of contract, arguing that the claims arose from the services provided by a broker with respect to the transportation of property and therefore were preempted by 49 U.S.C. § 14501(c)(1), "Federal authority over intrastate transportation." In response, Huntington contended that its claims fell within the statutory exception to preemption as carved out by 49 U.S.C. § 14501(c)(2)(A). The court granted Transport Direct's motion, finding that the provisions of 49 U.S.C. § 14501(c)(1), which closely paralleled those found in the Airline Deregulation Act of 1978 (codified at 49 U.S.C. §§ 41713(b)(4)(A) and (b)(4)(B)(i)), broadly preempted state law claims other than breach of contract. The court further found that the statutory exception relied on by Huntington, which referred to the ability of the states to define safety standards and insurance requirements, did not permit a private right of action. Accordingly, the court dismissed Huntington's claims for violations of the DTPA, negligence and negligent misrepresentation, leaving only the breach of contract claim for trial.

This appears to be a case of first impression in Texas courts as it relates to federal preemption of claims asserted against a transportation broker under 49 U.S.C. § 14501(c)(1).

14. Ventress v. Japan Airlines, et al. (9th Cir. 2010) ___ F. 3d. ___, 2010 WL 1729705

Scope of Federal Preemption under ADA.

Plaintiff, a flight engineer for Japan Airline ("JAL") sued for wrongful termination, violation of California's whistleblower statute (California Labor Code §1102.5(b) and emotional distress. The case was ordered to arbitration after the USDC granted Defendants' motion for judgment on the pleadings. Plaintiff appealed and 9th Circuit affirmed. On remand, the arbitration award for defendant was confirmed by the USDC. The second appeal followed. Held: The ADA (49 U.S.C. §41713) as amended by the Whistleblower Protection Program (49 U.S.C. § 42121) does not preempt Plaintiff's state law whistleblowing and wrongful termination based on public policy claims. The ADA preempts state law related to a carrier's prices, routes or services. *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 383. An analysis of the scope of "service" by the 3rd, 8th and 11th Circuits followed. The 9th Circuit concluded that Plaintiff's activities did not interfere with the carrier's service because he reported safety violations 6 months after they occurred and after completion of the scheduled flights.

15. Eastco International Corp. v. Coyote Logistics, LLC, 2009 WL 5125193 (N.D.Ill. 2009)

Plaintiff Eastco engaged Defendant Coyote Logistics for the loss of a mold used in manufacturing lighting fixtures. Eastco obtained a rate quote from Coyote and prepared a straight bill of lading – short form which identified Coyote as the carrier. The bill of lading further incorporated the carrier's tariff terms by reference. Eastco delivered the mold to Coyote who in turn retained Vitran Express to perform the actual transportation. Vitran failed to deliver the mold and it was never found. Vitran tendered $700 to Eastco for settlement of the claim per the limitation of liability in Vitran's tariff.

Eastco then sued Coyote for a balance of $18,300.00. Coyote moved to dismiss, arguing that: (a) the Carmack Amendment only applies to carriers and Eastco failed to allege with sufficient detail that Coyote is a carrier; (b) the limitation of liability in Vitran's tariff shielded it from liability; and (c) Eastco failed to state a state law claim for negligence.

The court held denied Coyote's motion on points one and two, but granted it as to point three based upon Carmack preemption. The court held that Eastco had plead Coyote's status as a carrier with sufficient particularity, especially in light of the terms of the bill of lading which identifies Coyote as a carrier and Coyote's failure to disclose that it intended to broker the load. The court then held, with little analysis, that Coyote could not receive the benefit of the limitation of liability on Vitran's tariff. Finally, the court held that the Carmack amendment preempted Easto's state law negligence claim that Coyote caused the mold to be transported pursuant to documents that included the wrong motor carrier classification.

E. Jurisdiction/Removal

16. Travelers Property Casualty Company of America v. Legacy Transportation Services, Inc., 2010 WL 1463574 (N.D. Cal. 2010).

Plaintiff's motion to remand. Denied.

Plaintiff insurance company subrogated to the rights of the shipper, Tomotherapy Incorporated ("Tomotherapy"). Tomotherapy produces machines used in oncology and contracted with the Defendant carrier to transport, rig and install a machine in interstate commerce from Wisconsin to New Jersey. Defendant, Legacy Transportation Services, Inc. (under the auspices of United Van Lines) "shipped" the machine in interstate commerce and arranged for DTI Rigging to off load and install it at destination. During the process of off loading, rigging and installing, the machine was damaged to the tune of $874,226.27.

Plaintiffs filed a complaint for breach of contract, negligence and breach of bailment in the California State Court, County of Contra Costa. Defendant removed the case on the basis of Carmack.

Plaintiff moved to remand taking the position this was not an interstate transportation as the contract sued upon concerned only the offloading and rigging occurring intrastate in New Jersey.

The Court reviewed Carmack and the definition of "transportation," noting that the term includes "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit … handling [and] unpacking." 49 U.S.C. § 13102(23)(b). Also, the Carmack Amendment is "comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation," citing *Coughlin v. United Van Lines, LLC.*, 362 F. Supp. 2d 1166, 1168 (C.D. Cal. 2005). In light of these sweeping and broad definitions, the Court concluded the matter involved interstate transportation and denied the motion to remand because the circumstances of the case were covered by the Carmack Amendment.

The Court also rejected Plaintiff's contention the contract between the parties contained a forum selection clause for Contra Costa County, California, because Carmack preempts state law claims therefore a forum selection clause pointing to state court is unenforceable.

A further question over the status of the Defendant, Legacy, and whether it was acting as a broker only, was addressed by the Court. The Court found Legacy was a motor carrier in this case because it was acting as the agent of a "listed" carrier in the course of the interstate transport.

17. Pelican Plumbing Supply, Inc. v. Fox, 2010 WL 1936190 (E.D. Mo. 2010).

Defendant's motion to remand granted.

Plaintiff sued Fox in Missouri State Court "on account" (Count 1) and on "the note" Count 2) seeking $63,009.14 in damages related to plumbing supplies the Plaintiff purchased from Fox, but which apparently arrived broken and damaged. Plaintiff then amended the complaint to add FedEx National LTL and to assert a cause of action under the Carmack Amendment (Count 3). FedEx removed the case without the consent of the other Defendant, Fox. Fox moved to remand and the Court granted that motion.

Regarding the lack of consent, FedEx argued the Co-Defendant's consent was not required because Count 3 alleging Carmack was a separate and independent basis for removal and was a separate and independent cause of action from those asserted against Fox. FedEx relied on the "rule of unanimity" (which rule only requires consent to remove from those parties who would independently have had the right to remove) and that the "presence of even a single federal claim gives the defendant the right to remove an entire case to federal court." *Phipps v. F.D.I.C.*, 417 F.3d 1006, 1010 (8th Cir. 2005). In the instant case, the Judge distinguished that case (and others like it) on the basis the "rule of unanimity" only applies to removal of federal claims.

Regarding the "separate and independent" claim issue, the Court considered the definition of that term as set forth in *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 14, 17 S. Ct. 534, 95 L. Ed. 702 (1951) (stating "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action)." "[C]laims are not separate and independent if they are derived from the same set of facts of the injury alleged is the result of a series of interrelated transactions." *Mayo v. Christian Hospital Northeast-Northwest,* 962 F. Supp. 1203, 1025 (E.D. Mo. 1997). Looking at the Plaintiff's pleadings, a single wrong is alleged, that is damage to plumbing supplies, causing one event of injury to the Plaintiff.

Accordingly, the Court held that Count 3 of the Amended Complaint alleging Carmack was not "separate and independent" from the state-created causes of action and that, therefore, FedEx needed the consent of the Co-Defendant, Fox to remove. Lacking that consent, the case could not be removed and the Defendant's motion to remand was granted.

18. Travelers Indemnity Company of Connecticut v. Colma Drayage, Inc., 2010 WL 934076 (N.D. Cal. March 15, 2010)

Marinpak MPK Sonoma, Inc. ("Marinpak"), a food processor located in Sonoma, California, ordered a piece of machinery from a French manufacturer that was designed and built to Marinpak's specifications. The machinery was shipped from France to Oakland.

After the cargo arrived in Oakland, Marinpak contacted Defendant, Colma Drayage, Inc. ("Colma"), to transport the machinery from Oakland to its Sonoma facility. Colma arranged for Defendant, Devincenzi Trucking, Inc. ("Devincenzi"), to pick up the machinery, and Devincenzi in turn arranged for Defendant, Shumate Enterprises, LLC ("Shumate") to transport the machinery to Sonoma (Colma, with Devincenzi and Shumate, the "Defendants"). The machinery was shipped in one standard container holding three packed crates and another flat rack container holding two packed crates.

While the machinery was being transported by truck from Oakland to Sonoma, one of the crates containing the machinery struck a highway overpass and damaged critical components of the machinery. Travelers Insurance Company of Connecticut ("Travelers") paid $764,059.28 to its insured, Marinpak, to replace the machinery.

Plaintiffs, Travelers and Marinpak (the "Plaintiffs"), sued Colman, Devincenzi and Shumate for alleged violations of the Carmack Amendment. Devincenzi then filed a third party complaint against the marine terminal operator, Carrix, Inc. ("Carrix"). Devincenzi alleged that Carrix got the load, including the flat rack, ready to be hooked up to the truck tractor that was to haul the cargo to Sonoma. Once the load was ready to be hauled, Shumate hooked up its truck tractor and hauled the load away from the Port of Oakland, only to strike a freeway overpass on the way to Sonoma.

Carrix moved to dismiss Devincenzi's third party complaint for indemnification on the basis of lack of jurisdiction, arguing that the third party complaint involved a separate "occurrence" from the facts constituting the Plaintiffs' Carmack claim. Specifically, Carrix argued that there could not be any legal connection or relationship between its handling of the cargo and the motor carrier driving the cargo into an overpass, because those two discrete occurrences were so far removed in time and location that they could not be said to form part of the same case or controversy.

The question before the court was whether the Plaintiffs' Carmack claim against the Defendants formed part of the same case or controversy, or arose from the same nucleus of operative fact, as Devincenzi's indemnity claim against Carrix, which was predicated on the active and primary negligence or other wrongful conduct of Carrix.

The court denied the motion to dismiss the third party complaint against Carrix, finding that there was a direct causal link between Carrix's alleged negligence and the event that indisputably caused the cargo damage, that is, the crate striking the overpass.

The court reasoned that Devincenzi alleged an additional link in the causal chain that lead to the injury, that is, Carrix's negligence in readying the load for transport. Therefore, Devincenzi's claim shared a common nucleus of operative fact with the Plaintiff's complaint. Thus, the court had supplemental jurisdiction over the third party complaint.

19. 5K Logistics v. Daily Xpress, Inc., United States District Court for the Eastern District of Virginia

The 'players' are Dominion Gas & Electric ("Dominion"), 5K Logistics ("5K") and Daily Express, Inc. ("DXI"). There were 2 loads, both heat exchangers, in the nature of large cylinders made up of coils of metal pipes. The heat exchangers were shrink wrapped and were placed on metal frames. The loads had originated from a manufacturer down south and during transport from there to Maryland it was determined the destination was not in a position to receive the loads. Both exchangers were therefore initially delivered to a facility in Pennsylvania, which was owned by Dominion and operated under a contract by 5K. The exchangers were left in the metal frames on the ground for approximately three (3) months. Dominion then instructed 5K that the Maryland facility was ready to receive the loads and 5K arranged transport with DXI. 5K arranged for a crane to lift the exchangers onto the flat-beds of DXI and the metal frames were chained to the trailers. On the way around the Washington D.C. beltway, one of the exchangers fell off the trailer. It transpired that the exchangers were only secured onto the frames by 'rebar threads,' which was totally inadequate for the size and weight of the cargo.

Dominion filed suit in the United States District Court for the Eastern District of Virginia against only 5K, claiming breach of contract. 5K then filed a third-party complaint against DXI for breach of contract, indemnity and/or contribution and on the basis of Carmack. We filed a Motion to Dismiss the state law claims based on Carmack pre-emption and to dismiss the entire suit as 5K had failed to provide proper and timely notice of the claim within 9 months or to file suit within limitations of 2 years and 1 day, all as provided for in the bill of lading and the tariff of DXI. The Court granted our Motion as to the state law claims and denied without prejudice our Motion as to the entire case and subject to further discovery expanding on whether a proper claim and/or suit were timely filed.

20. Midwest Crane and Rigging, Inc. v. Federal Motor Carrier Safety Administration, 603 F.3d 837 (10th Cir. 2010)

Petitioner, Midwest Crane and Rigging, Inc., a Kansas company engaged in leasing self-propelled construction cranes to contractors, petitioned for review of an order of the Federal Motor Carrier Safety Administration (the "FMCSA"), finding that the company was subject to FMCSA jurisdiction.

The company's cranes at issue are self-propelled by the truck chassis on which they are permanently mounted. The self-propelled cranes travel interstate from their storage yard to job sites, where they are used to hoist materials.

The Tenth Circuit Court of Appeals held that the FMCSA did not act arbitrarily and capriciously in determining that the crane apparatus was "property" and the chassis to which it was permanently affixed was a "commercial motor vehicle" within the meaning of 49 U.S.C. § 31132(1)(A) and the Federal Motor Carrier Safety Regulations (the "FMCSR"); and, thus, the company was a "private motor carrier" within the meaning of 49 U.S.C. § 31502(b) and the FMCSR. Therefore, the petitioner was subject to jurisdiction of the FMCSA.

The court stated that, under the FMCSR, a "private motor carrier" is a "person who provides transportation of property or passengers, by commercial motor vehicle, and is not a for-hire motor carrier." The court noted that, although Congress routinely references the term "property" in regulating the motor carrier industry, it has never defined the term. In cases of Congressional silence, the authorized agency, such as the FMCSA, possesses broad discretion in administering the law.

Further, the term "commercial motor vehicle," as defined in 49 U.S.C. § 31132(1)(A), is a "self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle [] has a gross vehicle weight rating or gross vehicle weight of at least 10,001, whichever is greater…." The self-propelled cranes in this case had a gross vehicle weight rating of from 56,000 pounds to 129,000 pounds.

Therefore, affording deference to the FMCSA's interpretation of Title 49 and its own regulations, the court was not persuaded that the FMCSA's decision was arbitrary and capricious, the standard for appellate court review of an administrative agency decision.

As of June 17, 2010, no petition for certiorari has been filed.

F. Forum Non-Conveniens

21. Federal Insurance Company v. M/V CMA CGM Marlin, 2010 WL 727271 (S.D.N.Y. 2010)

Maritime cargo damage case involving forum selection clauses in 2 different bills of lading on a shipment from China to California.

Plaintiffs, Federal Insurance and Eagle Quest International, LTD., sued Defendant, Tian Rong Logistics ("Tian Rong") and CMA CZG, S.A. and CMA CGM (America), LLC ("CMA"). Tian Rong filed a third-party complaint against CMA CZG, S.A. and CMA CGM (America), LLC ("CMA") alleging if there was any damage to the cargo, such damage was caused by CMA.

CMA moved to dismiss the third-party complaint on the basis of a forum selection clause in favor of the Courts of Marseille contained in a bill of lading listing Tian Rong as consignee and CMA as the carrier.

For its part, Tian Rong moved to dismiss the complaint based on a forum selection clause pointing to California on a different bill of lading listing Eagle Quest as consignee and Tian Rong as "the person to whom the goods should be delivered."

CMA moved to dismiss the third-party complaint and the complaint based upon the forum selection clause in the Tian Rong/CMA bill of lading point to Marseille.

The Court stated forum selection clauses are "prima facie valid," citing *Macsteel Int'l. USA Corp. v. M/V Larch Arrow*, 09-0045-cv, 2009 U.S.App. LEXIS 26070, at *3 (2d Cir. 2009) and listed the 4 part test to enforce a forum selection clause, i.e.,: (1) whether the forum selection clause was communicated to the party resisting enforcement, (2) whether it is mandatory or permissive, (3) whether the claims and parties are subject to the clause, and (4) whether the opposing party has rebutted the presumption of enforceability by showing it would be unreasonable or unjust to enforce the clause.

Applying the test to the Tian Rong/CMA bill of lading, the Court held that all 4 factors were met and granted CMA's motion to dismiss the third-party complaint. The Court denied CMA's motion to dismiss the complaint because the Court found the Plaintiffs were not given notice of the forum selection clause, the Plaintiffs were not a party to that bill of lading, Tian Rong had no authority to bind Plaintiffs to CMA's choice of forum and the Plaintiffs did not sue on the Tian Rong/CMA bill of lading.

The Court granted Tian Rong's motion to dismiss the Plaintiff's complaint because of the forum selection clause pointing to California under the Tian Rong/Eagle Quest bill of lading. The Court then transferred those claims to the

United States District Court for the Central District of California.

G. Freight Charges

22. Estes Express Lines, Inc. v. Macy's Corporate Services, 2010 WL 398749 (D.N.J. 2010)

Plaintiff motor carrier sues shipper for freight charges. Plaintiff's motion for summary judgment was denied. The Defendant shipper's cross-motion for summary judgment was granted.

Estes sued Macy's for $107,000.00 in freight charges. Macy's defended saying it did not contract with Estes. Instead, different company, Saindown (which was a wholesaler to Macy's) contracted with Estes. As a result of a prior dispute between Macy's and Saindown, Saindown agreed to remove certain nonconforming products from Macy's stores and to ship them back to Saindown's facilities located in New York, New Jersey, Connecticut and California. Saindown contracted with Estes to pick up the Saindown products at Macy's and to return them to Saindown's facilities.

Macy's personnel were instructed to create bills of lading to act as receipts for each shipment but not to function as a contract of carriage. The bills of lading created by Macy's for that purpose did not designate the consignor or the consignee and the nonrecourse clause was not marked.

For its part, Estes would then send bills of lading and invoices to Saindown, which identified Macy's as the "shipper" and "BILL CHARGES TO: SAINDOWN."

Saindown did not pay Estes and Estes sued Saindown in the United States District Court for the District of New Jersey and obtained a Judgment against Saindown in the amount of $107,516.55, plus $37,630.79 in collection fees (which fees were based on Saindown's contract with Estes). Estes has not collected against Saindown.

Estes then sued Macy's in the United States District Court for the Central District of California. On Macy's motion, that Court transferred the case to the United States District Court for the District of New Jersey.

On Estes' motion for summary judgment, Estes argued Macy's was liable because Macy's issued the bills of lading. Macy's countered that Saindown is solely responsible to Estes because of the agreement between Saindown and Estes. The issue was which governs, the bills of lading issued by Macy's or the agreement between Estes and Saindown?

Examining the fact Estes admitted there was a contract between it and Saindown and that Estes' own bills of lading stated "BILL CHARGES TO: SAINDOWN," against the backdrop of the circumstances that led up to these shipments, the Court felt the Macy's bills of lading served only as receipts as opposed to a contract of carriage. Further, the Macy's bills of lading did not designate the consignor or the consignee and did not set forth a limitation of liability as a common bill of lading contract of carriage ordinarily would.

Estes also contended Macy's would be unjustly enriched unless Macy's compensated Estes for the freight charges to remove the nonconforming product from its locations. The Court rejected that argument because Estes could not prove Macy's received an unjust benefit. The agreement was for the benefit of Saindown to carry out its separate obligation to Macy's to remove its nonconforming products.

For the same reason, the Court rejected Plaintiff's book account cause of action.

As an aside, the Court also addressed (and denied) motions filed by the Plaintiff to strike affidavits filed by Macy's employees in connection with the cross-motions for summary judgment. Estes contended the affidavits contained legal argument instead of being limited to facts (as required pursuant to local rules in the United States District Court for the District of New Jersey) and were otherwise incompetent and hearsay. Applying the local court rules, the Judge declined to strike the affidavits.

Plaintiff, Estes' motion for summary judgment for freight charges was denied. Defendant, Macy's cross-motion for summary judgment granted.

23. Christenberry Trucking & Farm, Inc. v. F&M Marketing Services, Inc. 2010 WL 1254374 (Tenn.Ct.App. 2010)

Christenberry Trucking & Farm, Inc. ("Christenberry") and F&M Marketing Services, Inc. ("F&M") contracted for F&M to serve as an independent sales agent for Christenberry. The contract specified F&M was to be paid a 6% commission on all accounts it secured for Christenberry. Pursuant to the contract F&M secured Christenberry a profitable route to transport computers for UPS. After securing the UPS route Christenberry ceased paying F&M its commission and brought a declaratory judgment action in the Chancery Court for Knox County, Tennessee.

The Chancery Court found that Christenberry did contract with F&M and agree to pay F&M a commission for its services. However the Chancellor classified F&M's services as those of a freight broker. Since F&M did not possess freight brokerage authority the Chancellor sanctioned F&M by nullifying its contract with Christenberry. The Chancellor relied upon on *Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc.*, 988 F.2d 288 (1st Cir. 1993) to support its decision.

The Tennessee Court of Appeals upheld the Chancery Court's classification of F&M's services as those of a freight broker, but revised on the use of *Paul Arpin* to nullify the Christenberry F&M contract. On the question of nullification the Court of Appeals favorable cited *Reo Distrib. Servs. v. Fisher Controls Int'l,* 985 F. Supp. 647 (W.D. Va. 1995) stating that Reo represents, "a better reasoned approach than *Paul Arpin*." The Court of Appeals, following Reo, found that federal law did not intend for unlicensed brokers to be denied contractual recovery and that it would not be a violation of Tennessee or Federal public policy to allow F&M to recover for Christenberry's breach.

24. Norfolk Southern v Groves and Brampton Enterprises, LLC, 586 F. 3d 1273 (11th Cir. 2009)

The Eleventh Circuit decided that it would not agree with the Third Circuit as to who is really a consignee. The defendant Brampton d/b/a Savannah Re-Load is a warehouse receiving containers for export which is almost the exact facts found in *Novolog*. The Eleventh Circuit citing both *South Tec* and *Novolog* makes it clear that being named consignee and accepting the shipment is not enough to establish a consignee responsible for destination demurrage. The court indicates that the failure to take depositions or propound interrogatories to determine whether or not Brampton would admit to being a consignee or to determine other facts which would determine it was a consignee played a role in their decision. Finally it found that the only named consignee in this case was a mere 'agent' which had not even been advised that it was listed as a consignee by the shipper on the bill of lading. The Court's finding that a party who never agreed to be named as a consignee cannot be held liable even if it accepts delivery runs in the face of how bills of lading are issued without the signature of the consignee and suggests that accepting the freight services of the carrier is not enough for it to be held liable to pay for the those services. It would seem that a carrier in this circuit can only protect itself by holding the shipments until either the consignee or some other party signs a separate agreement that it will be liable for demurrage charges when a shipment is delivered to it.

The moral of this story for the carrier is if you can't bring your action in the Third Circuit you may be in for a tough time to collect your demurrage charges if the consignee turns out not to be the owner of the goods delivered.

25. Canadian National Railway Company v Matrix Polymers, Inc., Southern District of New York (05-CV-6295)

However, Judge Kevin Thomas Duffy sitting in the Southern District of New York in the Second Circuit took over three years to decide he would punt and after citing to both *Novolog* and *South Tec* decided he just did not have enough facts to find that Matrix had actually accepted the goods nor whether or not it might have been merely an agent under *South Tec* (even though there was no notice of agency on any of the bills of lading) and that he had to here testimony to determine whether or not Matrix had given notice to the carrier that it was not the owner of the goods (though there was no written notice given the railroad pursuant to federal law which would have denied the fact that Matrix was consignee and would have identified any other party which might have been the consignee) and therefore a trial would be necessary. The case shows that when the Court does not want to decide something it won't, even when the obvious is presented. Not surprisingly both sides did not want to face Judge Duffy at a trial and settled the case the day before trial.

26. Estes Express Lines v. SMI Creations, LTD., 2010 WL 1719291 (D. Colo. 2010)

Dispute over freight charges incurred by defendant for plaintiff motor carrier's transportation services for various shipments from May 28, 2008 through October 27, 2008. Plaintiff motor carrier moved for summary judgment. That motion was granted.

Defendant disputed the plaintiff's accelerated amount of the freight charges to the undiscounted amount and disputes allocation of plaintiff's collection fees.

Plaintiff, Estes, negotiated reduced freight rates with the defendant pursuant to a contract and referred to those reduced rates as "discounted" rates.

Defendant argued the Negotiated Rate Act, 49 U.S.C. § 13709, (the "NRA") applied to the case and characterized the plaintiff's "undiscounted" rates as if they qualified as "undercharges." Defendant argued the rates sought by plaintiff were unenforceable inasmuch as defendant was a "small business concern" pursuant to 49 U.S.C. § 13709(h)(1)(A) and 15 U.S.C. § 631, et. seq.), and was thus exempt from the collection of undercharges.

The Court quoted the statutory language emphasizing the prerequisite the undisputed amount of the freight charges must be "billed and paid" first. The defendant had not paid the discounted amount. Interpreting the plain language of the statute, the Court held the defendant did not qualify for the small business exemption in the statute.

On the issue of late fees and collection fees, the Court reviewed the applicable tariff and contract allegations and stated "[s]hippers are required to be on notice as to each of the provisions of a carrier's filed tariff; similarly, the parties to a contract are on notice as to the provisions of a contract to which they are both parties." Applying the plain language of the tariff, the Court held defendant was liable for the full undiscounted rate, plus a 30% collection fee.

Defendant argued plaintiff waived its rights because despite the plaintiff continued to ship defendant's freight and continued to invoice at the discounted rate despite the defendant's failure to pay. The burden is on the defendant to set forth proof of a affirmative decision to waive by the plaintiff. The Court rejected that argument because defendant failed to set forth any proof of a knowing decision by plaintiff to waive collection of the undiscounted amount.

Finally, defendant argued it should be treated as though it paid the plaintiff's invoices by virtue of the fact defendant made an Offer of Judgment in the amount of $13,000.00, with a condition of minimal payments being made over time. The Court reviewed *Moore's Trucking Co. v. National Starch & Chemical*, 1994 WL 741081 (D.N.J. 1994), a case involving a finding a waiver where a motor carrier accepted payment of the discounted amount without protest, continued to do business with the shipper, waited 2 to 3 years before pursuing the loss of discount provisions and the shipped relied on the carrier's non-enforcement and distinguished that case because in the instant case, the defendant shipper failed to pay any amount (not even the discounted amount) and concluded plaintiff's actions did not constitute a waiver. The defendant's Offer of Judgment could not be considered a payment of the freight charges.

Accordingly, the Court granted plaintiff's motion for summary judgment for the freight charges.

H. Freight Forwarder/Broker Liability

27. FNS, Inc. v. Bowerman Trucking, Inc., 2010 WL 532421 (S.D. Cal. 2010)

This is a case about broker liability. A freight forwarder, FNS, had a contract with Bowerman, a motor carrier, to transport a shipment of cell phones. LG Electronics owned the cargo. The shipment, which was worth approximately $2,000,000.00, was stolen when the Bowerman trailer was left unattended. FNS paid LG and subrogated to its rights and sued Bowerman in the United States District Court for the Southern District of California.

The complaint alleged various state-created causes of action and contained a Carmack clam and alleged that Bowerman was a motor carrier. No alternative cause of action for broker liability (such as negligent entrustment) was plead in the complaint. Bowerman moved to dismiss based upon Carmack preemption.

The Court granted the motion. The complaint only made a passing reference to broker liability and the Court considered such reference to be insufficient to set forth a cause of action under state law against a freight broker. The Court also dismissed FNS' attorney fee claim pursuant to Carmack, holding the attorney fee provisions of Carmack were limited only to household goods.

28. Peerless Importers, Inc. v. Cornerstone Systems, Inc., 2010 WL 549197 (N.Y. 2010), 26 Misc. 3d 1223(A), 2010 N.Y. Slip. Op. 50236(U)

The Court considered cross-motions for summary judgment. The issue was whether a federally licensed freight broker (Defendant, Cornerstone) held itself out as a motor carrier and thus should be subject to Carmack liability. The Court denied both motions because of questions of fact.

Plaintiff, a wine distributor in Brooklyn, New York, sued Cornerstone, a freight broker, in New York State Court for $50,000.00 worth of wine which allegedly froze en route. Plaintiff seems to have alleged the requisite elements for a Carmack cause of action without actually stating "Carmack." Nevertheless, Plaintiff took the position the Defendant held itself out as a motor carrier. Plaintiff points to Defendant's marketing materials which state, among other things, the Defendant provided "rock solid logistic solutions [including] intermodal services, truck services and rail car/railcar consolidation."

For its part, Defendant submitted an Affidavit to the effect it is a licensed broker and not a licensed motor carrier and it only arranged for the transportation of the wine through carriers such as "Fastbreak," Union Pacific Railroad and CSX.

Taking note the test is fact sensitive, the Court cited *Zima Corp. v. M.V. Roman Pazinski,* 493 F. Supp. 268, 273 (S.D.N.Y. 1980) and listed the four (4) factors to consider, as follows: (1) the way the party's obligation is expressed in the documents exchanged between them (although self-description is not necessarily determinative); (2) the parties' history of dealings; (3) issuance of a Bill of Lading (although the mere fact a party issues a Bill of Lading is not necessarily dispositive): and (4) how the parties made their profits.

The Court felt questions of fact existed and denied both motions.

I. Damages

29. Those Certain Underwriters at Lloyds, London v. DTI Logistics, Inc., 686 S.E.2d 333 (Ga. Ct. App. 2009)

Plaintiff DTI dropped three trailers loaded with Colgate-Palmolive cargo valued at $100,000 at a Ryder Truck facility parking lot. The trailers were removed from the Ryder facility by persons unknown and then returned empty. DTI filed a claim with Lloyds which Lloyds denied based upon the unattended trailer exclusion in its policy. DTI sued and the case proceeded to a jury trial on the issue of whether the trailers were taken from a "guarded lot" and the loss therefore outside the scope of the unattended vehicle exclusion. The jury found that the Ryder lot was a guarded lot and the trial court awarded DTI $101,718.07 plus prejudgment interest of $25,496.40.

On appeal Lloyds first argued that DTI had suffered no loss because it had not paid Colgate-Palmolive's claim. The Georgia Court of Appeals held that because the Carmack Amendment imposes liability on carriers, motor carriers have an insurable interest in the cargo. The court then looked at the policy's language which obligated Lloyds to indemnify DTI for all risks or physical loss or damage from an external cause to lawful cargo. The court found that the definition of indemnify "is broad enough to include any loss, not just liabilities to third parties." *DTI Logistics*, 686 S.E.2d at 336.

Lloyds next argued that the trial court charged the jury with the wrong definition of the policy term "guarded lot" when it charged that a "guarded lot" is a piece of land that is watched over or the entrances and exits are supervised. The appellate court reviewed numerous layman and legal definitions of the word "guard" and affirmed the trial court's jury charge because its definition was not plain legal error.

Lloyds' third argument was that it was entitled to a directed verdict on the question of whether the lot met the charged definition of a "guarded lot." The Georgia court of Appeals rejected this argument, noting that there was evidence that Ryder employees were present 24 hours a day, the employees were instructed to keep a lookout on the lot, the lot was enclosed by a barbed wire fence, the lot had a single entry/exit, and the Ryder employees had in the past stopped and ejected suspicious persons on or around the lot.

Lloyds' final argument concerned the award of prejudgment interest on the principal balance of the judgment. Georgia law provides that a liquidated demand, meaning one where the amount claimed is fixed or certain, accrues prejudgment interest. Lloyds asserted that the discrepancy between the amount claimed in DTI's complaint and the principal amount awarded at trial prevented rendered the amount unliquidated. The appellate court rejected this argument because the value of the cargo was never disputed and the discrepancy arose from application of the insurance policy's deductable.

30. APL Co. PTE Ltd. v. Blue Water Shipping U.S. Inc., 592 F.3d 108 (2nd Cir. 2010)

This admiralty proceeding involved the issue of whether the steamship line, APL, took reasonable steps to mitigate its demurrage damages when Defendant Blue Water, failed to pickup 29 reefers of garlic for final delivery to consignee Akata Food Trading Company. On discharge from the vessel Customs and Border Protection ("CBP") placed holds on the garlic and imposed anti-dumping tariffs. Blue Water, an NVOCC, failed to clear the holds and demurrage charges quickly surpassed the value of the garlic. Blue Water essentially abandoned the cargo and APL moved forward with efforts to auction it. The efforts to auction the cargo were delayed by APL's confusion about CBP regulations and the need for FDA inspections. The garlic was ultimately found to be unfit for consumption and destroyed.

APL sued Blue Water for $474,072.18 which included demurrage charges of $402,700.00. The district court found that Blue Water had breached its transportation contract with APL, but held that APL had failed to mitigate its damages and entered judgment against Blue Water in the amount of $184,910.00.

On appeal, the Second Circuit vacated the portion of the district court's judgment regarding APL's efforts to mitigate its damages. The Second Circuit held that the district court erred when it applied a "results based" analysis of APL's mitigation efforts. The appellate court explained that an injured party need only undertake "reasonable efforts" to mitigate damages and that it is not required to actually mitigate its losses. When reviewing the question of whether APL undertook reasonable efforts towards mitigation the court noted that "the standard of what reason requires of the injured party is lower than in other branches of law." Blue Water, 592 F.3d at 111. The court further noted as material the fact that Blue Water had the same opportunity, and, under the shipping documents, the contractual obligation, to avoid losses associated with the destruction of the cargo.

Key Point – to establish mitigation of damages, one need only show that one's efforts were reasonable under the circumstances. One need not succeed in lowering losses or pursue every possible avenue for mitigation.

J. Miscellaneous

31. Ocean Garden Products, Inc. v. Northfield Insurance Co., 2010 WL 1640940 (S.D. Tx. 2010).

Cargo loss case involving theft of 600 cartons of frozen-block shrimp shipped from Arizona to New Jersey and stolen en route at a yard in El Paso, Texas. The United States District Court for the Southern District of Texas held the carrier, Loga Transport, Inc. liable under the Carmack Amendment as well as common-law bailment.

The Plaintiff, Ocean Garden Products, Inc. sued the motor carrier, Loga and the freight broker, Distributors Transport, Inc. Defendant, Northfield Ins. Co. insured the carrier, Loga with a policy with a limit up to $100,000.00. Northfield declined coverage on the basis the insured motor carrier voided coverage by failing to notify Northfield of the lawsuit and by refusing to cooperate in the investigation.

The Court overruled those objections and found Northfield was provided actual notice by its insured and Northfield investigated the loss. Consequently, Northfield was not prejudiced as it had investigated. As to the lack of cooperation, the Court held the insured did not void coverage by refusing to submit to an examination under oath. The carrier did not refuse, it "collapsed" and "disappeared" and Northfield could not say what new information could have been revealed by a deposition of its own insured.

The Court further awarded fees and costs to the Plaintiff against the motor carrier's insurance company, Northfield, because, according to the Court, Northfield breached its insurance contract with Loga and, as a successor, the Plaintiff could sue Northfield to enforce the policy.

32. Brewer v. J.B. Hunt Transport, Inc., _ So. 3d _, 2010 WL 1177434 (La. 2010)

This is a personal injury case wherein the twenty-three (23) year old Plaintiff rear-ended a tractor-trailer owned by Defendant J.B. Hunt and being operated by Defendant Jackson. The entire front end of Plaintiff's pick-up truck was crushed underneath the trailer, resulting in permanent, life altering damages to the Plaintiff.

The accident occurred during a lane change in a construction zone. The Defendant, Jackson, the driver of the J.B. Hunt tractor-trailer, slowed to 5-10 m.ph. and changed lanes across a solid white line as he approached the road construction area, allegedly without signaling the lane change and partially blocking two (2) of the lanes of traffic. The Plaintiff following the tractor-trailer braked and tried to steer out of the way leaving 102 feet of skid marks and crashed under the rear-end of the trailer. The accident resulted in significant brain injury to the Plaintiff.

After two (2) weeks of trial, the jury found the Plaintiff 100% at fault for causing the accident.

On appeal, the Court reversed finding the jury's allocation of fault was in error and was interdicted by a legal error of the trial Court which allowed the jury to consider Plaintiff's prior and subsequent bad acts of substance abuse. On de novo review, the Court of Appeals assessed the Defendants 60% at fault. Special damages in the amount of $10.6 million and general damages of $2.5 million were to be reduced according to the 60% allocation of fault to the Defendants.

On appeal to the Louisiana State Supreme Court, the Court found the Court of Appeals committed error by conducting a de novo review and awarding 60% fault to the Defendants. Nevertheless, the jury verdict attributing 100% of the fault to the Plaintiff was "manifestly erroneous." The Defendant driver was at least partially at fault in his execution of the lane change. Under Louisiana State Law, the burden is on the driver making the lane change to ascertain it can be executed safely. A professionally trained driver, from a higher vantage point than that of the surrounding passenger motor vehicles should have used greater care making the lane change. The Supreme Court of Louisiana then found and determined the Defendants were 30% at fault (which was the lowest amount the jury could have reasonably allocated to the Defendants) and the Plaintiff was 70% at fault and molded the damages accordingly.

Two (2) Judges issued dissenting opinions stating in essence that it was up to the jury to determine fault and credibility and that the jury's verdict that the Plaintiff was 100% at fault after a two (2) week trial was not manifestly erroneous and the verdict should not have been disturbed.

33. Hitachi Sumitomo Heavy Industries Construction Crane Co., Ltd. v. Midwest Specialized Transportation, Inc., Dallas & Mavis Specialized Carrier Co., LLC and Greatwide Logistics Services, United States District Court, Eastern District of Kentucky Central Division at Lexington (5:2009-cv-00154)

This is a Sixth Circuit case involving *Toledo Ticket.*

The case involves allegations of cargo damage to a large construction crane weighing at least 138,000 lbs. transported on a Bill of Lading dated November 7, 2008. Plaintiff, Hitachi, the owner of the goods, alleged the crane was worth at least $2.7 million and possibly as much as $3.6 million. During the subject transportation from Kentucky to Japan for "retrofitting," the crane was damaged when it fell over (taking the flatbed with it) on a highway on-ramp.

The shipper was Link-Belt Construction Equipment Company ("Link-Belt"). Link-Belt was acting on behalf of the crane's owner, plaintiff, Hitachi Sumitomo Heavy Industries Construction Crane Co., Ltd., when Link-Belt drafted the Bill of Lading. The crane had been consigned by plaintiff to Link-Belt under a contract requiring Link-Belt to insure the crane.

The shipper, Link-Belt dealt with Co-Defendant, Midwest Specialized Transportation, Inc. ("Midwest") directly to arrange for the transportation. Link-Belt also had a written contract with Midwest limiting Midwest's liability to $2.50/lb. Link-Belt had significant prior shipments with Midwest and Link-Belt listed Midwest as the "Carrier" on the Bill of Lading. Midwest, which has broker authority and motor carrier authority, brokered the shipment to Dallas & Mavis. Dallas & Mavis' flatbed trailer arrived at Link-Belt. Link-Belt had prior dealings with Dallas & Mavis also and so it was not unusual for Dallas & Mavis to have arrived to pick up the crane. It took the better part of a day to load the crane onto the flatbed. The accident occurred while the crane was being carried by Dallas & Mavis.

All three parties cross-moved for partial summary judgment on the issue of the limitation of liability.

Plaintiff moved to declare (1) the limitation invalid under *Toledo Ticket*, and (2) that the actual carrier Dallas & Mavis did not issue a Bill of Lading but only a "receipt" and that therefore the carrier could not limit its liability pursuant to Carmack.

Initially, Defendant Midwest took the position it was a broker and thus had no liability. Nevertheless, Midwest changed its position and argued it was a carrier with a limitation of liability in the amount of $2.50/lb., or $345,000.00.

Defendants Dallas & Mavis/Greatwide moved to cap the damages at no more than $100,000.00 pursuant to the released rate in the tariff (and alternatively to cap the damages at the "used goods" limitation of $13,000.00).

The shipper Link-Belt drafted the Bill of Lading making the transportation subject to the "Carrier's" rules tariff. Because Link-Belt made the decision not to declare the value in its own Bill of Lading, Link-Belt in essence chose the "released rate" limitation of liability which is capped at a maximum amount of $100,000.00.

The Dallas & Mavis Tariff was available to the shipper on request and the shipper never requested a copy of the Tariff. The Tariff, at several paragraphs, offers shippers a choice of different levels of coverage in exchange for higher (or lower as the case may be) freight charges.

Among other things, Plaintiff argued the shipper (its agent Link-Belt) could not be bound to the Dallas & Mavis released rate because it had no notice of it. Dallas & Mavis responded that the case was similar to Kirby and that, in essence, Dallas & Mavis was the downstream carrier entitled to enforce its released rate. The District Court Judge granted our motion for oral argument and a decision from the Judge is still pending.

At oral argument we addressed:

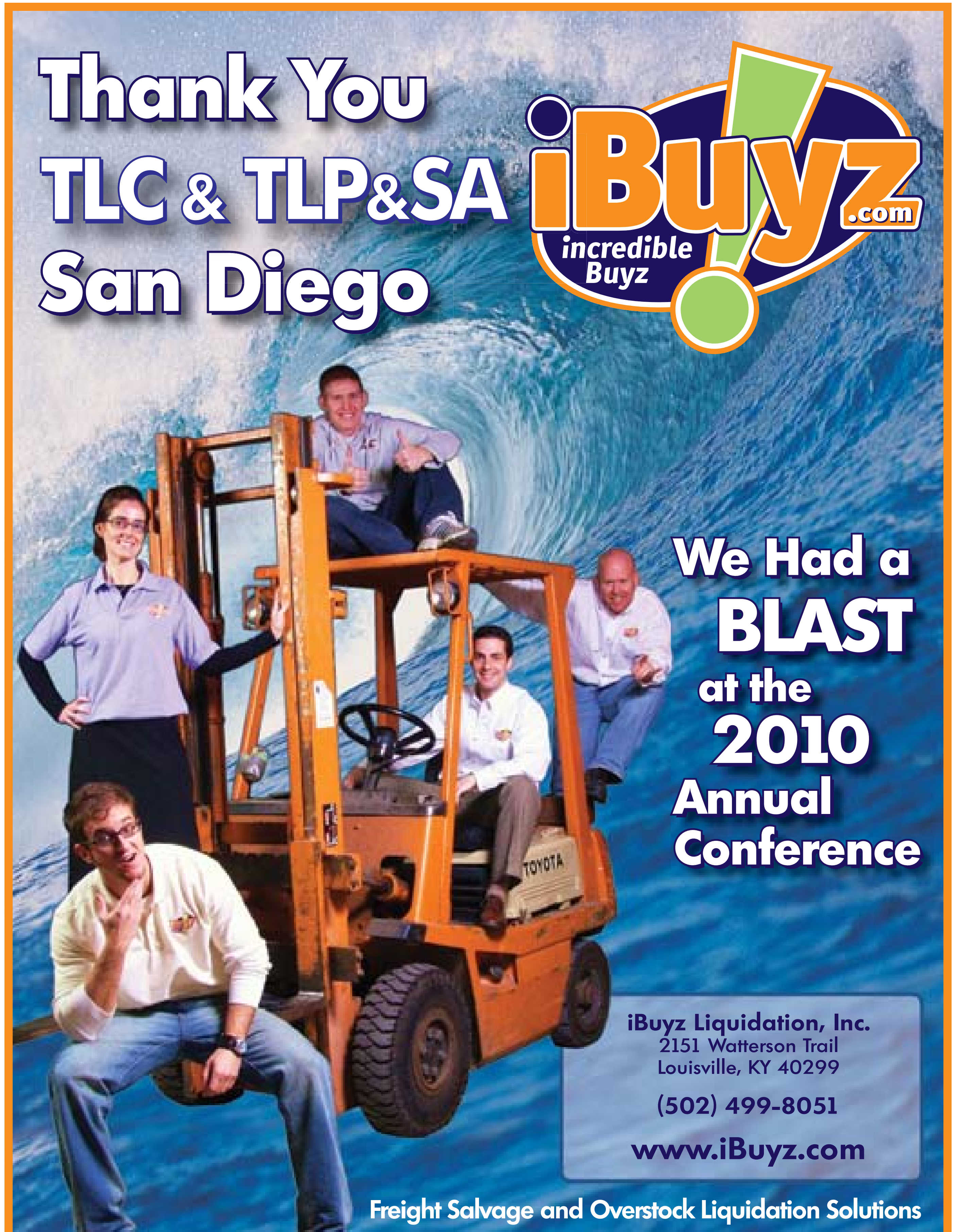
1. The practical impact to make shipments seamless and the effect on tens of thousands of shipments daily;
2. *Toledo Ticket* is contrary to Congressional intent for uniformity;
3. There was a separate older contract between Link-Belt and Midwest for contract carriage with an evergreen clause and a limitation of liability in the amount of $2.50/lb or $345,000.00. The shipment was made pursuant to a contract not common carriage. Thus, Link-Belt (the shipper) bound the Plaintiff, Hitachi, (the owner) to a $2.50/lb. limitation of liability ($345,000.00) with respect to Midwest (the listed "Carrier" on the Bill of Lading). Midwest, in turn, brokered the shipment to Dallas & Mavis (the carrier) which had a limitation of liability capped at a maximum of $100,000.00.

   Hitachi had a contract with Link-Belt, which had a contract with Midwest, which, in turn, tendered to Dallas & Mavis.
4. The carrier met the requirements of *Toledo Ticket* and, further, it was not necessary to apply *Toledo Ticket* because the shipper was very sophisticated and had a policy of not declaring value.
5. Even if one were to apply *Toledo Ticket*, the carrier met the *Toledo Ticket* requirements.
   - The carrier maintained a tariff;
   - Tariff was available online;
   - The shipper drafted the Bill of Lading and made the shipment "subject to" the tariff;
   - Tariff inadvertence clause;
   - The shipper arranged for the transportation and had ample opportunity to review the tariff;
   - Any ambiguity is construed against the shipper which drafted the Bill of Lading on its own form, on its own letterhead and title block [see *Toledo Ticket*];
   - The shipper had the option to declare the value but chose not to pursuant to its business practice and to enjoy a lower freight rate.
6. *Toledo Ticket* is unrealistic. It makes every Bill of Lading move into a "house closing" in order to review the tariff and have a shipper with authority sign a separate form agreement to enforce a limitation of liability. This is contrary to Congress' statement that the tariff need only be available "on request."
7. The rate was dependent on the value and the shipper received a lower freight rate.
8. The shipper cannot conceal the value on the Bill of Lading and then seek full value. Carriers cannot balance that kind of risk. It would be unfair to allow a shipper to enjoy the benefit of a lower freight rate while not accepting the released rate in the event of a loss based on the shipper's business decision.

We are advised Plaintiff and Midwest are in settlement negotiations.

34. Kawasaki Kisen Kaisha, Ltd. et al v. Regal Beloit Corp., Supreme Court Decision June 21, 2010.

The High Court gets it right and the Ninth Circuit is reversed. Please see attached Supreme Court Opinion.



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