In Transit

Transportation Loss Prevention & Security Association

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In This Issue...

Transportation Loss Prevention and Security Association

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TLP & SA welcomes the following new members

Randy A. Phillips - Great West Casualty - Knoxville, TN
Matthew J. Grimm, Esq. - Great West Casualty - Knoxville, TN
Patrick Sullivan - Great West Casualty - Knoxville, TN
Kirk Cummings - Central Transport - Warren, MI
Jeff Cackowski - Central Transport - Warren, MI

TLP & SA welcomes back the following members

Charlie Masiello - Crystal Motor Express- Wakefield, MA
LLoyd Stoller - Nussbaum Trucking - Normal, IL

CRYSTAL BALL FOR THE YEAR AHEAD

By: William D. Bierman, Esq. - Executive Director, TLP & SA.

Although January 1st officially starts the New Year, September may be the unofficial start of the Business New Year. Summer vacation is over; the season is about to change; our kids go back to school and those of us in the Transportation Industry gear up for the year ahead.

It is a good time to look into our Cyrstal Ball and seek answers to our 2011/2012 transportation questions. Of course the areas of greatest interest are the economy, jobs, and competition. Most of our immediate concerns fall into these categories.

ECONOMY

There is consensus the 2012 election will play a major role in the direction of the economy. Many pundits and economists suggest major corporations are sitting on substantial funds waiting to see the outcome of the election. These corporations are merging, downsizing and preparing for the future. Unfortunately, they are not hiring until they know their future tax obligations, their health care contributions, new union rules and other regulations which may burden their business.

Our Crystal Ball says if the president is re-elected and divided government remains, little if anything will change and business may begin to lose hope for an economic turn around. With a change in administration and a pro business outlook, we predict big and small business will come back into the game, hiring will increase and growth will return to our economy. Strangely, hope and change are on the other foot now. Consistency and predictability are the bywords of a good business atmosphere and a hopeful stock market.

JOBS

Everyone agrees jobs are a necessary ingredient for a business turn around, but few agree on the way to get them. The present Administration is pushing for an extension of the transportation projects which features "continuation" of infrastructure construction and repairs. Such projects sound appealing to the transportation industry, but as we have found out in the past one must read the legislation to find out what is in it. Will this proposed action quietly provide sweeping new powers for the Federal Motor Carrier Safety Administration as the FMCSA has sought in their recent Five Year Plan? Will FMCSA have new regulatory authority over shippers, brokers and consignees?

FMCSA is short handed to begin with. Their vaunted CSA Program "touches" at most 90,000 carriers out of the between 500,000 to 600,000 cariers on the FMCSA rolls. How will the agency be able to regulate millions of shippers and brokers? The obvious answer is they cannot or perhaps the government will hire thousands of new FMCSA employees to address the "jobs" issue.

Unfortunately, there is no book on how to create a job. What we do know is that less government regulation, less paperwork, and lower taxes on corporations create a climate where business can grow and thus create more jobs. If we see such a climate, jobs will follow. Today, our Crystal Ball does not see such a climate.

COMPETITION

Competition encourages efficiency and keeps costs down. When the transportation industry was deregulated in the '80s and '90s, Congress' intent was to remove the so-called filed rate doctrine, and encourage competition. When Congress passed the National Transportation Policy it envisioned the regulator's role as more than a "safety cop". The regulators were also charged with the resposibility to promote competitive and effecient transportation services as well as safe operations.

It appears FMCSA and other transportation regulators have abandoned that mandate as evidenced by the agency's failure to continue the requirement that each common carrier file evidence of valid all-risk cargo insurance. A rule that protected the shipping public and provided rules for competition.

Moreover despite the Admistration's desire to promote jobs and help small business, the new CSA regime is projected to cost the industry between 100,000 and 200,000 driver jobs (jobs that could not be exported overseas) and put small trucking companies (between 1 -100 trucks) out of business. How can this possibly help the economy or promote competition? Obviously, it cannot.

CONCLUSION

So as we face the business year ahead, our Crystal Ball is not as helpful as it has been in years past. We face unusual situations where the answers are not straight forward. Nevertheless, goods must still move from point A to point B, on time, and without damage. Business must make a profit to survive and we need experienced workers to make that happen. Therefore, our Crystal Ball portends what has to be done will be done. We are still the United States of America, the greatest country on the face of the earth. We have and we will overcome adversity.

Can I get an AMEN!

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Recent Court Cases

as analyzed by the Conference of Freight Counsel

Marian Weilert Sauvey, Esq. , Chairperson and Vic Henry, Esq., Vice-Chairperson

Carrier Liability

1. American Home Assurance Co. a/s/o Crown Equipment Corporation v. Panalpina, Inc. and A.P. Moller-Maersk A/S v. BNSF Railway Company, 2011 U.S. Dist. Lexis 16677 (S.D. N. Y. 2011).

Background: This case involved the international intermodal carriage of three containers of forklifts and forklift parts from the United States to Australia. While en route, the train transporting the containers derailed in California. American Home Assurance filed suit against Maersk to recover for damage to the cargo. Maersk impleaded BNSF, who was contracted by Maersk to transport the containers from Illinois to California. Maersk moved for partial summary judgment and declaratory judgment seeking a determination that that it was entitled to (1) a declaratory judgment finding that to the extent it had any liability, it was entitled to indemnification from BNSF; (2) partial summary judgment that any such liability was subject to limitation; (3) judgment declaring that any limitation of liability applicable to Plaintiff's claim against Maersk would be at least as favorable to Maersk as the limitation of liability BNSF was entitled to maintain; and (4) a judgment declaring that Maersk was entitled to indemnification from BNSF for its attorneys fees and expenses. BNSF moved for partial summary judgment seeking a determination that its liability was limited to COGSA's $500 per package limitation of liability.

Issues: Could BNSF rely upon COGSA's limitation of liability or did the Carmack Amendment apply? If Carmack did apply to BNSF, did the intermodal through bill meet the Staggers Rail Act prerequisite for limiting a rail carrier's Carmack liability? Was Maersk entitled to indemnification from BNSF and to what extent (if at all) was its liability limited?

Opinion: Utilizing the Supreme Court's analysis in Kawasaki Kisen Kaisha Ltd., v. Regal-Beloit Corp. et al., the Court determined that Carmack applied to BNSF, as it provides the default legal regime governing the inland leg of a multimodal shipment originating within the United States and traveling on a through bill of lading. The Court also ruled that the terms and conditions of the bill of lading alone did not give Crown independent notice of Carmack applicability and did not give Crown the choice to opt out of Carmack coverage as required by the Staggers Rail Act. Thus, BNSF, as the receiving rail carrier did not contract out of Carmack and did not limit its liability to COGSA's $500 per package limitation. Maersk's motion for partial summary judgment and declaratory judgment was also denied, as the motion did not seek a determination of liability. Therefore, because no determination of liability had been made at that point, the motion was premature.

Continued on page 09

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2. Bay Machinery Services, Inc. v. Codan Forsikring A/S, v. ATS Logistics Services, Inc., Case No. 4:08-cv-00368-SWW (E.D. AR. 2011).

Background: This consolidated action arose out of damages sustained to the nacelle component of a wind turbine during the inland portion of an international, multimodal shipment from Denmark to Illinois. Vestas Wind Systems A/S (Vestas) contracted with DFDS Transport A/S (DFDS) to transport the nacelle from Denmark to the United States. On September 24, 2004, Vestas issued a "Notice of Contract Award" to ATS for the transportation or arranging for transportation of Vestas' wind turbine components. After awarding the transportation contract to ATS and prior to any components being shipped, Vestas sent ATS a Carriage Contract that included a blank space in which the carrier's name was to be inserted. It also provided that the carrier shall not subcontract any of its obligations without the prior approval of Vestas, and that "in any event Carrier shall remain responsible for the performance of all its obligations under this Agreement." This document was never signed by any party. Subsequently, but without any Carriage Contract being formally accepted or entered into, beginning on October 22, 2004, multiple loads of components were transported. On November 16, 2004, Vestas sent an e-mail to ATS asking for a response to its contract, only to receive a reply from ATS proposing a few modifications, including a limitation of the carrier's maximum liability to $100,000 per trailer. Vestas did not respond. On November 17, 2004, ATS signed a second version of the Carriage Contract that contained the requested limitation and a clause that allowed ATS to subcontract any of its obligations (but still remaining responsible for such obligations). Vestas never signed this document and claimed it had no record of receiving it. In the meantime, Bay Machinery, who had entered into a contract with ATS in 2003, picked up the nacelle at the port of Beaumont on November 15, 2004. This load was assigned to Bay Machinery by virtue of a Load Confirmation & Rate Agreement that stated "a minimum of $100,000 cargo insurance is required unless otherwise noted." No notice of additional insurance coverage was given to Bay Machinery. During transport, t he nacelle became disconnected from the trailer and fell onto the ground. With its insurance payment in the amount of $606,917.30 to Vestas, Codan became subrogated to Vestas' claims against ATS and Bay Machinery.

Issues:

- Was the inland carriage of the nacelle governed by COGSA or the Carmack Amendment?
- Was ATS acting as a broker or as a carrier?
- Was Codan's action barred by limitations?
- Did Codan establish a prima facie case of liability under Carmack?
- Was ATS entitled to a limitation of liability pursuant to the second Carriage Contract (signed only by ATS)?
- Was Bay Machinery entitled to a $100,000 limitation of liability?

Opinion:

(1) The DFDS bill of lading was not a through bill of lading and, consequently, Carmack applied to the inland carriage of the nacelle. Further, the conduct of Vestas, DFDS, ATS and Bay Machinery reflected a clear separation between the carriage of the nacelle by sea under the DFDS bill of lading and its subsequent domestic, inland carriage.

(2) The agreement under which Vestas and ATS were operating established ATS' status as a carrier under Carmack, as the Notice of Contract Award sent by Vestas to ATS informed ATS that it was being awarded the "transportation" contract for which ATS was to "provide transportation service for all components…" In addition, throughout the process, including the versions of the Carriage Contracts, ATS represented itself as a carrier and bound itself to remain responsible as a carrier notwithstanding any subcontract of the transportation of Vestas' shipments.

(3) Codan's action was not barred by limitations as there was no contractual limitation established, and in any event, ATS' disallowance of the claim was not "clear, final and unequivocal." Thus, no limitations period was ever triggered.

(4) Codan had established a prima facie case of full liability under Carmack.

(5) ATS did not properly limit its liability with Codan, as it did not satisfy three of the four required elements under Carmack.

(6) Bay Machinery was entitled to a limitation of liability of $100,000 pursuant to the Load Confirmation & Rate Agreement, as no notice was given of the need for additional insurance. In

Continued on page 11

addition, the Court ruled that ATS was acting as an agent for Vestas, and Vestas therefore was subject to this limitation.

For the foregoing reasons, the Court awarded judgment in favor of Codan on its Carmack claims and awarded it $606,917.30 in damages. Codan could seek the full amount from ATS but was limited to $100,000 in damages from Bay Machinery.

3. Cholita Corp. v. M/V MSC Mandraki, her engines, Boilers, etc., and Mediterranean Shipping Co., 2011 U.S. Dist. LEXIS 39138 (SD NY April 4, 2011).

Background: Three sealed refrigerated containers of plantains were transported by ship from Ecuador to New York. When they arrived in New York, they were damaged. The plaintiff sued the ship for damages to the plantains. The defendant countered that, due to the sealed containers, it had no ability to inspect the plantains and there was also no evidence of the condition of the plantains when they were delivered to the carrier so plaintiff had not made its prima facie case under COGSA of delivery to the carrier in good condition.

Issues: Despite lack of evidence that the cargo was in good condition when it was tendered to the carrier, could the shipper make out a prima facie case under COGSA for the damaged cargo?

Opinion: Yes, the court found that a shipper can meet its burden under COGSA from showing from the condition of the cargo as delivered that the damage was caused by the carrier's negligence and not by any internal vice of the cargo. The plaintiff presented enough information in response to the motion for summary judgment that indicated that the damage could have only been caused by the negligence of the ship that the court allowed the case to proceed.

4. Coast Citrus Distributors, Inc. d/b/a Coast Tropical v. M/V CSAV Hamburgo, 2011 WL 1102851 (S.D. Fla. 2011).

Background: Coast brought this action pursuant to COGSA alleging that Defendants breached their duty of care regarding five refrigerated containers of mangos. Two of the containers did not make it onboard the intended vessel (scheduled to depart on February 26, 2008) because the shippers had failed to timely provide the cargo and customs documentation. In addition, two other containers did not ship on this vessel because of the carrier's operational problems. All five containers were eventually loaded onto another vessel that departed on March 5th, and were to be transshipped onto the CSAV Hamburgo and eventually offloaded at Port Everglades, Florida on March 21st. On or about March 17th, CSAV learned that the Hamburgo had suffered an engine failure while in the Panama Canal. On or about March 21st, the Hamburgo left the port with all five containers, but in order to make up the time lost due to engine trouble, CSAV made the decision to alter the course by skipping the stop at Port Everglades and instead, go straight to Port Elizabeth, New Jersey before heading back to Port Everglades. This decision was made because there were more containers and more perishable cargo going to New Jersey than to Florida. On March 31st, the Hamburgo arrived at Port Everglades and the five containers were offloaded. On or about April 3rd, Coast hired surveyors to inspect the five containers and it was determined that the mangos had exceeded the USDA's estimated maximum storage life.

Issues: Did Coast meet its burden under COGSA to make a prima facie case? If so, did the Defendants exercise due diligence and/or was the damage caused by one of COGSA's excepted causes? If an excepted cause or any reasonable deviation occurred, could Coast show that the Defendants' negligence was, at the least, a concurrent cause of the loss?

Opinion: The Defendants were not responsible for the delay of two containers leaving the port (due to paperwork not being received); therefore, this was a reasonable deviation. However, because the Defendants did not exercise due diligence in regard to two others, this delay was an unreasonable deviation. While the Court ruled that a reasonably prudent carrier would have decided to bypass Port Everglades under the circumstances, it also pointed out that even if the Hamburgo had sailed there directly, the mangos in the two containers delayed by the carrier's operational issues would still have exceeded their shelf life upon arrival. The Defendants were successful in meeting their burden in showing inherent vice in the mangos caused by a required hot water treatment. As such, the burden shifted back to Coast to show that the carrier's negligence was, at the least, a concurrent cause of the loss to the other three containers. Plaintiff did not meet its rebuttal burden in this regard. Accordingly, the court found for Coast with respect to its COGSA claim and awarded damages in the amount of $50,706.88, as the proper measure of damages was the fair market value of the boxes within the two containers, plus the cost for the survey, minus any hot water damage and any money received by Coast.

5. Coast Citrus Distributors, Inc. d/b/a Coast Tropical v. M/V CSAV Hamburgo, 2011 WL 1102851 (S.D. Fla. 2011).

Background: This case involves a shipment of merchandise for plaintiff from Miami to Guatemala City, Guatemala. Plaintiff hired defendant, a freight forwarder, to arrange for the transportation. Defendant issued a bill of lading that detailed the amount of merchandise in the shipment, loaded it into a shipping container and arranged for it to be transported to Guatemala. Plaintiff alleges that the bill of lading contained inaccurate information in violation of the Federal Bill of Lading Act, 49 U.S.C. § 80101, et al., and COGSA. As a result of the bill of lading's misdescription, the merchandise was seized by Guatemalan customs and delivery of the merchandise was delayed for several months. Defendant filed a motion to dismiss arguing that the plaintiff had the burden to ensure that the merchandise was properly loaded and counted under a bill of lading that indicated the shipment was "shipper's load and count" on its face and that it had no liability under a provision that placed all liability for loss or damage on the plaintiff.
Issues: Was the "shipper's load and count" reference on the bill of lading sufficient to limit the forwarder's liability for inaccurate information? Was the forwarder able to limit its liability under COGSA?

Opinion: The court found that a carrier cannot escape liability by inserting the words "shipper's load and count" on the bill of lading. When a common carrier loads the goods, the carrier is responsible for verifying that the quantity of the goods described on the bill of lading matches what is loaded for transport. The court also found that COGSA required a carrier to issue a bill of lading with the accurate number of packages or pieces or the quantity of weight as furnished in writing by the shipper and that a carrier could not contract under minimum COGSA liability.

6. Mattel, Inc. v. BNSF Ry. Co., 2011 U.S. Dist. Lexis 495 (C.C.Ca. January 3, 2011)

Background: CMA, an American agent for an ocean carrier, entered into contracts with various shippers to move goods from China to Ft. Worth, Texas under CMA's through bills of lading (TBOL) on which Mattel was listed as the consignee. Mattel claimed to be the shipper and the beneficial owner of the goods. There was also a service contract between CMA and Mattel that placed liability for loss or damage on CMA. CMA subcontracted with BNSF to move the goods by rail from the port to Texas, where there was a derailment, resulting in damage to the goods and Mattel's lawsuit against BNSF for $1.27M. The TBOLs contained both a Himalaya clause and a covenant not to sue CMA's subcontractors. BNSF filed a motion for summary judgment relying on these provisions.

Issues: Did the provisions of the TBOLs apply to bar Mattel's claims against BNSF?

Opinion: As COGSA applied and it does not bar covenants not to sue, that provision was enforceable against Mattel. There were no inconsistencies between the service contract, which made CMA liable, and the TBOL with respect to BNSF's reliance on the TBOL covenant not to sue provision. The provision was enforced and the case dismissed.

7. Richard Underwood v. Allied Van Lines, Inc., 2011 U.S. Dist. LEXIS 40853 (D.Nev. April 14, 2011) and 2011 U.S. Dist. LEXIS 55642 (D.Nev. May 24, 2011)

Background: Plaintiff sought leave to file a second amended complaint against a household goods carrier including a claim for intentional infliction of emotional distress. That complaint, when filed, obviously included a claim for punitive damages under the Carmack Amendment, which defendant sought to have dismissed.

Issue: Was the Plaintiff allowed to file a complaint against a household goods carrier including a claim for intentional infliction of emotional distress? Was Plaintiff's claim for punitive damages preempted by the Carmack Amendment?

Opinion: Plaintiff was not allowed to file an amended complaint including and intentional infliction of emotional distress claim as that claim arose out of the same conduct underlying the Carmack claim and would have been futile as it was preempted. Plaintiff's punitive damage claim was also preempted.

8. OneBeacon Insurance Company v. Haas Industries, Inc., 2011 U.S. App. Lexis 4603 (9th Cir. 2011).

Background: OneBeacon brought suit against Haas under the Carmack Amendment to recover for goods lost during shipping. Following a bench trial, the district court entered judgment in favor of Haas. OneBeacon appealed the district court's holdings that OneBeacon lacked standing to sue under Carmack and, alternatively, that Haas limited its liability. OneBeacon was the subrogated insurer of Professional Products, Inc. (PPI), who purchased three pallets of computer wafers from Omneon Video Graphics (Omneon). Instead of arranging for its own carrier, PPI authorized Omneon to arrange shipment through Haas, a carrier Omneon frequently used. Omneon did not list a declared value for the shipment on the bill of lading and did not indicate PPI's ownership of the goods identified on the bill of lading.

Issues: Did OneBeacon have standing to sue under Carmack? Did Haas limit its liability?

Decision and Result: The Court determined that the crucial phrase under the current version of Carmack is "the person entitled to recover under the receipt or bill of lading." Throughout, the Conditions of Contract Carriage referenced the rights and duties of the "shipper." OneBeacon argued that the "Shipper" was defined as "the party from whom the shipment is received, the party who requested the shipment be transported by Haas industries, and [sic] party having an interest in the shipment, and any party who acts as an agent for any of the above." Therefore, because PPI was a "party having an interest in the shipment," it fell within the bill of lading's definition of "Shipper." OneBeacon also argued that Haas failed to limit its liability under the four-step Hughes test, as it failed to satisfy the first element. Specifically, OneBeacon asserted that a carrier must still maintain a tariff even if it is not required to file the tariff. The Court disagreed, holding that the Hughes test remains the same with one exception: Instead of maintaining a tariff in compliance with the ICC, a motor carrier must now, at the shipper's request, provide the shipper with "a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based." As there was no evidence that either Omneon or PPI requested this information, the Court reversed the holding that OneBeacon lacked standing, affirmed the holding that Haas limited its liability, and remanded the case for an entry of judgment in favor of OneBeacon consistent with the limitation of liability.

Limitation Period and Notice

9. Christopher Aniedobe v. Hoegh Autolin ers, Inc., et al., 2011 U.S. Dist. Lexis 22909 (S.D. Md. 2011).

Background: Plaintiff hired Cartainer, a forwarding agent, to arrange for shipment of his Toyota Sequoia from Baltimore to Nigeria. Cartainer contracted with Hoegh to provide transportation. Plaintiff brought suit against both Cartainer and Hoegh for damages (including theft of parts) that occurred during transport. Defendants filed separate motions for summary judgment, including Hoegh's request for partial summary judgment capping Plaintiff's recovery.

Issues: Did Plaintiff give Hoegh timely notice of his claim as required by COGSA and the bill of lading? If so, did Hoegh's agreement with Cartainer limit its liability to $500.00? Could Cartainer escape liability due to its status as an agent for the Plaintiff and/or Hoegh?

Opinion: The Court determined the countdown for timely notice did not start until the Plaintiff's agents first gained access to the vehicle or until it was actually released from Hoegh's custody. Under either scenario, Plaintiff provided timely notice. Accordingly, the Court denied Hoegh's motion in this regard. However, because Plaintiff, acting through his agent (Cartainer), left blank the space on the bill of lading for declaring a higher value of the goods, he accepted COGSA's limitation of liability (which was incorporated into the bill of lading). Plaintiff unsuccessfully argued that the extent and nature of the damages constituted unreasonable deviation from the contract. As for Cartainer, they argued that as Hoegh's agent, it could not be held responsible for acts of this disclosed principle. The Court disagreed, and held that Cartainer was actually acting as an agent for the Plaintiff when it contracted with Hoegh. Despite this, because there was nothing that indicated that Cartainer acted negligently when it opted for the default limited liability, the Court granted Cartainer's motion.

10. Daybreak Express, Inc. v. Lexington Insurance Co. a/s/o Burr Computer Environments Inc. and J. Supor & Sons Trucking & Rigging Co., 2011 Tex. App. Lexis 143 (App. Tex. 2011).

Background: In this subrogation action, Lexington sued Daybreak in connection with property damage that occurred during the interstate shipment of electronic equipment. The trial court found that (1) Lexington proved all elements of a Carmack Amendment claim; (2) the claim was not time-barred under the applicable New Jersey statute of limitations; and (3) Lexington sustained damages of $85,000. Daybreak appealed.

Issues: Which limitations period applied (Carmack, 28 U.S.C. § 1658, Texas or New Jersey)? Was Lexington's claim barred?

Opinion: The Court rejected Daybreak's contentions that federal law provided the applicable limitations period, as Carmack does not establish such a limitation. In addition, 28 U.S.C. § 1658 did not apply because (1) the four-year limitations period applies to claims made possible by post-1990 legislative enactments; and (2) Carmack claims against motor carriers have been authorized since 1935. As the governing federal statute did not provide a limitations period, the court "borrowed" Texas' two-year limitations period, as it was the most closely analogous. The Court then relied upon Carmack to determine that Lexington's claim accrued on the date Daybreak provided written notice that it had disallowed the claim (February 6, 2003). While Lexington filed its original petition on January 6, 2005, it only sued at that time for breach of an alleged settlement agreement. The Carmack claim, which was deemed by the court to arise from a wholly separate transaction, was not asserted until 2007. Therefore, Lexington's Carmack claim did not relate back to the breach of contract claim asserted in its original petition and was barred by the applicable two-year limitation period. The judgment of the trial court was reversed and a take-nothing judgment was rendered in favor of Daybreak.

Note: In its analysis, the Court overlooked the fact that the Carmack Amendment was recodified in 1995 (in the ICCTA).

11. Holtec International Corporation, v. Preferred Metal Technologies, Inc., v. UPS Ground Freight, Inc., d/b/a UPS Freight, f/k/a Overnite Transportation, 2011 U.S. Dist. LEXIS (D.N.J. April 13, 2011)

Background: Holtec International Corporation (Holtec) sold fabricated borated aluminum panels, manufactured by Preferred Metal Technologies (PMT) to a customer. PMT used UPS to transport the two crates containing the panels to its customer under a bill of lading prepared by PMT without any additional declared valuation but under which PMT obtained "exclusive use" of the UPS vehicles. When they panels arrived, they were damaged. PMT notified UPS of the damage and, on December 27, 2005, sent a Claim for Loss or Damage to UPS for the shipment. In the section that called for the amount of the claim, PMT wrote "To Be Determined." UPS acknowledged the claim by letter on January 4, 2006, indicating that, before it could begin its investigation, it needed additional information including the "Amount of Claim and How Determined." In response to this letter, PMT sent three letters dated July 31, 2006, November 27, 2006 and March 20, 2008 updating UPS on the status of its claim. Holtec sued PMT to recover the value of the panels, which in turn sued UPS. UPS filed a motion for summary judgment arguing 1) that PMT's complaint was time-barred because it failed to file an appropriate "claim" as defined in 49 CFR § 1005.2, an implementing regulation of the Carmack Amendment, 49 U.S.C. § 14706; 2) alternatively, PMT failed to file its Complaint within the required two-year statute of limitations after UPS denied its claim; and 3) even if PMT had a viable claim, such claim was limited to $5,600 pursuant to the rate set forth in UPS's freight tariff. PMT claimed that UPS's liability limitation was not applicable under the theory of material deviation.

Issues: Was PMT's claim for an "amount to be determined" a proper claim? Was the lawsuit barred by the two year statute of limitations? Was UPS's liability limitation applicable ?

Opinion: The Court relied on the Third Circuit's decision in Lewis v. Atlas Van Lines, Inc., 542 F.3d 403, 409-10 (3d Cir. 2008), which construed the meaning of "specified" and "determinable" and in which that Court "clearly held that "a claim that is 'determinable' need not include any dollar amount at all." Id. at 409. Rather, "all that is required is that the claim provide enough information to make it possible to assign a dollar amount to the claim at some point after the claim itself is filed." Id. In other words, "[v]alid claims are determinable not because they include some dollar amount, but because they provide enough information about the nature and extent of the carrier's liability to allow the carrier to understand its potential exposure to liability." Id. at 411. It found that PMT had informed UPS of the nature of the claim and how damages would ultimately be determined and found that to be a sufficient claim under Lewis. The statute of limitations argument failed because UPS did not plainly convey that it had denied that claim in that letter and UPS did not, in response to any of the future letters, advise PMT that it did not want to wait for further information. Finally, the court rejected PMT's material deviation argument under the law of the Third Circuit.

12. Jumbo Transport Solutions A/S v. Trend way Transportation Services Inc., 2010 ONSC 7100 (CanLII) Ontario Superior Court

Background: The plaintiffs sought a ruling on summary judgment that Condition 12 of the Ontario "Uniform Bill of Lading" [having similar wording in the other provinces] does not act as a "time bar" to a claim against the defendant.

Condition 12 provides:

i) No carrier is liable for loss, damage or delay … unless notice … setting out the particulars of the origin, destination and date of the shipment of the goods and the estimated amount claimed … is given in writing to the originating carrier within 60 days after delivery of the goods or, in the case of failure to make delivery, within 9 months after the date of the shipment.

ii) The final statement of the claim must be filed within 9 months after the date of shipment, together with a copy of the paid freight bill.

The cargo loss in question occurred on December 9, 2008. The initial claim notice was issued to the carrier on December 11, 2008 providing basic shipment information and advising of an 'intent' to make a claim and that a formal claim would be later issued when the amount of the loss was determined. On January 29, 2009 information was sent to the defendant carrier consisting of time loss estimates and a detailed description of the hours and amounts claimed for the work necessary to repair the damaged cargo. This led to further correspondence between the plaintiff and an insurance adjuster for the carrier wherein further loss details were requested.

Issue: The defendant took issue with the sufficiency of the contents of the notice of the claim and the final claim described above. It maintained that Condition 12 was not satisfied and that accordingly the action was effectively 'time barred'.

Opinion: The Court noted that the purpose of Condition 12 is for adequate notice and sufficient particulars of a claim so as to allow a carrier to be able to investigate and adjudicate the claim in a timely manner and to develop any defense within a reasonable time. Standards consistent with court pleadings need not be satisfied to achieve these requirements. Condition 12 does not require the issuance of suit or such level of 'perfection' or detail. Having set forth a description of the shipment, the origin, the accident in question, where and when the loss took place and detailed particulars of the amounts claimed for labor and costs, the claimant was seen to have satisfied the intent behind the Condition. As such, there was no time bar defense to this case and matters were to proceed to trial. Moreover, there was no indication of prejudice to the defendant carrier or its insurer as a result of the form or contents of the claim notices provided. Further, in having exchanged correspondence with the claimant within the 9 month post-loss period seeking further information – at the same time being silent as to any criticism of the information that was being provided - the carrier's representatives were seen to have waived the notice requirements in the Uniform Bill of Lading.

Continued on page 19

June 3, 2011

Shortsighted

By: President, CargoNet

When confronted with major challenges like global warming, it's a natural reaction to wonder whether one person can actually make a difference. I'm sure all of us have asked ourselves at some point, "Is throwing one plastic bottle into the recycling bin really going to help?"

The answer to the question, of course, is yes. Collectively, we as individuals have the potential to change a lot of things. Retail loss prevention is no different. If you start by asking yourself, "How can I crack that cargo theft ring active in Southern California?" very likely you will get nowhere. The key is to start small — to assess your immediate realm of influence.

A great place to start small in retail loss prevention is the area of short counts. Every retailer deals with this issue. The purchase order is sent to the vendor. The vendor packs the shipment. The carrier picks it up and delivers. The retailer unpacks and finds the order to be short count and issues a chargeback to the vendor. The vendor files a claim with the carrier. The claim is paid or disputed. Hours of administrative resources, time, and money are lost.

Everyone has a small but significant role to play in improving this procedure. For the retailer, gaining visibility into the process is the first step. Using a system to track short counts by vendor and carrier helps to identify problem areas that need attention.

Carriers have the law on their side. A substantial amount of cargo claims litigation revolves around the shipper load and count exception in the Bill of Lading Act. The shipper load and count provision should apply to all situations in which the carrier is unable to verify the count or condition of a load. To be relieved of liability for short count, the carrier needs to ensure that the shipment is sealed at point of origin and that the term "SLC" or other clear language of shipper liability is included. Carriers can also include this clause in service contracts.

With these retailer and carrier processes in place, the responsibility falls back on the vendor — where it should be — to ensure load count is correct for each shipment.

Someday item-level RFID tracking may resolve all these issues. For now, the best advice is to start small and make a difference where you can.

13. King Cheese Corporation v. FFE Trans portation Services, Inc., Case No. CV10-02643-ODW (C.D.Ca. 2/20/2011)

Background: King Cheese Corporation (‘King Cheese”) sued FFE Transportation Services, Inc. (“FFE”) alleging that FFE caused damage to its cheese products by delayed delivery for one load, and by and improper loading and handling for two other loads. The claims were timely made to FFE, which rejected one for lack of proper support and accepted the two others, but for significantly lesser amounts based upon its limitation of liability. FFE sent two payment checks to King Cheese, for the limited liability amounts. King Cheese deposited one check into its bank account, and the other was deposited into its attorneys' trust account. King Cheese refused to pay 10 outstanding invoices for shipments completed by FFE. King Cheese sued FFE in state court, alleging breach of contract and negligence. FFE removed the case to the District Court for the Central District of California, and filed a Counterclaim for the amounts owing on the outstanding invoices. FFE filed a motion for summary judgment on both the Complaint and the Counterclaim.

Issues: (1) Did FFE properly limit its liability? (2) Was King Cheese barred by the doctrine of accord and satisfaction? (3) Was FFE entitled to payment of the invoices?

Opinion: (1) The court found that FFE properly limited its liability under the bill of lading and its tariff, even though King Cheese did not see FFE's tariff. The court relied upon One Beacon Inc. Co. v. Hass Indus., Inc. (ND Cal. 2008) 567 F. Supp.2d 1138 in holding that FFE was not required to provide notice of the tariff, or seek advance approval of the tariff because 49 USC §14706(c)(1)(B) requires disclosure only upon request of the shipper. (2) The court found that King Cheese was barred by the doctrine of accord and satisfaction even though one of the payments was deposited into its attorney's client trust account pending the outcome of the case. This issue was decided under state law. King Cheese contended that no real controversy existed because FFE's refusal to pay the entire amount of the claim was arbitrary. The court rejected this contention, finding that FFE's reliance upon its limitation of liability (even if it had not been upheld) created an actual controversy. (3) The court found no defense to the payment of the freight charges, and awarded FFE the full amount owing.

14. Pacific Indemnity Co. v. Atlas Van Lines, et al., _ F.3d_, 2011 WL 1486069 (9th Cir. April 20, 2011).

Background: This case arises out of a loss of household goods by fire during shipment from Illinois to Arizona. The Ninth Circuit Court of Appeals affirmed the District of Arizona Court's granting of summary judgment (655 F.Supp.2d. 1023) holding that a shipper (and its subrogating insurer) are bound by the limitations of the downstream motor carrier's (Atlas') bill of lading and tariff where intermediaries were used to make the shipping arrangements. The shippers, Ina and Murray Manaster (the Manasters), contracted with Pickens Kane Moving & Storage Company to move their high-end antiques and fine art from Illinois to Arizona. They declared $1 million on the bill of lading issued by Pickens. When Atlas, which was retained by a third party contracted by Pickens, picked up the shipment from Picken's warehouse, Picken did not advise Atlas of the $1 million coverage requirement or declare a value on its own or Atlas' bill of lading. The shipment was destroyed by fire during transport. The Manasters had insured the full value of their goods through Plaintiff Pacific Indemnity, which paid the Manasters' claim in full and was subrogated to their interests. Pacific then filed suit for carrier liability under the Carmack Amendment against both Pickens and Atlas to recover $1 million in damages Pacific paid to its insureds. Pickens and Atlas cross-claimed against each other for carrier liability. Pacific moved for summary judgment against Pickens Kane and Atlas. Pickens moved for summary judgment against Atlas for indemnity in the amount of $1 million. Atlas moved for partial summary judgment against Pacific and Pickens to limit its liability to an amount no greater than $52,500.

The District Court held that Atlas was liable to both Pacific and Pickens for $52,500 or $5.00 per pound, and that Pickens was liable to Pacific for $1 million. The District Court denied Pickens' motion for reconsideration, but granted Pickens its reasonable expenses from Atlas. Pickens appealed from judgment against it in the amount of $1 million and Atlas separately appealed the judgment awarding costs to Pickens arguing that: 1) Pickens was not innocent as only it knew about the $1 million limitation yet it did not obtain any additional valuation; (2) because Pickens

Continued on page 19


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Kane only recovered $52,500 of the $1 million it sought, Pickens was not a prevailing party; and (3) because § 14706(b) is entitled "apportionment," Pickens should be entitled to only 5.2% of its costs, the same percentage of the total damages attributed to Atlas. The appeals were consolidated and the Ninth Circuit Court of Appeals affirmed both judgments.

Issues: What is a household goods carrier's liability for "full replacement value" under 49 U.S.C. §14706(f)? Is a waiver required to apply the replacement value limits set out in the carrier's tariff? Is the indemnity obligation under the Carmack Amendment (49 U.S.C. §14706(b)) subject to a prevailing party or success on the merits analysis?

Opinion: The Ninth Circuit Court determined that the District Court apportioned the damages properly under 49 U.S.C. §§ 14706(f)(2) and (3) to limit Atlas' liability to the tariff amount of $5.00 per pound in the absence of a declared value. The Court found that the interpretation of subsections (2) and (3) was a matter of first impression. Section 14706(f)(2) provides that "[u]nless the carrier receives a waiver in writing under paragraph (3), a carrier's maximum liability for household goods that are lost, damaged, destroyed or otherwise not delivered to their final destination is an amount equal to the replacement value of such goods[.]" That subsection also provides that "the replacement value of such goods [is] subject to a maximum amount equal to the declared value of the shipment and to rules issued by the Surface Transportation Board and applicable tariffs." The Court looked to subsection (f)(2) that states that replacement value of the household goods is subject to or conditioned upon three factors: (1) declared value of the property, (2) rules issued by the Surface Transportation Board (STB); and (3) carrier's "applicable tariffs." Because Pickens did not declare a value, the first factor was not implicated. As to the second factor, the Court examined the STB's decision that found when a shipper does not declare a value for a shipment, the replacement value is deemed to be $4.00 per pound or a minimum of $5,000 and found that this decision was permissible and to be accorded deference. As to last factor (i.e., a carrier's "applicable tariffs"), the Court noted that the $4.00 per pound tariff was approved by the STB after full notice and comment rule-making (and that Atlas adjusted this tariff to $5.00 per pound in its exceptions to tariffs). The Court found that "[t]he plain language of the statute and the [STB's] interpretation of the statute operate to limit Atlas' liability to the tariff amount on these facts." No waiver was required.

With respect to the indemnity claim, the Court found that because the shipment was destroyed while in Atlas' care, Pickens was entitled to its reasonable costs from the carrier (i.e., Atlas) over whose line or route the injury occurred, under the plain language of § 14706(b); that it was inappropriate to apply the prevailing party analysis because § 14706(b) contains no prevailing party requirement; and that Atlas' argument that Pickens should be entitled to only 5.25% of its costs was really a challenge to the reasonableness of the award. Because Atlas did not contest the reasonableness of the fees at the District Court level, except in relation to the judgment, the Court found that Atlas waived that argument.

Preemption

15. Eagle Transportation, LLC v. Willie Scott, et al., 2011 U.S. Dist. LEXIS 60958 (S.D.Miss. June 7, 2011)

Background: Plaintiff Eagle, a broker (Eagle), entered into a motor carrier agreement with defendant Willie Scott, an individual doing business as Scotty's trucking, a carrier (Scotty's), to transport goods for plaintiff's customers. The contract included an indemnification provision and a provision establishing the carrier's liability under the Carmack Amendment at the full value of the damaged or lost items. Peco Foods (Peco) hired Eagle to arrange for the transportation of a load of frozen chicken from Mississippi to Michigan. Eagle tendered the transportation to Scotty's under the contract. During transportation, most of the cargo was damaged beyond salvage. Scotty's insurer and also a defendant, Great American Insurance Company (Great American) seized the remainder of the cargo and sold it for salvage. Eagle apparently paid its customer, Peco, for its loss, then filed a claim against Great American for the full value of the cargo (approximately $50K). In response, Great American tendered a check for the amount it had received as salvage, $2.056.25. Plaintiff filed suit in state court in Mississippi bringing state law claims for breach of contract and negligence, claiming Scotty's breached the motor carrier agreement by failing to deliver the goods, allowing them to be damaged, failing to indemnify Eagle for its liability to Peco. In addition, Eagle made a claim against Scotty's for negligently allowing the cargo to be damaged and failing to deliver it and separate claims against Great American for negligently failing to sell the goods for a reasonable salvage value. Finally, Eagle sought a declaratory judgment for the full value of the goods under Scotty's insurance policy with Great American. Great American removed the case to federal court. Eagle sought remand of the case on the basis that the Carmack Amendment preempts state law claims by shippers against carriers for loss stemming from the transportation of goods, but would not preempt its action because it was between a broker and a carrier.

Issues: Does the Carmack Amendment preempt a claim between a broker and a carrier?

Opinion: The court found that the Fifth Circuit had not addressed whether the Carmack amendment could preempt a broker's claims against a carrier and went out of its way to note that it was not expressing any opinion as to whether a transportation broker's breach of contract claim against a carrier was preempted by the Carmack Amendment. However, it found that the negligence claims were so preempted and that the Carmack Amendment applied to these and that remand was not proper.

Continued on page 23

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Issues: Does the Carmack Amendment preempt a claim between a broker and a carrier?

Opinion: The court found that the Fifth Circuit had not addressed whether the Carmack amendment could preempt a broker's claims against a carrier and went out of its way to note that it was not expressing any opinion as to whether a transportation broker's breach of contract claim against a carrier was preempted by the Carmack Amendment. However, it found that the negligence claims were so preempted and that the Carmack Amendment applied to these and that remand was not proper.

Jurisdiction, Removal, Forum Non Conveniens, Venue

17. South Mississippi Electric Power Association v. Norfolk Southern Railway Company, 2011 U.S. Dist. LEXIS 49901 (S.D. Miss. May 9, 2011)

Background: Plaintiff and Defendant railroad entered into a contract that was effective January 1, 2007 in which Defendant agreed to transport coal from various mines to Plaintiff's plant in Mississippi. The contract provided base transportation rates for transporting coal to the plant, and it required quarterly adjustments of the base rates according to cost indices included in the contract. The contract also imposed a percentage-of-rate fuel surcharge. On January 5, 2007, the Surface Transportation Board issued a decision in which it concluded that "computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice, and we direct carriers to change this practice." Rail Fuel Surcharges, Ex Parte No. 661,2007 STB LEXIS 39, *1, 2007 WL 201205 (S.T.B. Jan. 25, 2007). The Board further concluded "that the practice of 'double dipping,' i.e., applying to the same traffic both a fuel surcharge and a rate increase that is based on a cost index that includes a fuel cost component . . . is an unreasonable practice, and we direct carriers to change this practice as well." Id. However, the STB explicitly declined to impose the new rule retroactively. Id. at *2-*23. This lawsuit arose out of Plaintiff's allegations that the Defendant was required to comply with the STB's decision and various other allegations relating to the fuel surcharges and failures to provide service. At issue was language in the contract between the parties that incorporated the regulatory provisions of the Interstate Commerce Act except with respect to the fuel surcharge provision. In response to the complaint regarding services, the Defendant also argued that ICCTA preempted a state law breach of contract complaint.

Issues: Do the actions of the STB apply to provisions in a contract between a railroad and a shipper when the contractual provision specifically excepts the application of those regulatory provisions? Did ICCTA preempt state law breach of contract actions involving rail carrier services for Section 10709 contracts?

Decision: While the contract did incorporate the federal provisions for everything else, the fuel surcharge provision specifically excepted it from the application of the federal regulations and, therefore, the STB's order on fuel surcharges did not apply to it. ICCTA does not preempt Plaintiff's breach of contract action merely because the parties incorporated related duties and obligations in the transportation contract. Section 10709 provides that Plaintiff's proper remedy is a breach of contract action.

18. Sotheby's Inc. v. Modern Art Services, Ltd. and David Hill, 2011 U.S. Dist. LEXIS 45155 (S.D.N.Y. April 21, 2011)

Background: Plaintiff filed a complaint in state court against Modern Art, a shipping company, and David Hill, an employee of Modern Art, alleging that Defendants negligently mishandled a statue in violation of New York State common law when they caused the statue to fall to the floor, damaging it. Defendants removed the case to federal court pursuant to 28 U.S.C. § 1441, asserting, among other things, federal question jurisdiction under 28 U.S.C. § 1331 under Carmack Amendment preemption. Plaintiff moved to remand the matter to state court, arguing, among other things, that the Carmack Amendment "only applies . . . to shipment[s] . . . by rail or motor carrier" and the statue was being shipped by air; and federal common law did not warrant preemption of Plaintiff's claims.

Issue: Was removal proper under federal question jurisdiction on an air freight shipment?

Opinion: As the statue at issue was to be shipped by air to Hong Kong, Plaintiff's claim was not preempted by the Carmack Amendment. The court also found that the doctrine of complete preemption was inapplicable to a well-pleaded complaint against an air carrier alleging state law claims as there was no evidence of Congress' intent to transfer jurisdiction of this issue to federal courts.

19. Valerus Compression Services v. Lone Star Transport, 2011 U.S. Dist. Lexis 10769 (E.D. Wis. Jan. 27, 2011).

Background: Valerus sued Lone Star for damage to property that had been manufactured in Wisconsin. The damage occurred in Kansas. Plaintiff and defendant were both from Texas. Lone Star moved to transfer the case to Texas as a more convenient forum. Valerus argued that the product was back in Wisconsin, both sides already had Wisconsin lawyers (my favorite argument), most of the discovery was done, the case was unlikely to go to trial and that electronic filing meant that no one had to actually go to Wisconsin. Lone Star countered that the primary issues-untimely claim filing and failure to mitigate damages-were Texas issues unrelated to the actual value of the damage and there were no Wisconsin witnesses on those issues.

Issue: ***On Wisconsin***, or ***The Eyes of Texas are upon You?***

Opinion: The judge ruled that convenience would not be served by transferring the case to Texas. The case had a Wisconsin connection and the "interest of justice" (not to mention the employment of Wisconsin lawyers) dictated that the case stay there. It was already far along and a transfer would just cause a delay. The court noted that the existence of electronic filing and telephonic appearances obviated some of the practical concerns of decades gone by when it came to convenience issues.

20. Williamson-Dickie Manufacturing Company v. M/V Heinrich J, et al., 2011 WL 320098 (S.D. Tex. 2011).

Background: This action involved alleged water, mold and mildew contamination of a containerized shipment carried over the road in Guatemala, aboard the M/V Heinrich to New Orleans, and then again over the road to Fort Worth. Plaintiff is incorporated in Delaware with its principle place of business in Fort Worth. Plaintiff contended that Seaboard Marine Ltd. (Seaboard), operator of the M/V Heinrich, is a Liberian corporation with a registered agent in Austin, Texas. Seaboard claimed it was headquartered in Florida. Plaintiff sued marine and land carriers, seeking to recover for damage to cargo. Seaboard moved to dismiss and filed an alternative motion to transfer, contending that the venue was improper based upon a forum selection clause contained in the bill of lading.

Issues: Did Seaboard waive its right to move for dismissal for improper venue by not specially including that defense in its responsive pleading? Was transfer appropriate pursuant to 28 U.S.C. § 1404(a)?

Decision and Result: Seaboard did not specifically invoke the bill of lading's forum selection clause or Rule 12(b)(3) when it filed its responsive pleading. While its answer did state the affirmative defense of improper venue, that defense referred generally to "the Seaboard bill of lading terms and conditions." Seaboard argued that this catch-all terminology was enough. The Court disagreed and pointed out that the very forum selection clause relied upon by Seaboard also included its right to waive the forum selection clause. The Court added that even if it had determined that Seaboard did not waive its ability to transfer this case pursuant to rule 12(b)(3), the proper analysis would have been a transfer analysis under 1404(a) and not dismissal under 12(b)(3). The Court also denied Seaboard's motion to transfer, as the balancing of the 1404(a) factors weighed against such a transfer.

Freight Charges

21. Elena Isupov v. American Relocation Moving Specialist, 2011 U.S. Dist. Lexis 55378 (E.D. Cal. 2011).

Background: Plaintiff filed a pro se complaint alleging that she entered into negotiations with a moving company in order to relocate her belongings from California to Tennessee. On the date of the move, Plaintiff alleges that American breached the original binding estimate and demanded additional money to complete the move. Although it appeared that Plaintiff paid a $500 deposit on the date of her move, her belongings remained in possession of American. Plaintiff demanded that her belongings be returned or, if they had been sold, compensation in the amount of $100,000. Plaintiff also demanded that the "system-

Continued on page 26

Cargo Salvage Claims

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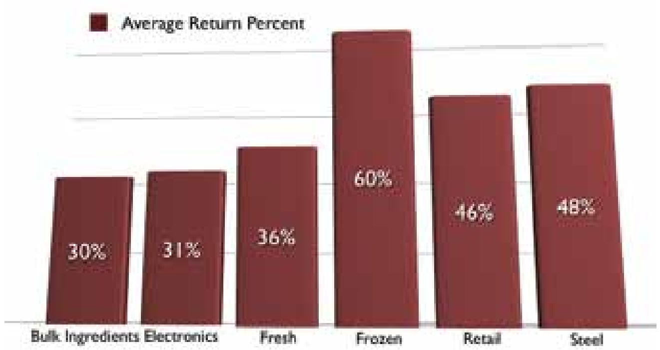

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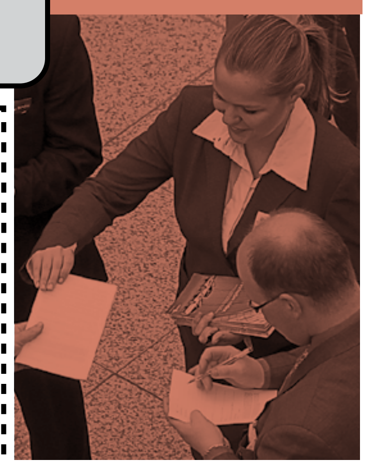

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atic fraud conducted by the Defendant be halted immediately."

Issues: Did Plaintiff's complaint fail to state a claim upon which relief could be granted?

Decision and Result: Plaintiff's breach of contract claim was insufficient, as it was void of any statutory or other legal authority to establish federal court jurisdiction. Assuming that Plaintiff intended to bring an action for breach of contract arising out of interstate commerce, the Carmack Amendment was the exclusive cause of action available. However, plaintiff failed to establish a prima facie case under Carmack. The Court noted that the estimated amount was $1,175, so even if the estimate was binding, she had not paid the amount required in order to receive her belongings. Accordingly, the Court dismissed Plaintiff's complaint with leave to amend.

Carrier/Broker/Freight Forwarder Issues

22. Sunopta Global Organic Ingredients, Inc. v. C.H. Robinson Worldwide, Inc., 2011 WL 1532063 (E.D. Wash. 2011).

Background: Sunopta contracted with CHR, acting as a cargo broker, to transport 43,192 pounds of apple juice concentrate from Delaware to Washington. The shipment was allegedly rejected at delivery, as the seals had been broken and the product appeared to have been spoiled or contaminated. Sunopta filed suit in state court and CHR removed. Plaintiff asserted that it filed an amended complaint that no longer made a federal claim under the Carmack Amendment "so that the matter could be remanded to state court." However, Sunopta never filed a motion to remand and proceeded to respond to the motion for summary judgment filed by CHR. The Court was not persuaded that CHR's answer to the amended complaint represented a fundamental change in its legal argument such as would weigh in favor of remand. Therefore, the Court exercised supplemental jurisdiction over the remaining common law claims.

Issue: Was CHR, as a broker, liable for the negligence the party it contracted with (J & L Trucking) to transport the apple juice?

Decision and Result: The mere fact that CHR identified itself as the "Carrier" on its "Shipment Detail" did not raise a genuine issue of material fact as to whether J & L Trucking was acting as an agent of CHR (as opposed to acting as an independent contractor). Sunopta failed to provide any evidence that CHR controlled the manner of performance of J & L Trucking such that it could be considered an agent of CHR. There was also nothing in the agreement between CHR and J & L Trucking or the pleadings that indicated that CHR was acting in some other capacity other than that of a broker. As such, because there was no basis for holding CHR liable for any negligence of J & L Trucking, CHR was awarded judgment on Sunopta's claims as set forth in its amended complaint.

23. Unified Global Logistics v. Nabers Solutions, 2011 Cal. App. Unpub. Lexis 437 (Jan. 21, 2011).

Background: Nabers was a licensed broker. UGL was also a licensed broker, as well as a motor carrier. When Nabers brokered a load to a carrier, it would first obtain a copy of its operating authority, a certificate of insurance and a W-9. LG Electronics hired FNS USA, Inc. to arrange for the transportation of 252 LCD televisions from California to Virginia. FNS hired UGL, which in turn hired Nabers. UGL and Nabers had worked together on 5 previous occasions. Nabers had provided UGL with a copy of its broker's license, a copy of a contingent cargo liability policy and a W-9. Nabers hired CAC American to haul the freight. The load was stolen enroute. UGL paid FNS in full for the loss, in accordance with their oral agreement. It sued Nabers to recover the amount paid. Although not specifically mentioned in the case, it appears that CAC was uninsured for the loss because the truck hauling the load was not listed on CAC's insurance policy. The trial court granted Nabers' motion for summary judgment, finding that the Carmack amendment did not apply to brokers, which is all Nabers was in this transaction. UGL claimed that it "was lead to believe" Nabers was a motor carrier, and therefore Carmack should apply. The court said there was no real evidence to support this claim. Since the goods were never in Nabers' possession, it could not have been negligent in causing their theft. Finally, the trial court held that, in general, there is no duty on the part of a broker to hire a competent carrier, unless there was a contract to do so. It found no such contract and noted that Nabers did take steps to make sure the carrier was competent, even though not required to do so.

Issue: Was Nabers a broker or a motor carrier?

Opinion: The Court of Appeals affirmed the trial court in all respects. It found insufficient evidence to support UGL's "belief" that Nabers was a motor carrier and overwhelming evidence that it was only a broker. It noted that UGL only became concerned about Nabers' status after the loss and that it was of no concern to UGL at the time it entered into the contract to ship the goods. There was no breach of contract and the attempt to claim negligence in selection of the carrier was just an effort to rebrand a breach of contract claim as a tort, something the Court would not allow.

Damages

24. APL Co. Pte. Ltd. and American President Lines, Ltd. v. Blue Water Shipping U.S. Inc., 2011 WL 1542374 (S.D.N.Y. 2011).

Presenter: Robert Spears

Background: This admiralty action arose out of the breach of an agreement between Plaintiffs APL and American (together APL) and Defendant Blue Water concerning the transport of fresh garlic containers from China to the United States. The garlic shipments failed to clear customs and 26 of the 29 containers were eventually destroyed. At the bench trial, the Court concluded that APL failed to reasonably mitigate its damages and awarded APL damages in the amount of $184,910.00 (substantially less than the $472,072.18 in damages APL had originally sought). However, the Second Circuit vacated the portion of the judgment that reduced the amount of damages awarded to APL for failure to mitigate its loss and remanded the action to this Court for a reassessment of the reasonableness of APL's mitigation efforts.

Issues: Were APL's mitigation efforts reasonable? If so, what was the proper amount of damages APL was entitled to?

Opinion: After learning definitively from Blue Water that the consignee would not be picking up the garlic, APL contacted various parties within Customs and the FDA several times in order to facilitate the garlic's disposition. While confusion within APL regarding the quick sale procedures resulted in a delay in APL contacting Customs, the Court concluded that this delay was within the range of reason. The Court added that many of the delays that APL experienced in attempting to minimize demurrage charges and effectuate a quick sale of the garlic were caused by third parties. Accordingly, the Court awarded APL damages in the amount of $288,337.18. This amount represented $474,072.18 (the total amount Blue Water was obligated to pay) less $184,910.00 (the amount previously awarded and paid by Blue Water) and $825.00 (salvage proceeds from the three containers that had their contents sold). APL was also awarded pre-judgment interest.

Miscellaneous

25. Nipponkoa Insurance Co., Ltd. and Toshiba International Corporation v. Port Terminal Railroad Association, 2011 U.S. Dist. LEXIS 29892 (S.D. Tex. March 23, 2011)

Background: This is a motion on a permissive intervention action in which Caterpillar sought to intervene in the lawsuit that had been filed by Toshiba and Nipponkoa (plaintiffs) against the Port Terminal Railroad Association (PTRA). Plaintiffs had sued PTRA under Carmack to recover for the damages that were caused when a Toshiba generator that PTRA agreed to carry was run into by a Caterpillar dump truck that was being carried on another PTRA train. Caterpillar asked to intervene to pursue its claims for damage to its dump truck. PTRA argued that the only thing in common was the accident and, as a result of the different bills of lading and liability limitations that were applicable, Caterpillar should not be allowed to intervene.

Issue: Was intervention allowed?

Opinion: After a lengthy discussion of the Carmack Amendment as applicable to railroads, the court found that the existence of different issues with respect to the cargo, bills of lading and liability limitations did not support intervention.

25. In The Matter Of: Missouri Basin Well Service, Inc., USDOT# 261829 Petitioner Federal Motor Carrier Safety Administration Docket No.: FMCSA-2011-0078

Background: Missouri Basin Well Service (MBW) was an interstate carrier transporting water and oil products in North Dakota and surrounding states. In doing so, it used a number of contract carriers. In response to a complaint that MBW was not maintaining safety related records for its independent contractors, the FMCSA conducted a compliance review. During the review, MBW refused to produce any records relating to transportation by the contract carriers, arguing that they and not it were responsible for both the vehicles and drivers that the contract carriers used. The FMCSA found that MBW had not maintained the required information on drivers and equipment for the contract carriers that it subcontracted its services to and assigning it an unsatisfactory safety rating as a result. This is the petition for review and the FMSCA decision on the petition for review of the safety rating.

Issues: Was MBW responsible for the drivers and vehicles of the motor carriers that it contracted with?

Opinion: The FMCSA reviewed numerous factors with respect to whether or not MBW was responsible as a carrier for the drivers operating for the contract carriers it hired. These included direct communications between MBW and the contract drivers, prior approval of contract drives and vehicles, training provided by MBW for the contract drivers, drug and alcohol testing and transportation documents. Ultimately, the review determined that MBW was not responsible for the operations of the contract carriers and the FMCSA upgraded MBW's safety rating.

TRANSPORTATION LOSS PREVENTION & SECURITY ASSOCIATION, INC.

(TLP & SA)

APPLICATION FOR MEMBERSHIP

1. Name of Applicant: ____________ ________________ ________________ _________

Last *First* *Middle Initial*

2. Affiliation:______________________________ ____

(Indicate the company and position, or, if state or federal agency, the position held.)

3. Other Information:

Office Address:____

City: _________________________State or Province: ___________________ Zip Code:__________

Office Telephone: (_______) ________-_______Ext._______ Office Fax: (_______)________-_______

E-mail:__________________________ ____

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

____ Freight Claims ____ Labor/Human Resources ____ Rail

____ Logistics ____ Litigation ____ Insurance

____ Motor Carrier ____ Maritime/Admiralty ____ Aviation

____ DOT/NTSB ____ Other: ____________________________________

(*please specify*)

5. **Please enclose payment with application form.** **2012 Annual Corporate Dues $450.00.** (09/01/11– 8/31/12)

Please send completed application and payment to:

Transportation Loss Prevention
& Security Association, Inc
c/o Nowell Amoroso Klein Bierman, P.A.
155 Polifly Road
Hackensack, NJ 07601
Tel (732) 350-3776 or (201) 343-5001
Fax (201) 343-5181
E-Mail: wbierman@nakblaw.com
Eloughman@tlpsa.org
Website: www.tlpsa.org

MY PASSWORD to enter the Secure Section of the web-site is ___________________________

William D. Bierman, Executive Director

Date: __________________ Signature of Applicant: ____