In Transit

Transportation Loss Prevention & Security Association

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INSIDE

Transportation Loss Prevention and Security Association

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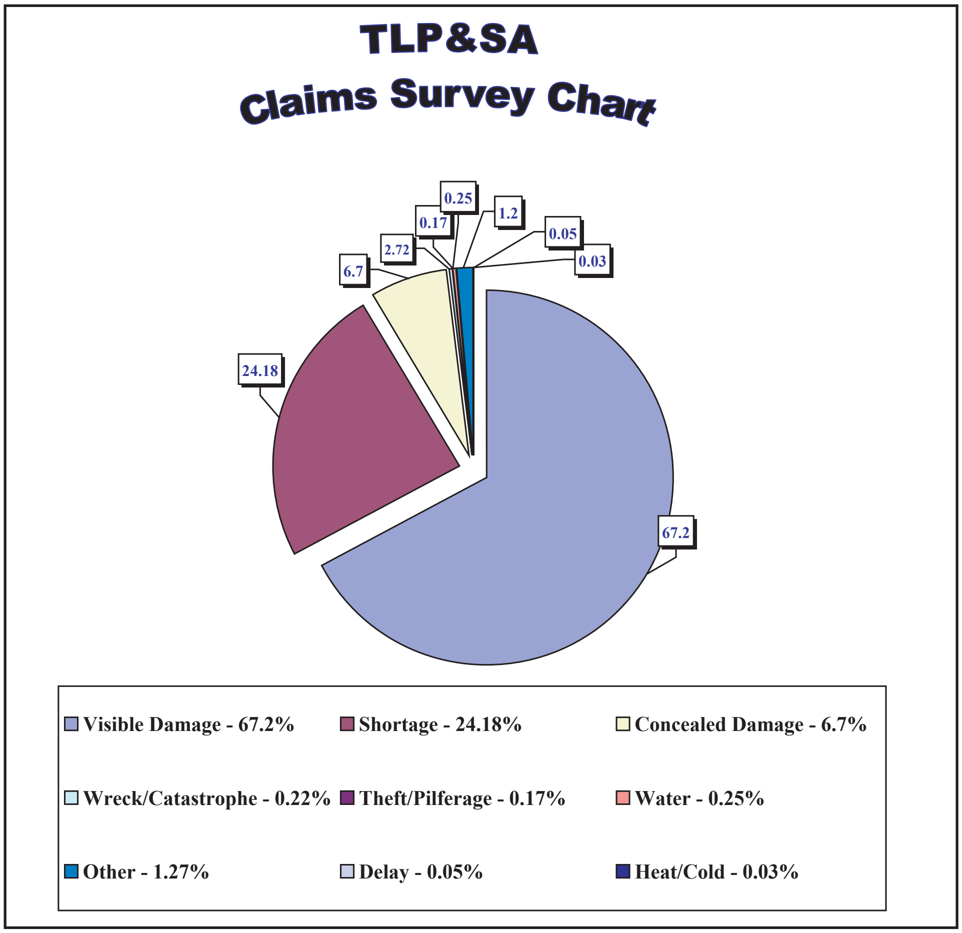
TLP&SA CLAIMS SURVEY



FROM THE EXECUTIVE DIRECTOR...

As our members and friends have observed over the past several years, our IN TRANSIT NEWSLETTER has evolved into a unique periodical which provides in depth discussions of practical information that our readers can use immediately for their individual benefit as well as the financial benefit of their respective companies. While there are many publications available in the transportation community ranging from magazines to question and answer formats to providing lists of current legal cases, our NEWSLETTER has carved out a special niche in response to the requests of our members.

In conjunction with our staff at TLP&SA, we have been able to elicit short but comprehensive articles from both our members as well as experts in the transportation community. These articles are addressed to current problems or issues which affect our daily business lives. Our authors, whether industry professionals, experts, or attorneys, are acutely aware of the needs of our readers and they strive to present issue oriented pieces which assist in solving real world problems that exist today in the loss prevention and security areas.

In a continuing effort to respond to our constituents, we solicit your questions and your suggestions for new articles. We will make every effort to respond to you in a timely fashion. To demonstrate our diversity, the current issue of IN TRANSIT covers such matters as, Alternate Dispute Resolution (ADR), Oral Vs. Written Contracts, Brokers: Potential Pitfalls For The Unwary, and as always, a review of recently decided transportation cases. This issue also contains our Documented Annual Nationwide Cargo Claims survey on trucking in North America.

Both past and present issues of IN TRANSIT appear on our website so that our members can also refer to them in case the hard copy is misplaced. We invite our members to visit our website often as we are constantly updating it and adding useful items such as our EXPERT BANK (www.TLPSA.org).

To those of you in the transportation community who receive our NEWSLETTER but who have not as yet become members, we invite you to become one of us. Your participation strengthens our ranks and allows us to provide additional services. Please fill out the membership application contained in the NEWSLETTER and return it to us as soon as possible. If you are a member and know some one else who should be a member, please let us know and we will forward all the necessary information.

To those of you in the transportation community who would like to submit articles, we solicit your participation. Your experience is priceless and it will go a long way to assist others. It seems to us that what goes around comes around. The person you help today may very well be the person who helps you tomorrow. It is in this spirit of unity and cooperation that we are looking forward to our 5th Annual Joint Conference with TCPC. This yearly gathering of Carriers, Shippers and industry professionals is unique to our industry and provides unparalleled opportunities for education, networking while having a wonderful time in sunny San Diego.

From my Assistant Director, Ed Loughman, and myself as well as from our entire Board of Directors, we thank you all for your participation in TLP&SA during this past year and we look forward to working with you in the year ahead in our ongoing effort to assist you in achieving success.

William D. Bierman, Esq.
Executive Director

ALTERNATE DISPUTE RESOLUTION
A WASTE OF TIME AND ENERGY

BY *William D. Bierman, Esq-Nowell Amoroso Klein & Bierman, P.A.*

Mediation and arbitration, anything but going to court has become a mantra for legal scholars, lawyers and clients. Even courts are mandating arbitration and mediation for cases that are being prepared for trial.

Mediation and arbitration, anything but going to court has become a mantra for legal scholars, lawyers and clients.

Is this form of alternate dispute resolution (ADR) really the panacea it is cracked up to be or is this just another case of the "Emperor's new clothes".

Many of us remember the old story of the two tailors who convinced the gullible Emperor to pay them an exorbitant amount of money for unique new clothes that could only be seen by someone of high intelligence and discriminating good taste. The Emperor agrees, pays the money, and wears the "new clothes" for a holiday parade. All the subjects who had heard the story of these special clothes not wanting to appear stupid or of poor taste, cheered the Emperor and commented approvingly on the Emperor's sartorial splendor. But one little boy who had not heard the story yelled out that the Emperor was naked and the little boy started to laugh. Of course then, all the subjects as well as the Emperor himself realized that they had been duped. The subjects all began to laugh and the Emperor was embarrassed and furious. The two tailors, on the other hand, were long gone.

The drumbeat of ADR has been getting louder for the past ten years. By now most of us, lawyers and clients alike, have participated

PROBLEMS WITH ADR

The drumbeat of ADR has been getting louder for the past ten years.

By now most of us, lawyers and clients alike, have participated in one way or the other in some form of ADR. Unfortunately, the experience has not always been rewarding. For us, there have been complaints that the arbitrators or mediators were not knowledgeable in the transportation field no matter the "experience" listed on their resumes. The arbitrators or mediators had not read or understood the party's submissions nor were these intermediaries aware of the practical ramifications of their recommendations. One of the loudest gripes was that the arbitrator or mediator was not in control of the process so as to guide the parties to a conclusion. In some cases, these third parties made matters worse by suggesting results that both parties had previously rejected without having ascertained the parties' individual positions beforehand.

Additionally, the cost of protracted ADR sessions was certainly not as cost-effective as one would have thought. This list is not exhaustive.

Many of you have your own horror stories.

There have been complaints that the arbitrators or mediators were not knowledgeable in the transportation field

SOLVE YOUR OWN PROBLEMS

The question then becomes is ADR a waste of time and energy. Should we just scrap the process and move on, or accept our fate in court? Have we been sold a bill of goods like the gullible Emperor? Well as they say, and not as a double entente, the jury is still out on this issue.

It is our feeling that the process can still be productive, but that we as parties must become proactive and more carefully define exactly how the ADR process should be conducted. If the parties are going to subject themselves by contract to ADR, that contract should spell out in detail all aspects of ADR. If the parties agree to ADR before or during litigation, that agreement should be drafted so as to anticipate any potential problems with ADR. Do not take the risk of binding yourself or your client to a general ADR procedure that is not specific to your needs and pocketbook. In other words, for an acceptable result, one must put in as much time and effort crafting your own ADR procedure before a problem arises, as one will put in during the ADR meetings.

Having heard all the complaints, and having experienced many of them myself, I suggest that at least the following issues be considered before agreeing to ADR.

DRAFT YOUR OWN RULES

Having heard all the complaints, and having experienced many of them myself, I suggest that at least the following issues be considered before agreeing to ADR. Of course, court ordered ADR pursuant to court rules may not allow this latitude. Nevertheless, these items should be addressed whenever possible:

1. Draft your own ADR rules. Don't just add an organization such as the American Arbitration Association in a one sentence inclusion in your contract without understanding all their rules. AAA for example is more expensive then you might think. They

a one sentence inclusion in your contract without understanding all their rules. AAA for example is more expensive then you might think. They charge by the amount of the claim.The cost of the arbitrator is extra. All administrative expenses are extra. You may be stuck with a finite group of arbitrators to choose from and after both sides strike certain people, the ones that are left may be unacceptable, but you can do nothing about it.

You should be flexible when drafting your own arbitration or mediation agreement and continuously update it based on any new problems that you may encounter.

2. Issues your own rules should address.
   a) Agreement on who should be arbitrator or mediator or at least define qualifications i.e. transportation attorney with minimum 5 years experience who is a member of recognized transportation organization and presently active in transportation matters;

   b) Where should the arbitration or mediation take place;

   c) What are the costs and fees and which party is responsible for payment;

   d) Parties will agree to submit the exact issue for decision so that intermediary will not decide issues that are not specifically before him/her, and parties will agree to the type and nature of submissions to be made (facts, briefs, etc.) and the time for such submissions;

   e) Parties will agree as to the nature of any hearing (type of representative, witnesses, affidavits, objections etc.);

   f) |Parties and intermediary will agree on time limit for decision;

   g) Parties and intermediary will agree on form of decision either just an amount or to include an explanation of the reasons for the decision;

   h) Parties and intermediary will agree as to whether the decision must comply with the applicable law governing the area;

   i) Parties will agree as to whether decision is final or if there will be an appellate process and, if so, what that will be.

CONCLUSION

You should be flexible when drafting your own arbitration or mediation agreement and continuously update it based on any new problems that you may encounter. If you have anticipated the issues set forth above, you can avoid some obvious problems. Having avoided these problems, we believe that the concept of mediation and arbitration can be very helpful to focus the parties on resolution before a final irreparable and maybe unexpected decision by a court or jury. If the parties keep talking and negotiating, there is a greater possibility for a negotiated settlement within the range of both parties expectations. No, ADR is not a waste of time and energy if it produces a mutually agreeable end to hostilities at a reasonable price. Just make sure that you can take your "new clothes" to the cleaners. Otherwise, it may be you or your company that is taken to the cleaners!

2005 SPECIAL BOARD OF DIRECTORS' AWARD

The Officers and the Board of Directors of TLP&SA has authorized a 2005 SPECIAL BOARD OF DIRECTORS' AWARD to be given to an outstanding member of our organization who has demonstrated leadership and devotion to our organization. This year's recipient is that type of unique individual who can be counted on in any situation. His quiet demeanor belies a "can do" attitude. As military men used to say, "He is the guy you would want in the fox hole with you."

TLP&SA presents this award for exemplary professionalism, achievement and contribution to the Association and its membership. This recipient's willingness to take on any challenge for TLP&SA even in the face of his heavy work schedule singles him out as a person to be admired. Over all the years and through all of the turmoil of our organization, this year's recipient has held firm and in his quiet down home way he has anchored our group. However, one should never underestimate the determination and attention to detail shown by our recipient. He sticks to his principles and his moral values come from a higher authority.

THE WEIRD POWER OF THE SPOKEN WORD:
ORAL CONTRACTS CAN MODIFY BILLS OF LADING

BY *Gordon D. McAuley , Esq.-Hanson, Bridgett, Vlahos & Rudy, LLP*

"There is a weird power in the spoken word…And a word carries far--very far--deals destruction through time as the bullets go flying through space." Joseph Conrad [1898]

It is getting very odd out in the mean judicial streets of transportation law. The homeboy lawyers are scratching their care-worn, balding pates over recent court decisions regarding the use of contracts to avoid the constringent federal law known as the Carmack Amendment. Most readers know that the Carmack Amendment, affectionately known to transportation attorneys as 49 U.S.C. section 14706, makes an interstate motor carrier almost strictly liable for any damage to goods that happens while they are in the possession of the motor carrier. The federal law allows the motor carrier and shipper to agree to limit the motor carrier's liability for cargo loss or damage, through the use of written agreements; most often by bills of lading. The shipper gets a lower shipping rate by agreeing to limit the motor carrier's liability if the cargo is lost or damaged. The federal law applicable to interstate motor carriage was significantly changed in the middle of the last decade through the Interstate Commerce Commission Termination Act of 1995, also endearingly termed "ICCTA" by transportation counsel who, apparently, are in need of more enriching hobbies. Court decisions dealing with the changes in the federal law since passage of ICCTA have been all over the map of predictability or even common sense. One recent ICCTA decision from Maryland has the very real potential to destroy transportation law as we know it. If it stands, transportation lawyers, and their shipper clients, may not have time to develop those new hobbies they richly deserve, because they will be involved in endless litigation.

"Litigious terms, fat contentions, and flowing fees." John Milton, Tractate of Education [1644]

Mastercraft Interiors, Ltd. v. ABF Freight Systems, Inc., 284 F.Supp.2d 284 (D. Md. 2004) is a supremely troubling decision. The defendant was represented by excellent and knowledgeable transportation attorneys, but sometimes being right and skillful are not enough to get the correct decision. The facts are not unusual. Mastercraft had been purchasing furniture from manufacturer Brown and Jordan for many years. Mastercraft paid Brown and Jordan six percent of the cost of each order for motor carrier transportation of the goods from the manufacturer to Mastercraft's customers. Brown and Joseph typically hired ABF to do the transport. When Brown and Joseph raised its percentage transportation charge to ten percent, Mastercraft contacted ABF directly to see if it could get a better deal. Discussions were had between the two companies and ABF began hauling the furniture for Mastercraft from the Brown and Jordan factory. Things went well at the beginning, but eventually Mastercraft began to think it was paying too much for the freight charges.. Specifically, it asserted that it had an oral agreement with ABF's salesperson to ship the goods at a price that was lower than what was actually charged.

It has been said that an oral agreement is not worth the paper it is written on. Federal law typically has embraced that concept. A contract for interstate shipping must be in writing. For garden variety interstate commerce, only a bill of lading is issued by the carrier. It states the agreement of the parties including what is being shipped to where and for how much money. If no limitation of liability is set forth in the bill of lading, or incorporated by reference to other documents, then the carriage is subject to the Carmack Amendment rules.

The new federal law provides the shipper and carrier an opportunity to avoid some of the unwanted provisions of the Carmack Amendment by entering into a contract that specifically opts out of certain provisions, including loss and damage, credit, lien, and other statutory provisions. For all of us in the transportation trenches it has been assumed without question that such a contract must be in writing. 49 U.S.C. 14101 (b) states that a carrier may enter into a contract with a shipper to provide specified services under specified rates and conditions. The statute also allows the shipper and carrier in writing to waive any of the Carmack Amendment provisions otherwise applicable to interstate motor carrier, except for registration, insurance and safety provisions.

Mastercraft and ABF did not have a written contract for specified services under specified rates and conditions. Instead ABF issued a bill of lading for each shipment, and billed Mastercraft in accordance with the rates published in the National Motor Freight Classification, as referenced in its bills of lading. Mastercraft's claim of an oral contract for lower rates should have been defeated faster than a welfare bill in the current Congress. But wait!!! There's more. Mastercraft's lawyer, reading section 14101(b) carefully, noted that the statute only states that a written contract is necessary to waive provisions of the Carmack Amendment. A "contract" is needed to establish specified rates and conditions. The statute does not expressly state that a "written" contract is required. And wouldn't you know this court bought the argument! These arguments usually go along the line of: " If Congress intended that a written contract be required, it would have said so." ABF replied: "Congress did say so!"

The court held that the parties may enter into an oral contract for interstate transportation of goods! It did not discuss the function of bills of lading in the relationship, or how the alleged oral contract regarding price trumped the written price provisions in the bill of lading.

Finally, the Court pooh poohed (arcane Latin phrase used by lawyers to confuse the public) ABF's argument that the federal statute that requires shippers who object to freight charges of interstate carriers to do so within 180 days, (49 U.S.C. section 13710) is not applicable to the dispute. That statute allows shippers to complain to the Surface Transportation Board about

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TRANSPORTATION CASE SUMMARIES

(SPRING 2005)

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

1. *Rational Software Corporation v. Sterling Corporation,* 393 F.3d 276 (1st Cir. 2005). **(Intrastate released rate upheld; course of dealings binds shipper)** This case is significant because it involved the enforcement of a released rate limitation on an intrastate bill of lading and reaffirmed the principle that a shipper is bound by its course of dealing with the carrier. The shipper, Rational, had used the defendant motor carrier, Sterling, to transport over 200 shipments locally in Massachusetts prior to the shipment in question. Each bill of lading included language in bold print that read: "Unless a different value is declared, the shipper hereby releases the property to a value of $.60 per pound per article." On the fateful shipment in question, a piece of computer equipment being moved from one plant to another, Sterling did not issue a bill of lading to Rational at origin. Sterling's did not present a bill of lading to Rational until after the computer was dropped and destroyed at destination, whereupon Rational signed the bill of lading, noting damage, but still neglected to insert a declared value. The trial court had ruled the shipper was bound by the limitation on the bill of lading on the grounds that it was aware of and accepted the limitation through its prior course of dealings with the carrier and because it accepted the limitation when it signed the bill of lading at destination without declaring a higher value. The Appeals Court affirmed the decision of the trial court, ruling that a prior course of dealing between the parties is "admissible to show the practice of the parties of limiting liability" in a transaction for the shipment of goods.

2. *Continental Insurance Company v. Saia Motor Freight Line, Inc.,* Civil Action No. H-03-4350, U.S. District Court, Southern District of Texas (2005). **(Limitation of liability; waiver of Carmack Amendment remedies; prima facie case)** Plaintiff's subrogor, Franklin Electric, shipped 24 crates of electric motors from Oklahoma to Mexico via the defendant motor carrier, Saia. After the shipment was transferred to a Mexican carrier for delivery in Mexico, the truck was involved in an accident, destroying the shipment. Plaintiff sought to recover $86,000 in damages, but Saia refused to pay, citing a tariff item that provided it would have no liability for any loss or damage to cargo during the Mexican portion of any transportation. On cross motions for summary judgment, the Court first rejected Continental's argument that the waiver provisions of 49 U.S.C. §14101(b)(1) applied only to private contracts between a shipper and a carrier and not to bills of lading. The Court ruled that bills of lading may be contracts of carriage and that the parties to a bill of lading could expressly waive Carmack Amendment remedies (full liability) through a bill of lading and the adopted tariff provisions. However, the Court went on to rule that since neither the bill of lading nor the defendant's tariff contained any waiver language and neither referred to the waiver provisions of §14101(b)(1), under the bill of lading, the shipper had not expressly waived application of the Carmack Amendment. The Court also denied the plaintiff's motion for summary judgment on liability, ruling that the plaintiff's proof did not establish that the crates were open to inspection and visible, and therefore questions of fact remained as to whether the shipment was in good condition at origin.

3. *AIG Uruguay Compania De Seguros, S.A. v. Landair Transport, et al,* 2005 Fla. App. LEXIS 975 (2005). (**Limitations in airfreight waybill extended to contracting carrier)** Another lost cell phone shipment. Here, the plaintiff had purchased $130,000 worth of cell phones and contracted with a freight forwarder to arrange for the transportation of the shipment from Illinois to Miami and thence to Uruguay. The freight forwarder contracted with an international freight forwarder ("MIF"), who, in turn, contracted with USA Cargo to transport the shipment to Miami. USA Cargo issued a bill of lading limiting its liability to $100 in the absence of a declared higher value. No declared value was specified on USA Cargo's bill of lading. USA Cargo then contracted with Forward Air, a property broker, to transport the shipment to Miami, and Forward Air issued its airfreight waybill providing that its liability would be limited to $.50 per pound, subject to a $50 minimum. Again, no value was declared for the shipment on the Forward Air waybill. Forward Air then subcontracted the shipment to Landair under a long-established relationship between Forward Air and Landair, which provided that Landair's liability would be limited to the same amounts as in Forward Air's waybill, $.50 per pound. After the shipment was lost, USA Cargo sent Forward Air a claim in response to which Forward Air sent USA Cargo a check for $1,625 pursuant to the liability limitations in Forward Air's airfreight waybill. In this subrogation action, the shipper's insurance company sought to collect from Landair $139,230, which it had paid the shipper. The Court of Appeal of Florida agreed with the plaintiff's contention that it had standing to sue Landair for the loss of the shipment but ruled that the liability limitation in Landair's bill of lading was enforceable and that the plaintiff could not recover the full value of the shipment after accepting the benefit of the lower transportation rate. The Court rejected the plaintiff's argument that the only bill of lading that can be considered is the original USA Cargo bill of lading and went on to hold that the Forward Air airfreight waybill was a valid bill of lading setting the terms of the connecting carrier's liability. The Court also ruled that the transportation agreement between Landair and Forward Air, establishing that Forward Air's bills of lading could be incorporated into Landair's agreement to transport goods, was also valid. Since Landair's liability ran to Forward Air, the party with whom it contracted, Landair was released from its liability by the USA Cargo-Forward Air release. "The liability under the airfreight waybill has been satisfied by Forward Air's payment to USA Cargo. There can be no further recovery by [plaintiff] against Landair."

4. *Mastercraft Interiors LTD v. ABF Freight Systems, Inc.,* 350 F. Supp 2d, 686 (D. Md. 2004). **(Oral rate agreement upheld; 180-day notice requirement ignored)** This is a bad decision for carriers seeking to collect tariff charges. The plaintiff, Mastercraft, sued the defendant motor carrier, ABF, to recover alleged overcharges on certain shipments from a California shipper, Brown Jordan ($180,000), consigned to the plaintiff. ABF counterclaimed seeking $98,000 in tariff charges and penalties against Mastercraft for unpaid freight bills on shipments from Brown Jordan and from other shippers to the plaintiff. Mastercraft contended that ABF had orally agreed to a certain (low) level of freight charges and claimed that it was due the claimed refund when it realized that the rates ABF had been charging were higher than the rates it believed ABF had orally agreed to. ABF sought summary judgment on the grounds that no oral contract, as alleged by Mastercraft, was enforceable under 49 U.S.C. §14101(b)(1) and because Mastercraft had not informed ABF within 180 days of its disagreement with ABF's charges, as required by 49 U.S.C. §13710(a)(3)(B). The Court rejected ABF's arguments and denied its motion for summary judgment, ruling that 49 U.S.C. §14101(b)(1) did not require that the alleged agreed upon freight rate be in writing. The Court ruled that only the express waiver of any rights and remedies (under Title 49) needed to be in writing. The Court held that contracts between carriers and shippers under §14101(b)(1) are governed by state law, and hence, oral agreements could be enforced, because the word "written" (in §14101(b)(1)) was not included in the provision authorizing a carrier's right to contract. The Court applied Maryland law and ruled that the service ABF was providing was not covered by the statute of frauds (requiring a writing), that the plaintiff could assert the terms of the alleged oral contract, and that those issues would have to be determined at trial. The Court rejected ABF's claim that 49 U.S.C. §13710(a)(3)(B), which requires shippers to contest the original bill or subsequent bill within 180 days of receipt in order to have the right to contest such charges, was inapplicable because the "180 day regulatory requirement cannot be imposed upon actions to enforce a contract under Maryland law." As to ABF's counterclaim for $98,000 in tariff charges and penalties, the Court denied that motion for summary judgment, ruling that there were genuine issues of material fact concerning the contract for the shipments originating at Brown Jordan, and that under Maryland principles of equity, Mastercraft had a common law right of set off concerning ABF's counterclaim on shipments from other points of origin. Due to the factual disputes and the application of Maryland law, the Court denied ABF's motions for summary judgment.

5. *The Lifelike Company, d/b/a My Twinn v. United Parcel Service, Inc.,* 2003 U.S. Dist. LEXIS 26232 (D. Colo. 2003). **(Overcharge claims and declaratory relief claims preempted by Carmack)** In this decision, the plaintiff, Lifelike Company, sued the defendant, UPS, for $178,000 in alleged overcharges claiming that it should have been given discounts under an incentive agreement that it had negotiated with UPS. Plaintiff sued UPS for breach of contract, promissory estoppel, misrepresentation and tortious interference with a contract and was seeking declaratory relief. UPS filed a motion to dismiss, claiming that all the plaintiff's common law and declaratory judgment claims were preempted by the Carmack Amendment. The plaintiff sought to avoid dismissal by arguing that its claims were not preempted because they did not arise from any "actual loss or injury" to the property transported by UPS. The Court rejected the plaintiff's argument and ruled that the Carmack Amendment's sweeping preemptive power preempted virtually all state and common law claims having to do with the transportation of goods, "including claims arising during formation of the contract and after shipment has occurred." The Court dismissed, with prejudice, all the plaintiff's state and common law claims.

6. *The Travelers Indemnity Company of Illinois a/s/o Quality Carton, Inc. v. Schneider Specialized Carriers, Inc.,* 2005 U.S. Dist. LEXIS 2029 (S.D.N.Y. 2005). **(Carmack preemption applies to "contract" carriage; consignee bound by B/L)** The plaintiff insurance company insured the consignee of a shipment consisting of a printing press that was destroyed in transit from California to New York. Plaintiff sought to recover $154,000 in damages it paid its insured. Plaintiff's insured had contracted with defendant Schneider for the transportation, and Schneider, in turn, arranged for defendant North American Van Lines to transport the printing press pursuant to a Master Transportation Contract between Schneider and North American. North American moved to dismiss the plaintiff's state law claims on grounds of Carmack Amendment preemption. The plaintiff argued the motion should be denied, arguing that (i) that the Carmack Amendment did not apply to North American as a contract carrier; (ii) North American had waived the protections of the Carmack Amendment as a result of the Master Transportation Contract; and (iii) the Carmack Amendment applied only to shippers and not to plaintiff's insured, the consignee. In rejecting those arguments and granting North American's motion to dismiss all the plaintiff's state and common law claims, the Court ruled that when Congress amended the Carmack Amendment in 1996 by expressly deleting the term "common" [carrier] from the previously enacted version of the Carmack Amendment, it effectively broadened the scope of the Carmack Amendment to apply to all carriers, both "common" and "contract." Next, the Court rejected the plaintiff's waiver argument (based on North American's participation in the Master Transportation Contract with Schneider), ruling that "absent an express agreement waiving the

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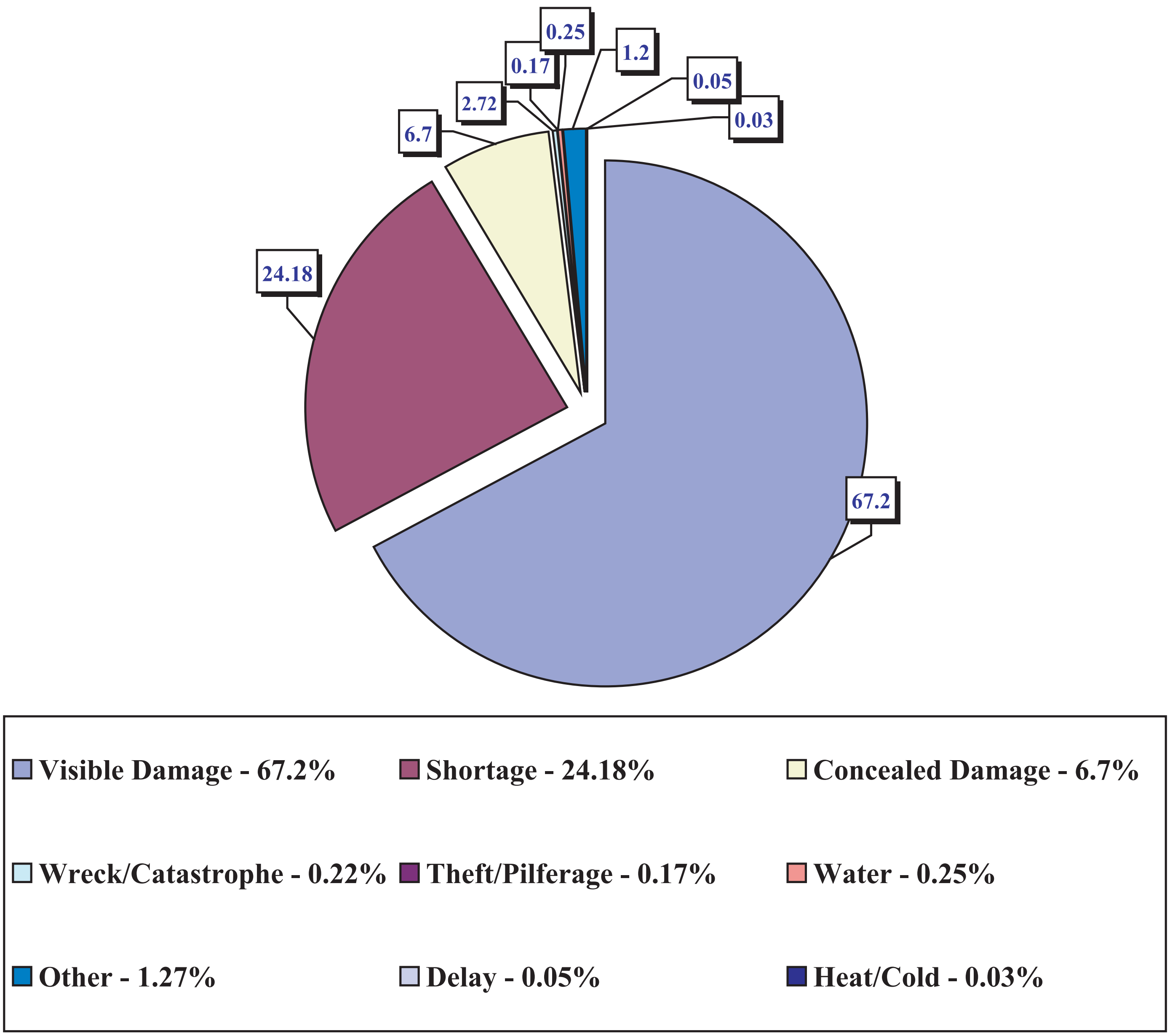
TLP&SA
Claims Survey Chart



MOTOR CARRIER CLAIMS SURVEY

One of the many benefits of being a member of TLP&SA is the ability to network with your peers and compare how your company is doing as compared to the rest of the transportation industry when it comes to claims and claim prevention.

The TLP&SA has gathered claims data from its member carriers, which includes most of the major LTL carriers in the industry. We consider these figures and percentages to be representative of the LTL carrier industry and to be more accurate than figures provided from any other source to date. Carriers can use these figures to compare with their own performance against the performance of the LTL industry as a whole.

The figures and percentages will show each carrier how they compare with the rest of the industry in each claims category and will indicate to each carrier which segment of their business needs the most attention.

The TLP&SA is also available to assist its member carriers in these endeavors along with cargo claim and security problems. Contact us through our website at www.tlpsa.org or by phone at 201-343-1652 (T, W, Th 10am-2pm).

CLAIM CATEGORY	TOTAL GROSS % OF $ PAID	% OF CLAIMS PAID VS FILED
	2004	2004
Shortage	26.69%	24.18%
Theft/ Pilferage	.97%	.17%
Visible Damage	64.10%	67.20%
Concealed Damage	4.30%	6.70%
Wreck/ Catastrophe	2.00%	.22%
Delay	.12%	.05%
Water	.60%	.25%
Heat/ Cold	.21%	.03%
Other	1.01%	1.20

	2004
Total number of Claims Paid vs. Number of Claims Filed	75.40%
Total Dollars Paid vs. Total Dollars Filed	39.50%
Net Claim Dollars Paid vs. Total Dollars Filed	34.90%
Percent of Claims Filed to Total Number of Shipments Made	.61%
Total Company Claim Ratio	.80%

	2004
Percentage of Claims Resolved Less than 30 days	80.40%
Percentage of Claims Resolved 31-120 days	16.20%
Percentage of Claims Resolved more than 120 days	3.40%

INDEMNIFICATION PROVISIONS IN BROKERAGE CONTRACTS;
POTENTIAL PITFALLS FOR THE UNWARY

BY *Robert E. Spears, Jr.* Esq.-Thomerson, Spears & Robl, LLC*

Indemnification clauses in broker contracts seem to be fairly straight-forward propositions: The carrier agrees to pay the broker for loss of or damage to cargo so that the broker is not stuck paying the claim out of its own pocket. This seemingly straight-forward proposition can pose a trap for the unwary because a broker may not be eligible for

The often muddled relationships between shippers, brokers and motor carriers, which may not be governed by a written contract due to ignorance or inattention, create a host of legal and factual issues regarding the duty to indemnify.

indemnification.

State laws governing enforcement of indemnification clauses often require that the indemnitee - the person seeking payment - have liability for the loss. Absent a contract or certain limited factual situations, a broker has no liability for the loss of cargo in the possession of a carrier.

The often muddled relationships between shippers, brokers and motor carriers, which may not be governed by a written contract due to ignorance or inattention, create a host of legal and factual issues regarding the duty to indemnify. Motor carriers must therefore investigate the terms and conditions of all relationships between parties in a transaction to determine if a broker has made a voluntary payment which bars the broker's right to indemnity. Similarly, brokers must take steps to protect their rights every time they pay a claim.

An Overview

Brokers almost always include indemnification clauses in their contracts with motor carriers to clarify the assignment of risk for liability for loss of or damage to cargo. Brokers use the broadest clauses possible which state that the motor carrier will "indemnify" the broker and hold the broker "harmless" from "any" damages "arising from" the transportation of the cargo performed under the terms of the contract.[1]” The broker's obvious goals are twofold: (1) to recover payment from the motor carrier, and thereby avoid paying a claim out of its own funds; and [2]" to speed the resolution of claims, and thus keep its customer happy.

Transactions often involve several parties. For example, a large shipper uses a third-party logistics providers ("3PL") to run a distribution facility and the 3PL has an in-house broker that arranges the transportation into and out of the facility. This in-house broker may have relationships with other independent brokers who are tasked with finding motor carriers to service certain lanes of traffic. These brokers then offer the load to carriers subject to the terms of a "confirmation sheet."

While brokers almost always have a contract with the motor carrier, the other relationships in a transaction may not be defined by a written contract that contains an indemnity clause. When a broker has no contractual obligation to pay the company asserting a claim, the motor carrier's obligation to indemnify the broker become tenuous.

What Does "Indemnity" Really Involve?

“Indemnify" is broadly defined as meaning "[t]o make good; to compensate; to make reimbursement to one of a loss already incurred by him.” Courts and commentators have elaborated on this definition:

"An obligation to indemnify may arise from a contractual relation, from an implied contractual relation, or out of liability imposed by law. When one person is obligated to pay money which another person in all fairness should pay, then . . . [he] may recover indemnity, . . . provided [that he] . . . has not conducted himself in a wrongful manner. .[3]."

“Indemnify" is broadly defined as meaning "[t]o make good; to compensate; to make reimbursement to one of a loss already incurred by him.”

While this definition seems uncomplicated, indemnification is not quite as simple as it seems. The party seeing indemnity must establish "actual liability [on his part] to recover [payment] against an indemnitor.[4] As another court explained, in the absence of allegations showing a legal necessity for payment . . . to the injured party, we must assume that such payment was made voluntarily and not under the compulsion of law; and such being true, the . . . [indemnitee] had no standing to seek indemnity.[5] Dozens of decisions over the past century specify that a party seeking indemnity cannot recover for a gratuitous, voluntary payment that it made to some other party.[6]

This caveat to the right to indemnity begs the question: What do you have to show to demonstrate "actual liability" or to show "a legal necessity" to make a payment? Does a broker seeking indemnity from a carrier have to fight the cargo owner's claim, suffer the costs of a lawsuit along with the attendant damage to its business relationship?

The answer is no, the broker does not have to "test" the cargo owner's claim by enduring a lawsuit. The broker must instead show that it had no legal defense, such as the expiration of the statute of limitations, workman's compensation preemption, or similar summary judgment type arguments, in order to establish that it was obligated to pay.[7]

Was The Broker Legally Obligated To Pay The Claim?

A broker's best legal defense to a cargo loss and damage claim is that at common law the broker generally has no liability for cargo claims. Brokers are generally held not liable under the Carmack Amendment, 49 U.S.C. § 14706, for loss of or damage to cargo.[8] A property broker's liability for the loss of cargo is instead generally governed by state contract law, state tort law or federal common law.[9]

If a broker has a contract with the cargo owner or its agent that requires the broker to pay for lost or damaged cargo, the broker is entitled to some measure of indemnity from the carrier. The only issue in this situation is whether the broker availed itself of any limitation of liability that it might have been able to claim under its contract with the cargo owner.

A broker's best legal defense to a cargo loss and damage claim is that at common law the broker generally has no liability for cargo claims. Brokers are generally held not liable under the Carmack Amendment, 49 U.S.C. § 14706, for loss of or damage to cargo.

If the broker is not obligated by contract to pay, then it is quite possible that the motor carrier has no duty to indemnify the broker for its payment to the owner. For example, under Florida law, a property broker cannot be liable for the loss of a load of cargo if the broker does not have possession of the shipment and the loss of the cargo occurs while it is in the possession of the motor carrier.[10] Other courts have held that a broker cannot be vicariously liable for the carrier's action.[11] Finally, some decisions provide that, absent a contractual provision to the contrary, the broker is not liable if the carrier lacks sufficient insurance coverage.[12] This absence of a duty to pay means that the broker has an absolute legal defense to the property owner's claim and the claim for indemnity is barred.

Practical Considerations

These principles raise important practical considerations for both brokers and carriers. Brokers should be sure that they have a contractual duty to pay the claim "up the line" before parting with their funds. If the broker has no contractual obligation to pay, and refusing to pay could constitute financial suicide, the broker may still preserve its rights (and its business relationship) by taking an assignment of the property owner's claims against the carrier as part of the settlement agreement. The assigned claim may not grant the broker a right to recover commensurate with its indemnification rights under the broker/carrier contract, but it is better than no recovery at all.

For both brokers and carriers, any claim from a broker should prompt a request for the broker's contract with its customer and all other "up stream" contracts. If there is a gap between two parties, meaning no contractual indemnity provision, the claim recipient can take the position that there was a gratuitous, voluntary payment which relieves it from the obligation to indemnify. While the broker claiming indemnity will see this as a "technicality," remember that absent an assignment of the cargo owner's claim to the broker, the broker seeking indemnity does not own the claim. An unwary company that indemnifies an unscrupulous broker, who absconds with the funds, could very well face a suit by the cargo owner regarding the same cargo claim.

For both brokers and carriers, any claim from a broker should prompt a request for the broker's contract with its customer and all other " up stream" contracts.

Finally, remember that the right to indemnity is often only perfected upon payment or judgment, meaning that a broker often must pay the claim or have judgment entered against it before it can recover indemnity.[13] A party receiving an indemnification demand should therefore demand proof of the payment or a judgment before remitting payment. This obligation to pay before seeking indemnity also has obvious ramifications when dealing with a thinly capitalized or bankrupt claimant.

Conclusion

The duty to indemnify involves an analysis of the claimant's liability to the owner of the cargo. Absent a legal obligation to pay for the loss of cargo, a broker or other intermediary's claim for indemnity may be barred.

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[1] See H. Seaton, PROTECTING MOTOR CARRIER INTERESTS IN CONTRACTS, 40-42 (2d. ed. 2003).

[2] BLACKS LAW DICTIONARY, 769 (6th ed. 1990).

[3] 42 C.J.S. Indemnity § 20 (1944), cited in T & S Express, Inc. v. Liberty Mut. Ins. Co., 847 So.2d 270, 272 (Miss. Ct. App. 2003); Williams v. Johnston, 442 P.2d 178, 182 (Idaho 1968).

[4] Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1127 (5th Cir. 1977).

[5] GAF Corp. v. Tolar Constr. Co., 246 Ga. 411, 411-12, 271 S.E.2d 811, 812 (1980) (quoting S. Nitrogen Co. v. Stevens Shipping Co., 114 Ga. App. 581, 586, 151 S.E.2d 916 (1966)).

[6] Decisions addressing this issue include: Reliance Ins. Co. of Ill., Inc. v. Richfield Hospitality Serv., Inc., 92 F. Supp. 2d 1329, 1333 (2000); Fed. Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F. Supp. 2d 1361, 1378 (N.D. Ga. 1999); Osborne v. Super Fresh Food Mkts., Inc., No. 98-3334, 1199 WL 999428, at *1 (E.D. Pa. Oct. 20, 1999); Greenville Shipbuilding Corp. v. Hartford Accident & Indem. Co., 334 F. Supp. 1228, 1237 (N.D. Miss. 1971); Scarborough v. Murrow Transfer Co., 277 F. Supp. 92, 96 (E.D. Tenn. 1967); Jennings v. United States, 251 F. Supp. 730 (D. Md. 1966) (reviewing decades of state and federal case law that bars indemnity for voluntary payments); Carpenter Paper Co. v. Kellogg, 251 P.2d 40, 46-7 (1952); Muhilbauer v. Kruzel, 223 N.E.2d 227, 230 (1966); Aetna Freight Lines v. R. C. Tway Co., 352 S.W.2d 372, 373 (Ky. Ct. App. 1961); Edwards v. Hamill, 138 S.E. 2d 151, 153-4 (N.C. 1964); Pan Am Gas Co. v. Natural Gas Constr. Corp., 418 S.W.2d 380, 381 (Tex. Ct. App. 1967); Oregon -Washington R. & Nav. Co. v. Washington Tire & Rubber Co., 219 P. 9, 10 (Wash. 1923).

[7] Reliance Ins. Co. of Ill., Inc. v. Richfield Hospitality Serv., Inc., 92 F.Supp. 2d 1329, 1338 (2000); Fed. Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F. Supp.2d 1361, 1378 (N.D. Ga. 1999); Osborne v. Super Fresh Food Mkts., Inc., No. 98-3334, 1199 WL 999428, at *1 (E.D. Pa. Oct. 20, 1999); Greenville Shipbuilding Corp. v. Hartford Accident & Indem. Co., 334 F. Supp. 1228, 1237 (N.D. Miss. 1971); Jennings v. United States, 251 F. Supp 730, 732 (D. Md. 1966).

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[8] See Chubb Group of Ins. Co. v. H.A. Transp. Sys., Inc., 243 F. Supp.2d 1064, 1068-9 (C.D. Cal. 2002); Prof'l Communications, Inc. v. Contract Freighters, Inc., 171 F. Supp.2d 546, 551 (D. Md. 2001); but compare, Tallyho Plastics, Inc. v. Big M Constr. Co., 8 S.W.3d 789, 792 (Tx. Ct. App. 1999) (holding that state law claims against a broker were preempted by the Carmack Amendment).

[9] See, e.g., Genesco, Inc. v. ITSI Nationwide, Inc., 2003 U.S. Dist. LEXIS 13830, at *5-7 (S.D. Fla. 2003); Chubb Group of Ins. Co. v. H.A. Transp. Sys., Inc., 243 F. Supp. 2d 1064, 1068-69 (C.D. Cal. 2002); Intercargo Ins. Co. v. Burlington Northern Santa Fe R.R., 185 F. Supp.2d 1103, 1113-15 (C.D. Cal. 2001); Prof'l Communications, Inc. v. Contract Freighters, Inc., 171 F. Supp. 2d 546, 551 (D. Md. 2001); see also, Indep. Mach., Inc. v. Kuehne & Nagle, Inc., 867 F. Supp. 752, 758 (N.D. Ill 1994) (applying state law to a party that was neither a motor carrier nor a freight forwarder); Adelman v. Hub City Los Angeles Terminal, Inc., 856 F. Supp. 1544, 1547-8 (N.D. Ala. 1994) (applying state law to claims against a party that arranged for transportation of cargo). This question will be governed by state law because the right to indemnification - whether by operation of law or under the terms of a contract - arises under state law. Any evaluation of the right to indemnity must therefore start with an examination of the state law that governs the contract. The supposedly "uniform" federal liability regime for loss or damage to cargo will not govern indemnification claims. Some federal courts have noted this incongruity and suggest that federal common law should be applied to preserve uniformity. See Chubb Group of Ins. Co. v. H.A. Transp. Sys., Inc., 243 F. Supp.2d 1064, 1069 n.5 (C.D. Cal. 2002); Commercial Union Ins. Co. v. Forward Air, Inc., 50 F. Supp.2d 255, 259 (S.D.N.Y. 1999).

[10] Genesco, Inc. v. ITSI Nationwide, Inc., 2003 U.S. Dist. LEXIS 13830, at *7-9 (S.D. Fla. 2003) (citing Golden Triad Carriers, Inc. v. Paco American Corp., 553 So. 2d 247, 249 (Fla. 3d DCA 1989)). As the court in Genesco explained: "If a broker does not have possession of the shipment and the loss occurs while the goods are in the possession of the motor carrier, the broker cannot be liable." Id.

[11] Chubb Group of Ins. Co. v. H.A. Transp. Sys., Inc., 243 F. Supp. 2d 1064, 1068-69 (C.D. Cal. 2002).

[12] Id; Golden Triad Carriers, Inc. v. Paco American Corp., 553 So. 2d 247, 249 (Fla. 3d DCA 1989).

[13] Ray & Sons Masonry Contractors v. U.S. Fid. & Guar. Co., 114 S.W.3d 189, 199 (Ark. 2003); Hoffman Constr. Co. v. U.S. Fabrication & Erection, Inc., 32 P.3d 346, 353 (Alaska 2001); Chester Carriers, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg, 767 A.2d 555, 563 (Pa. Super. 2001); Howard & Bowie, P.A. v. Collins, 759 A.2d 707, 712 (Me. 2000); First Indem. of America Ins. Co. v. Kemenash, 744 A.2d 691, 696 (N.J. Super. 2000).

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protections of the Carmack Amendment, [North American] has not opted out of the Carmack Amendment's scope." Finally, the Court rejected the plaintiff's argument that the Carmack Amendment applies only to shippers, citing Supreme Court precedent that "by virtue of the Carmack Amendment, … (a) bill of lading determines the rights of the consignee." The Court concluded that the plaintiff's insured, as consignee, was bound by the Carmack Amendment.

7. Yakubu v. Atlas Van Lines, Inc., *2004 U.S. Dist. LEXIS 27018 (D. Virginia 2004).* **("Binding" versus "nonbinding" estimates; no attorney's fees without invoking dispute resolution procedure**) This case involved a dispute between a household goods shipper and the defendant van line over whether the van line's estimate was binding or nonbinding and whether the plaintiffs were entitled to punitive damages and attorney's fees on an interstate household goods move. Plaintiffs claimed that the defendant had given them a binding estimate for their household goods move from Virginia to Texas, which ultimately involved not one but two trucks. On delivery of the first truckload, defendant demanded and was paid 110% of the estimated charges. The second truckload was held in storage in Virginia, as the dispute between the parties escalated over the scope of the original estimate. In its findings following a bench trial, the Court analyzed "binding" versus "nonbinding" estimates under 49 C.F.R. §375 and found that, due to the ambiguity in the estimate, it was construed in favor of the shippers and deemed to be binding on the carrier. The Court ordered the defendant to repay the plaintiffs $2,815, the difference between the original estimate and the actual cost of transporting the first shipment. However, the Court found that, although the evidence proved that the plaintiffs intended to cancel the second shipment, they provided no receipts or documentation in support of their damage claim, and thus found no damages were due the plaintiffs on the second shipment. On the plaintiffs' claim that they were entitled to attorney's fees under 49 U.S.C. §14708(d), the Court found that the plaintiffs would qualify for attorney's fees only if they had invoked the alternative dispute resolution provisions of that statute. Since the plaintiffs were aware of the availability of the carrier's arbitration program, notwithstanding the defendant's alleged failure to provide such notice, and since the plaintiffs had shown no prejudice and had failed to initiate arbitration, they were disqualified from an award of attorney's fees. Finally, the Court denied the plaintiffs' request for punitive damages.

8.Hath v. Alleghany Color Corp., Docket No. CIV 03-1475-PHX-EHC, February 23, 2005, U.S. Dist. Court, District of Arizona. (**Liability limitation upheld on "U-Pack" household goods move by general freight carrier)** In Hath, the plaintiff arranged with a general freight carrier, ABF Freight System, Inc., to furnish him with an empty trailer at his home in Michigan for a household goods shipment under ABF's U-Pack Moving Program. Under that program, ABF's liability for cargo loss or damage was limited to $0.10 (ten cents) per pound. The plaintiff admitted in discovery that he read the bill of lading and was aware of the $0.10 per pound limitation, but nonetheless elected not to purchase additional "insurance." While the shipment was in route to Arizona, a commercial shipment of ink, loaded into the same trailer with the plaintiff's household goods, stained or damaged the plaintiff's goods. The Court, in granting ABF's motion to limit its liability to $0.10 per pound, found that ABF had satisfied the so-called four-prong test to limit its liability and rejected the plaintiff's argument that ABF should not be permitted to limit its liability because it had not complied with the FMCSA's household goods regulations at 49 C.F.R. §375. Citing the Surface Transportation Board's decision in STB Docket No. 42055 (July 12, 2001), the Court ruled that ABF was not required to comply with the household goods regulations for its U-Pack Moving Service. Finally, the Court rejected the plaintiff's argument that because ABF had not advised him of his arbitration rights under 49 U.S.C. §14708 the liability limitation was invalid.

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overcharging interstate carriers, and to seek a Board determination whether the bill must be paid. This court held that a shipper need not use that avenue of dispute resolution. Reference to 49 U.S.C. 14101(b) confirms that the exclusive remedy for breach of transportation contract is a law suit filed in state or federal court.

Perhaps just as troubling is the court's finding that the dispute would be judged according to state law. Many transportation attorneys advocate reference of interstate carriage disputes to federal common law, rather than state law. But, that is a topic for a later discussion.

Why is your author exercised about this case? Because now every time a motor carrier brings suit for payment of freight charges, the shipper can assert that they had an oral contract that differs from the terms of the bill of lading. So long as the shipper can find someone willing to sign a declaration under oath that he or she spoke to the carrier and got an agreement that the shipping rates set forth in the bill of lading would not actually be charged, the matter cannot be resolved through summary judgment. A trial could be required to resolve the dispute. The expense and uncertainty in otherwise mundane disputes can escalate to unreasonable heights. Attorneys will benefit, but everyone else will be engaged in disputes in state court under state law. And, few people involved in the dispute will have time to develop enriching new hobbies.

Membership Additions

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