In Transit

Transportation Loss Prevention & Security Association

August, 2012

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AN AMERICAN JOURNEY

ON THE ROAD & AT THE CONFERENCE

Look Inside!
See pg#14
for TLP & SA
Cargo Claims Survey

AN AMERICAN JOURNEY

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

With all the tumult surrounding the upcoming election and the deep divisions between the political parties on substantial issues, it is surprising agreement can be found on anything. Even more surprising is to experience agreement from a large group of diverse people in an audience when they rose to their feet with tears in their eyes to recognize one of our own; a truly American truck driver from Mondovi, Wisconsin.

Well that's what happened in Orlando, Florida at the joint conference sponsored by the Transportation Loss Prevention & Security Association and the Transportation & Logistics Council. Alan McCoury, an affable white bearded truck driver for Marten Transportation who is working on his three millionth safety free mile was asked by his company to do a special run to New York. Alan was skeptical as he was happy with his regular route.

Nevertheless, Alan's wife Karen, who happens to be Freight Claims Manager at Marten, encouraged her husband to consider this unique assignment. Marten had volunteered to carry two 9/11 steel beams taken from the rubble of the Twin Towers from New York's JFK Airport to a memorial site on the campus of Southern Mississippi University. With some trepidation, Alan agreed.

Alan was to use his regular tractor, but Marten supplied a special trailer outfitted for this unusual haul. On the morning of the trip Alan picked up the trailer which was completely clad in red, white and blue vinyl showing a waiving American flag, a 9/11 logo; the Southern Mississippi Memorial and the phrase, "INSPIRED BY THE SPIRIT OF THOSE NEVER TO BE FORGOTTEN". Work worn, crusty Alan McCoury was beginning his American Journey.

Alan recalls not long into his trip he heard the sound of a police vehicle behind him. The officer signaled him over. Alan could not remember the last time he was pulled over by the police and he could not think of what he did wrong. The officer approached the Marten truck with a strange look on his face. As Alan rolled down his window to find out what was wrong, the officer timidly asked if he could have his picture taken with the decked out Marten vehicle. Alan agreed of course, and suddenly Alan began to realize this was no ordinary trip.

As Alan crossed the country, he experienced similar reactions; truck stops became an event, weigh stations allowed the Marten truck to go ahead of the line; and children waived from passing cars. When Alan finally arrived at the outskirts of the JFK Airport he realized why he was skeptical about this trip. He was lost and confused with all the airport signs prohibiting trucks and all the turn-offs to different places. Soon Alan was accosted by Airport Security, but when Alan identified himself and told security about his mission, everything changed. The security officers told Alan to wait in the cell phone lot marked "No Trucks". When Alan protested, a security officer told him he was special. Of course, a crowd quickly gathered to see Alan's trailer and pictures were again taken with cameras, cell phones and every other piece of modern equipment which would capture an image for posterity.

Shortly thereafter, several security officers escorted Alan to the hanger where 9/11 steel was sequestered. With the reverence due to their historic meaning, pieces of steel were carefully loaded into Alan's decorative trailer for their final trip to the memorial site.

Marten representatives wanted to take pictures as Alan left New York and they suggested he leave by way of the Verrazano Bridge. Alan knew the Bridge would be crowded that time of day and voiced some concern. Nevertheless, when the Marten vehicle approached the Bridge there were New York police cars holding back traffic and blocking the entrance so Alan could proceed over the bridge alone and so pictures could be taken with the New York City skyline in the background. The police sirens wished Alan a successful trip down south as he crossed the New York border.

When Alan recounted these events he began to get emotional as did the audience. Alan described his reception at the Atlanta baseball stadium where he was scheduled to park at a game. More pictures were taken and good wishes were given. Alan saw fathers point at the trailer and explain to their small children the meaning of 9/11. This was truly an adventure.

At the Mississippi state line Alan was confronted by lines of motorcycles. He confided as a truck driver he is wary of motorcycles and always gives them a wide berth. To his surprise these motorcyclists were present or retired firefighters and police officers who identified with the 9/11 first responders. They were there to escort him through the state to Southern Mississippi University. As Alan proceeded to his destination he recalled not one other truck passed him. They all reverently followed the so called 9/11 trailer. Arriving in Hattiesburg, the site of the Memorial, Alan was moved to see the streets lined with families and children with American flags. Again, parents were instructing their children about the events of 9/11.

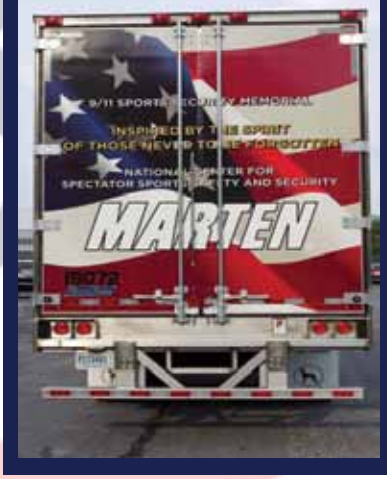
When Alan dropped off his precious cargo, he realized what a unique and wonderful journey he had. Memories of 9/11 flooded into his mind. Thoughts of how everyday Americans reacted to seeing him on his quest were powerful. In a low voice Alan told the audience aside from the birth of his children, this American Journey was the most important thing he had done in his life. The audience with tears in their eyes agreed as they rose in unison to give Alan the standing ovation he truly deserved.

Alan McCoury is flanked by his wife Karen and Bill Bierman

AN AMERICAN JOURNEY

Alan McCoury - All American driver from Marten Transportation.

Many photos were taken of An American Journey



Marten's special trailer showing the phrase:

"INSPIRED BY THE SPIRIT OF THOSE NEVER TO BE FORGOTTEN"

Confusing airport signs at JFK.

Crossing the Verrazano-Narrows Bridge with a police escort

Special parking for Alan's truck - in a NO TRUCKS lot at JFK

9/11 steel beams being carefully loaded at JFK.

Prescious cargo arrives at Southern Mississippi University

Recent Court Cases

as analyzed by the Conference of Freight Counsel

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

A. Career Liability

1. Ace USA and Ace European Group Limited v. Union Pacific Railroad Company, Inc., 2011 U.S. Dist. LEXIS 90254 (D. Kan. 2011) and 2011 U.S. Dist. LEXIS 141228 (D.Kan. 2011)

Background: Ace USA and Ace European brought suit as subrogees against Union Pacific under the Carmack Amendment (49 U.S.C. § 11706) for water damage to soda ash. The damage occurred while Union Pacific was transporting the ash under a bill of lading from Solvay Chemicals Co. that provided the terms and conditions for the shipment. The bill of lading referenced an agreement between Union Pacific and the American National Soda Ash Corporation, known as UP-C-35322. While the parties agreed that UP-C-35322 governed their relationship, they disputed what terms and conditions were otherwise incorporated by reference. The Plaintiffs and Union Pacific filed motions for summary judgment. While Plaintiffs' argued that Union Pacific's liability was governed by Carmack, Union Pacific argued that its liability was governed by a Section 10709 contract and not Carmack.

Issue: The threshold question was whether Carmack or the bill of lading, UP-C-35322 and the terms and conditions incorporated in it provided the standard for Union Pacific's liability.

Opinion: To support their argument that Carmack governed the parties' relationship, Plaintiffs relied upon a section of UP-C-35322 that required all claims to be processed in accordance with Carmack and its implementing regulations. As such, Plaintiffs argued that the contract expressly incorporated Carmack's liability provisions.

The Court disagreed for two reasons. First, the title of UP-C-35322 was "Rail Transportation Contract Pursuant to 49 U.S.C. Section 10709." Second, the plain language of the liability and claims provisions was expressly limited to how claims should be processed and did not indicate any intent to incorporate Carmack's liability provisions. Based upon this plain language of UP-C-35322, the Court determined that the bill of lading and UP-C-35322 constituted a Section 10709 contract. As such, it was not necessary for the Court to determine whether or not the bill of lading incorporated the contested provisions. As Plaintiffs' only claim was for violation of Carmack, Union Pacific was entitled to summary judgment. The Court overruled Plaintiffs' motion to the extent it sought summary judgment on Union Pacific's Section 10709 defense, and overruled the Plaintiffs' motion on Union Pacific's other defenses as moot.

Note: Plaintiffs subsequently filed a motion to alter or amend judgment and for leave to amend their theory of recovery (2011 U.S. Dist. LEXIS 141228). Plaintiffs argued their Carmack claim, which they pled, and the contract claim, which they did not plead, were essentially the same claim. As such, they asked the Court to act as though they had properly pled a breach of contract claim. The Court refused, ruling that because Plaintiffs clearly made a strategic litigation decision to bring only a Carmack claim, they were not entitled to renege on that decision after the Court granted Union Pacific summary judgment on that claim. The Court also refused to reconsider its interpretation of the bill of lading and UP-C-35322, as Plaintiffs' arguments were nothing more than a rehash of the old arguments the Court previously rejected. Finally, the Plaintiffs' request to amend their complaint was denied, as the Court was unwilling to vacate its judgment. Overall, the Court considered Plaintiff's new arguments as an attempt to blur the line between their Carmack claim and a breach of contract claim, ruling that "permitting them to do so would be anathema to the statutory framework that expressly permits parties to avoid the liability provisions of the Carmack Amendment by private

2. Federal Insurance Company v. Union Pacific Railroad Company, 651 F.3d 1175; 2011 U.S. App. LEXIS 14267 (9th Cir. July 13, 2011)

Background: This is another maritime case about a train wreck. Federal Insurance Company (FIC) sued for damage to property destroyed during the inland leg of international intermodal carriage. Text International Pte. Ltd. (Text) contracted with an ocean carrier, APL Co. Pte. Ltd. (APL) to ship goods from Singapore to Alabama. APL subcontracted with Union Pacific Railroad Co. (UP) for rail carriage inland from San Pedro, California. UP's train derailed, destroying Text's goods. The shipment moved under a through bill of lading that contained a clause paramount that provided that COGSA would apply while the goods were on the vessel and the Hague Rules would apply after discharge from the vessel. The bill of lading also included a covenant not to sue APL's subcontractors. FIC had insured the goods and paid Text for the loss. FIC sued UP. The district court ruled that a covenant not to sue in the through bill of lading required FIC to sue the carrier, APL, rather than UP, a subcontractor.

Issues: Was the shipment governed by the Harter Act? Was the covenant not to sue the subcontractor enforceable?

Opinion: The plaintiff had relied extensively on the 9th Circuit's decision in Regal-Beloit, which was reversed by the Supreme Court while this case was pending. Although Plaintiff did not make a Harter Act claim in its filings, the Court considered the applicability of the Harter Act. The court found that the bill of lading provided that the Hague Rules, which are "virtually identical" to COGSA for purposes of this case, applied as the parties could contract to effectively extend COGSA to cover the damage and displace the Harter Act. It then analyzed the covenant not to sue under the

Continued on page 06

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Hague Rules and COGSA and found that the covenant not to sue was allowable as it did not reduce the carrier's obligations, it only affected the mechanisms of enforcing a shipper's rights.

For a recent district court case reaching the same conclusion, see Nipponkoa Insurance Company, Ltd. v. Norfolk Southern Railway Company, 2011 U.S. Dist. LEXIS 71483 (S.D. Ohio July 5, 2011)

3. Orient Overseas Container Line Ltd. v. Crystal Cove Seafood Corp., 2011 U.S. Dist. LEXIS 109387 (S.D.N.Y. Sept. 26, 2011)

Background: Plaintiff Orient Overseas Container Line Ltd. (Orient) contracted with Defendant Crystal Cove Seafood Corp. ("Crystal") to transport frozen tilapia from Shekou, China to Smyrna, Tennessee. The refrigeration unit that the tilapia was transported in malfunctioned. When the shipment was attempted to be delivered, it was refused as the odor from the stinking fish might contaminate the warehouse. Orient filed a claim that Crystal has breached the terms of a bill of lading contract by refusing to take delivery of the cargo, and sought $49,364.20 in demurrage, transportation, and surveying expenses that Orient incurred as a result of Crystal's alleged misconduct. In a counterclaim, Crystal contended that, as a result of Orient's alleged breach of its duties under COGSA, it was damaged in the amount of $67,490.00. This decision was the proceeding on Crystal's MSJ on its counterclaim and to dismiss Orient's claims.

Issues: What are an ocean carrier's obligations under COGSA? Was the ocean carrier entitled to demurrage and its other expenses?

Opinion: The parties agreed that the damage counterclaim was governed by COGSA and the court found that Crystal had made out a prima facie case under COGSA. Once that occurred, the burden shifted to the carrier who may prove that "it exercised due diligence to avoid and prevent the harm." The court found that the issue of due diligence is always a factual one. The case turned on whether or not such diligence had been exercised, including a discussion of the age of the container (one year), a pretrip inspection of the container and no required maintenance for the relay board that malfunctioned. Based on these factors, the court declined to rule as a matter of law that Orient did not exercise due diligence. Crystals' MSJ on Orient's claims for demurrage and transportation and surveying expenses was not granted because the documents were ambiguous as to whether or not Orient was entitled to such amounts. As they were capable of more than one meaning, their application could not be resolved as a matter of law.

B. Limitation Period & Notice

4. 5K Logistics, Incorporated v. Daily Express, Inc.., 659 F.3d 331; 2011 U.S. App. LEXIS 21379 (4th Cir. September 20, 2011)

Background: The Court of Appeals' opening comments tell you how this case is going to come out in very good language for carriers:

In this case, it is undisputed that neither the shipper nor the shipping broker filed either a claim or a lawsuit within the prescribed time limitations. Were we to create some exception to the statutorily authorized, contractually mandated requirements of prompt filing, we would blow a hole in the balance struck by the Carmack Amendment and undermine Congress's intent to protect carriers against stale claims.

Dominion Resources Services, Inc. ("DRS") contracted with 5K Logistics, Inc. ("5K") for the transportation of two shipments. 5K is not a carrier; it is a broker. It subcontracted with Daily Express, Inc. ("DXI") for the carriage of the cargo. On August 24, 2006, DXI picked up the shipments and two separate short-form bills of lading were issued, each of which incorporated DXI's tariff that included a nine-month claim filing and two year written denial of claim suit filing requirement. One of the shipments was damaged in transit and was then refused by DRS. On November 14, 2006, 5K sent a letter (the "November 14 letter") to DXI notifying DXI that DRS was claiming $192,072.50 from 5K for damage to the cargo, and that, in the event 5K was required to compensate DRS, 5K would seek to recover from DXI. DXI responded on November 27, 2006, indicating that it had completed its investigation and that any claims "will be denied." Two years and nine months after the accident, DRS sued 5K. Four months later (three years and one month after the accident), 5K filed its Answer and its Third-Party Complaint against DXI.

The district court found that 5K was liable to DRS. In the third party action, the district court granted summary judgment to DXI on 5K's breach of contract claim and held that 5K's state law indemnity and contribution claims were preempted by the Carmack Amendment. 5K's Carmack Amendment claim for indemnity and contribution was tried, resulting in a judgment against DXI. The district court concluded that 5K had never filed a formal claim against DXI as required by the Carmack Amendment (the November 14 letter being only an intention to file a claim), and that the limitations period for bringing a lawsuit against DXI therefore never began to toll. However, the district court further concluded that 5K could not have filed a claim for indemnity and contribution against DXI until 5K's liability to DRS had been fixed, so the limitations periods did not apply to that claim. Having concluded that 5K's claims were not time-barred, the district court then determined that 5K was entitled to recovery from DXI, both of the amount that 5K paid to DRS and of the costs incurred by 5K in defending the suit brought by DRS.

Issues: Was 5K required to file a timely claim against DXI? Was DXI required to indemnify 5K under the Carmack Amendment?

Opinion: The Court of Appeals goes into an extensive discussion of the Carmack Amendment and its history, noting that Congress had limited the application of the Apportionment provision in 14706(b) to "carriers" and that the Carmack Amendment allowed shippers and carriers to bargain over the limitation periods for filing claims and lawsuits. There was no dispute that DRS had never filed a claim against DXI and the district court's finding that the November 14 letter sent by 5K was not a claim was not contested. 5K was contractually obligated to file its claim within nine months and did not do so. Even construing the November 14 letter liberally as a claim, the Court would then construe DXI's letter as a denial of that claim, requiring suit to be brought within two years, which was also not done. Thus, the Court of Appeals found that any suit against DXI under that bill of lading should have been dismissed as time-barred. The Court then responded to 5K's claims for exceptions to Carmack that it could not have known the amount of its claim until its claim for indemnity and contribution had been reduced to judgment. The Court noted that 5K pointed to no source of law for this position, that the Carmack Amendment preempted any state law contribution or indemnification claims and that, since 5K was not a carrier, it was not entitled to indemnification under 14706(b) anyway.

C. Limitations of Liability

5. Certain Lloyds Underwriters Subscribing to Policy Number MC-13159, v. Baldwin Distribution Services, Ltd., 2011 U.S. Dist. LEXIS 138941 (C.D.Ca. Dec. 2, 2011)

Background: Netgear owned, and Plaintiff insured, a shipment of wireless routers. Netgear contracted with FedEx to ship the routers from California to Ohio under a bill of lading. FedEx sub-contracted carriage of the cargo to Baldwin pursuant to a contract pursuant to which Baldwin agreed to be liable for the full value of the goods up to $250,000 unless FedEx signed a bill of lading with a different value. Baldwin's driver picked up the goods and signed the FedEx bill of lading. The cargo was damaged in an overturn accident in Oklahoma. Plaintiff paid $218,224 for the value of the loss, less salvage and then sued Baldwin for recovery of the monies paid to Netgear.

Issues: Was the carrier entitled to rely upon a stipulation that FedEx and Netgear had agreed to a $5.00 per pound limitation of liability when that provision was not included in the bill of lading and, as a result, to obtain a windfall by reliance on the contract between FedEx and Baldwin to which Netgear was not a party?

Opinion: The court had before it only the FedEx bill of lading, which had no liability limitations in it, and the agreement between Baldwin and FedEx. Relying on these documents, it declined to allow Baldwin to rely upon the stipulation of FedEx and Netgear to limit FedEx's liability to $5.00 per pound in light of the provision in the agreement between Baldwin and FedEx setting Baldwin's liability at $250,000.

6. Nipponkoa Insurance Co. v. Atlas Van Lines, Inc., 2011 U.S. Dist. LEXIS 94384 (S.D.In. Aug. 23, 2011)

An update to a case discussed at the last CFC meeting: Previously, the court had ruled that Atlas could not rely on contract with an intermediary to limit its liability for damages to goods of Toshiba America Medical (TAMS) because it did not have a written agreement with TAMS. The motion to reconsider hearing was held in August, 2011 and, lo and behold, the judge reversed his ruling from last January and granted Atlas' motion for partial summary judgment. The court acknowledged that it was in error in its interpretation of the cases dealing with intermediaries and limitations of liability. It went back and looked at Kirby, Werner Enterprises and Great Northern. It found that because the contract between ACS, an intermediary, and Atlas contained a limitation of liability, TAMS, the owner of the goods, was bound by that limitation. The court also held that even without the contract, the bill of lading and tariff limited Atlas' liability since no additional value was declared. This is a case with Maloof and the boys on the other side. The hearing was interesting, in that at one point Maloof told the judge that they could not sue the agent or the broker, but then had to admit that they had, in fact, sued the agent and the broker, but he didn't think they had a very good case against them. (This suit was dismissed before the hearing was held, then refiled after the decision came down. Gregg Garfinkel is handling this matter out in California. He filed a motion to dismiss the case-particularly the breach of fiduciary duty claim. Maloof offered to dismiss this cause of action if Greg would agree to let him file an amended complaint alleging new causes of action and agree not to file a motion to dismiss this amended complaint. You can probably guess Gregg's answer.) This case is now on appeal to the Seventh Circuit. Plaintiff has filed its brief and Atlas' brief is due the first of February. Stay tuned for further developments.

7. Personal Communications Devices v. Platimum Cargo Logistics, Inc., 2011 U.S. Dist. LEXIS 83695 (C.D.Ca. July 29, 2011).

Background: Personal Communications Devices (PCD) tendered seven shipments of mobile phones to Platinum Cargo Logistics, Inc. (Platinum) for transportation from California to Kentucky. PCD and Platinum negotiated a declared value of $35,000 per shipment, totaling $245,000 and PCD obtained $5M of insurance per truckload. Celestial Freight Solutions, Inc. (Celestial) provided the actual transportation. The seven shipments were consolidated onto one truck and then stolen from the unlocked truck yard. PCD sued Platnium,
Celestial and the truck driver alleging breach of contract and state law claims, which were dismissed. Platinum moved for partial summary judgment seeking to limit its liability under Carmack to $245,000, which was granted (as to both it and Celestial). [Prior agenda item - Winter, 2011]. This is the motion for reconsideration.

Issue: Was compliance with PCD's additional security measures necessary for Platnium to limit its liability under Carmack? Was Celestial entitled to rely upon Platnium's limitation of liability?

Opinion: The court found that there was no authority that requires a carrier to go beyond the Hughes test provisions to limit its liability; including complying with another provision in the contract and that Platnium had properly limited its liability. With respect to Celestial, PCD attempted to rely on the Royal & Sun Alliance v. UPS Supply Chain decision (2010 U.S. Dist. LEXIS 130929, 2010 WL 3000052 (S.D.N.Y.) that limited a subcontractor's ability to rely on the carrier's limitation of liability. This court found that decision was not binding on it and, because it had been issued five weeks prior to the hearing on the MSJ, was not the basis for a motion for reconsideration.

8. Tronosjet Maintenance, Inc. v. Con-Way Freight, Inc., 2011 U.S. Dist. LEXIS 84503; 2001 W.L. 3322800 (S.D. Tex.)

Background: Tronosjet shipped aircraft landing gear from New Brunswick, Canada to Fort Worth, Texas with defendant Con-Way. A straight bill of lading was issued for shipment of the cargo from Canada to Texas. The box for declaring a value and agreeing to pay for excess liability on the bill of lading was left blank. At destination, Tronosjet made a claim for $165,000 plus incidental damages to the cargo. Con-Way moved for summary judgment on the bill of lading based on the limitation of liability provided in the bill of lading and in Con-Way's tariff of $2.00 per pound.

Issue: Whether Con-Way effectively limited its liability for the shipment.

Opinion: Con-Way was entitled to summary judgment limiting its liability

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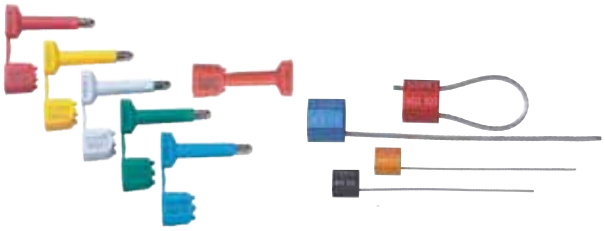

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based on the bill of lading and Con-Way's tariff. The Court determined that Con-Way met the test for limitation of liability under the Carmack Amendment, since Con-Way maintained a tariff, obtained the shipper's agreement to the limitation of liability as evidenced by the shipper's failure to insert a value in the released value portion of the bill of lading and pay extra for increased valuation, and Con-Way issued a bill of lading prior to the transportation.

9. Alpine Fresh, Inc, v. M/V Cap Itaim and Compania Libra De Navegacao S.A., et al., 2011 U.S. Dist. LEXIS 117950 (S.D.N.Y. 2011).

Background: Alpine Fresh brought this maritime claim against Libra and the other defendants alleging that 28 containers of its mangoes were damaged due to Libra's negligence. Alpine asserted that the mangoes were damaged when they were exposed to high temperatures during the inland trucking portion of transport and that Libra was responsible for arranging the trucking. Libra denied this claim and moved for summary judgment.

Issue: Could Libra rely upon the bill of lading's limitation of liability?

Opinion: The bill of lading provided that Libra was under "no liability whatsoever" (1) for damage occurring prior to its arrival on or subsequent to its discharge from the vessel, (2) for damage due to improper temperature settings prior to arrival on the vessel, and (3) by stating that if Libra arranged for shipping, it was only acting as Alpine's agent. As such, the Court determined that even if Libra did arrange for the truckers responsible for damaging the mangoes, the bill of lading effectively limited its liability to the period while the mangoes were on board the vessel. In addition, because Alpine brought suit under the Libra bill of lading, it was bound by its terms and could not prevail on its argument that it was an adhesion contract.

10. Dan Zabel Trading Company, Inc. v. Saia, Inc., aka Saia Motor Freight Line, 2011 U.S. Dist. LEXIS 122107 (D. Or. 2011)

Background: The magistrate in this case issued Findings and Recommendation, in which he recommended the Court grant Zabel's motion for summary judgment, deny Saia's motion for partial summary judgment, and enter a judgment for Zabel in the amount of $43,658.59, representing the value of the cargo lost while being transported by Saia. Saia filed objections to the Findings and Recommendation. As such, the matter went to the Court for a de novo review.

Issues: Did the magistrate err when he: (1) concluded that Saia had failed to limit its liability for cargo loss; (2) concluded that Zabel was entitled to summary judgment on the merits of his Carmack Amendment claim; and (3) referred to non-Carmack claims, and as a result, applied the wrong legal theory?

Opinion: As to the last objection, even though the magistrate erroneously referred to the breach of contract and conversion claims, he expressly stated that the pending motions addressed Saia's potential liability only under Carmack. Thus, the passing reference to the non-Carmack claims was of no consequence. As to the first objection, the magistrate ruled that while Saia satisfied the first two required elements to limit its liability under the Hughes/OneBeacon analysis, because the language of limitation in its tariff (incorporated by the bill of lading) was "incomprehensible, internally inconsistent, and incoherent," Saia failed to effectively communicate to Zabel that its liability was limited to $1 per pound.

The Court agreed with this conclusion. Finally, Saia argued that the record failed to establish an absence of material fact on the issue of whether Zabel tendered the goods to Saia in good condition. The Court pointed out that Saia never raised this argument before the magistrate, but in any event, there was sufficient circumstantial evidence to establish that Zabel met its burden in this regard. Accordingly, the Court found no errors in the magistrate's Findings and Recommendation.

11. J.D. Irving Ltd. v. Siemens Canada Ltd., 2011 FC 791

Background: Two steam turbine rotors fell off the deck of a cargo barge chartered by Irving and into the waters of the harbour in Saint John, New Brunswick. Siemens, the supplier of the rotors, sought damages amounting to $45,000,000 from Irving, among several others, in tort and contract. Irving commenced an action to limit its liability pursuant to Canada's Marine Liability Act, naming Siemens as a defendant.

Issue: Was Irving's liability limited?

Opinion: The definition of "maritime claim" in s. 24 of the Marine Liability Act cross-references Article 2 of the Convention on Limitation of Liability for Maritime Claims, 1976 which sets out the claims subject to a limitation of liability is to be limited. The losses having occurred on board the ship, and Irving arguably being a shipowner under the Marine Liability Act as a charterer with an interest in the ship, Irving's liability was potentially subject to limitation. The Convention further provides for the creation of a limitation fund in respect of claims subject to the limitation on liability which, pursuant to Articles 9 and 11 of the Convention, would answer the "aggregate of all claims which arise on any distinct occasion" in this case being the loss of the rotors at Saint John. Based on the gross tonnage of the ship involved in the incident, recovery on claims respecting the damage caused to the rotors and any loss resulting from the delay in shipment of the cargo was limited to $500,000, as against all named defendants coming within the definition of shipowner under the Convention or for whose acts the shipowner would be responsible.

D. Preemption

12. Dilts v. Penske Logistics LLC, 2011 U.S. Dist. LEXIS 122421; 2011 WL 4975520 (S.D.Ca. Oct. 19, 2011)

Background: This is a wage and hour case involving the extent of federal preemption of California state "meal and rest break" (M & RB) laws. Penske operated facilities and had employees in California who were involved in delivering Whirlpool appliances within the state. The plaintiffs in this case were a class of such drivers alleging breach of the M & RB laws.

Issue: Were the California M & RB laws preempted by the FAAA preemption provision (now found at 49 U.S.C. §14501)?

Opinion: The court found that the FAAA provisions applied to Penske's solely intrastate operations and that Penske was a motor carrier. After an extensive analysis of the scope of FAAA preemption, it found that the M&RB laws did relate to the services of a motor carrier and were preempted.

13. Exel, Inc., f/u/b/o Sandoz Inc. v. Southern Refrigerated Transport, Inc., 2011 U.S. Dist. LEXIS 144566 (SD Oh. December 15, 2011)

Backgound: Exel, a freight broker, entered into a contract with Southern Refrigerated Transport (SRT) to transport cargo for Exel's customers, including Sandoz. SRT transported a shipment of Sandoz's pharmaceutical products ("the Shipment") from Pennsylvania to Tennessee. The SRT truck carrying the Shipment was "stolen or otherwise lost from an unsecured rest area" and the Shipment was never recovered. Shipment is $8,583,671.12." Exel submitted a claim to SRT (on behalf of Sandoz) for the value of the Shipment ($8.5M). SRT denied the claim [on the basis] that the recovery is subject to a limitation of liability found in the bills of lading issued for the shipments." Exel sued for breach of contract, breach of bailment, violation of the Carmack Amendment, and relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. This is SRT's motion for judgment as to the non-Carmack claims on the basis of preemption.

Issue: Did the Carmack Amendment preempt state or common law claims by a broker against a carrier? Was Exel entitled to a declaratory judgment that the value of the lost shipment be determined under the terms of the broker-carrier agreement and not the bill of lading?

Opinion: The court found that Carmack did preempt all state and common law causes of action by a broker against a carrier except those independent of the carrier's obligations as a carrier, giving, as an example of a non-preempted claim, a contractual obligation to indemnify the broker. The court declined to grant a declaratory judgment to Exel finding that it would be redundant to the relief sought under Exel's Carmack Amendment claim, which was a better way to deal with that issue.

14. Frey v. Bekins Van Lines, Inc., 2011 U.S. Dist. LEXIS 90942 (E.D.N.Y. Aug. 9, 2011)

Background: This case arose out of claims by customers of Bekins that it was overcharging its customers on a variety of bases, including under estimating charges, providing false weight tickets and similar claims. Plaintiffs brought state law claims for fraud, negligence, negligent misrepresentation, unjust enrichment and violations of consumer protection provisions and good faith and fair dealing. Defendants had previously filed a motion to dismiss on the basis of Carmack preemption and field preemption, which the Court had rejected on the basis that Carmack only applies to loss or damage to goods and that federal law did not exhibit an intent to preempt all claims regarding household goods transportation. This motion to dismiss was made on the basis of preemption under 49 U.S.C. 14501(c).

Issue: Does 14501(c)(1) preempt the application of state laws to claims on interstate household goods shipments?

Opinion: The court found that 14501 did preempt the application of the state law claims relying on cases from the Supreme Court including two Airline Act cases (Morales and Wolens) and Rowe v. New Hampshire Motor Transport, finding that the state law claims "related" to the services of a motor carrier and were preempted by federal law.

15. Just in Time Logistics, Inc. v. Marquez Brothers International, Inc., Case No.: 09-CE-CG01624 (Superior Court, Fresno County, CA, 9/21/11)

Background: Just in Time Logistics arranged through another broker, Cross-Country Logistics, for Sahota Trucking to transport a shipment of cheese and yogurt from Hanford, California to Houston, Texas. The shipper, Marquez Brothers, withheld payment of past due freight charges of $87,900, alleging an offset against Just in Time due to a refer failure as Sahota was traveling through Arizona. After two unsuccessful demurrers (California-speak for motions to dismiss), Marquez cross-complained for breach of contract, negligence,
negligent hiring and breach of the covenant of good faith and fair dealing.

Issues: Were the state law claims against the broker preempted by 49 U.S.C. §14051(c)?

Opinion: The court held that all of Marquez' causes of action except for breach of contract were preempted by 49 U.S.C. §14501(c) relying upon Chatelaine v. Twin Modal Transport. The Court held that Just in Time's load confirmation was a brokerage contract, but did not constitute a guarantee of delivery relying upon Adelman v. Hub City Los Angeles Terminal. Applying California law, the Court awarded interest of 1 ¾% compounded monthly for a total award of $250,360.09 to Just in Time.

16. Marshall W. Nelson & Associates, Inc. v. YRC INC., 2011 U.S. Dist. LEXIS 85718 (ED Wis. August 3, 2011)

Background: Marshall hired YRC to transport air ducts from Wisconsin to Oklahoma. Marshall requested and YRC agreed to provide "full insurance coverage." The ducts were damaged during transport; however, YRC
denied Marshall's claims. Marshall filed an amended complaint including a claim under Carmack and a claim for the bad faith denial of an insurance claim. YRC sought dismissal of the bad faith claim on the basis of Carmack
preemption of the state law claim.

Issue: Is a claim for bad faith denial of an insurance claim for loss or damage to goods transported by a motor carrier preempted by Carmack?

Opinion: Yes. After reviewing the case law under Carmack, including the Gordon v. United Van Lines decision of the Seventh Circuit that found that some causes of action are not preempted and other recent case law on preemption, the court found that the Carmack Amendment preempted the bad faith denial claim since it was related to the damage to the goods.

E. Jurisdiction, Venue and Removal

17. Federal Courts Jurisdiction and Venue Clarification Act of 2011, PL 112-63 (HR 394)

This law, which was enacted in December, 2011, clarifies a number of issues that have been repeatedly litigated in the courts and on which the courts of appeals have reached differing positions. Among other things, the new law:

- clarifies that unrelated state claims do not in and of themselves defeat a removal petition which is otherwise properly based on federal claims;
- codifies the rule of unanimity that all defendants must consent to removal; and
- resolves a split among circuits and now gives each defendant 30 days to remove so an earlier served defendant can consent to a later served defendant's removal petition. A further summary of the statute is enclosed with the case materials.

18. Constructores Asociados de Vivienda Y Urbanizacion, S.A. de C.V. v. Bennett Motor Express, LLC., Case No. A10A2235 (Ga. App. 2011).

Background: Constructores purchased a trencher from an auction company in Pharr, Washington and contacted its customs agent, BF Forwarding (BFF), to arrange for transportation of the trencher from Washington to Mexico. BFF showed Constructores a proposal from World Trans America, Transport, Inc.
(WTA) and Constructores authorized WTA to ship the trencher. Constructores paid WTA $44,000 for the shipment. WTA issued a carrier rate confirmation to Bennett to transport the trencher for $29,000 and Bennett issued a bill of lading that included the auction company as the shipper and Constructores as the consignee. The confirmation stated that all charges were to be paid by the consignee and that it was subject to the rules tariff printed on the back, which included a forum selection clause (and consent to jurisdiction). Bennett delivered the trencher to BFF in Texas, but Constructores, having already paid for the shipment, refused to pay Bennett. Bennett's truck remained at destination for over seven days, at which time Bennett decided to deliver the trencher to a storage facility pending resolution of the payment issue. Three months later, the trencher was released to Constructores in exchange for a $40,000 cash bond that was posted in a Texas court. Bennett then filed suit against Constructores in Georgia. Constructores unsuccessfully moved to dismiss the complaint for lack of personal jurisdiction and ultimately lost at trial. Constructores appealed.

Issue: Did the trial court err in finding that WTA was the agent of Constructores, therefore permitting a determination that Constructores was contractually bound to the forum selection clause and to pay Bennett's freight charges?

Opinion: The Court determined that Constructores's argument was based upon common law agency principles that were inapplicable to interstate commerce shipments. The Court relied upon the holding in Kirby, which plainly established a bright line default rule that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers. As such, the Court extended the same rationale to forum selection and personal jurisdiction clauses. In addition, the Court pointed out that it had adopted the Supreme Court's ruling in The Bremen v. Zapata Off-Shore Co., that forum selection clauses are prima facie valid and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances. Judgment affirmed.

19. Daily Express, Inc., v. Maverick Transportation, LLC, 2011 U.S. Dist. LEXIS 121417 (M.D. Pa. 2011)

Continued on page 13

Background: This case arises out of damages to a load of glass, which was secured by Maverick and transported by Daily. Daily had an agreement with PPG Industries (PPG) for the transportation of the glass. Maverick secured the load onto the Daily trailer pursuant to the terms of a spotting/securement agreement between Maverick and PPG. During transport, some of the glass fell and broke, resulting in Daily paying $11,803.08 to PPG along with other expenses related to the cleanup. Daily filed a complaint against Maverick in state court and alleged negligence. Maverick removed based on the applicability of the Carmack Amendment. Daily then filed an amended complaint with three separate counts: (1) negligence, (2) a Carmack claim (in the alternative), and (3) indemnification. Maverick unsuccessfully moved to dismiss the first and third count (arguing Carmack preemption), and also filed a motion for summary judgment. Daily moved to remand for lack of subject matter jurisdiction, and in the alternative, a motion for summary judgment on Maverick's Carmack defenses.

Issues: Did the Carmack Amendment apply in this case giving the court jurisdiction? Was Daily estopped from seeking remand since its amended complaint included a Carmack claim?

Opinion: Maverick was not acting as a motor carrier when it secured the cargo; therefore, Carmack did not apply. Further, the Court ruled that Daily was not estopped from seeking remand, as it framed its Carmack cause of action so that it did not admit the truth of Maverick's averments as to the applicability of Carmack. However, the Court pointed out that even if Daily was judicially estopped from seeking remand, federal courts have an obligation to address questions of subject matter jurisdiction sua sponte. Accordingly, the court determined that it did not have subject matter jurisdiction in this case and Daily's motion to remand was granted. Maverick's motion for summary judgment was denied as being moot.

20. L.K. Goodwin Co. v. Harbor Freight Transfer Corp.,C.A. No. 11-277S (D.R.I. Dec. 12, 2011)

Background: This is a lawsuit involving a shipment for a company in Rhode Island (Goodwin) to Hawaii, which was transported from Pennsylvania to Delaware and then by Matson to Hawaii. Matson challenged the jurisdiction of the Rhode Island court over it.

Issues: Did the court have jurisdiction over Matson?

Opinion: The court engages in a detailed discussion of both specific and general jurisdiction over the ocean carrier, Matson, finding first that it did not have specific jurisdiction over Matson because Matson had no contacts with Rhode Island in connection with the specific transaction at issue. It also reviewed general jurisdiction principles and found that general jurisdiction did not apply either because Matson had a web site that was accessible in Rhode Island or that Matson was actually providing services to military personnel between Rhode Island and Hawaii. The court goes into an interesting discussion of how many shipments were enough to bring Matson under its jurisdiction, which may have applicability for motor carrier cases as well.

21. Baldori v. Delta Airlines, Inc., 2011 U.S. Dist. LEXIS 33546; 2011 WL1212069 (W.D. Mich. Mar. 29, 2011)

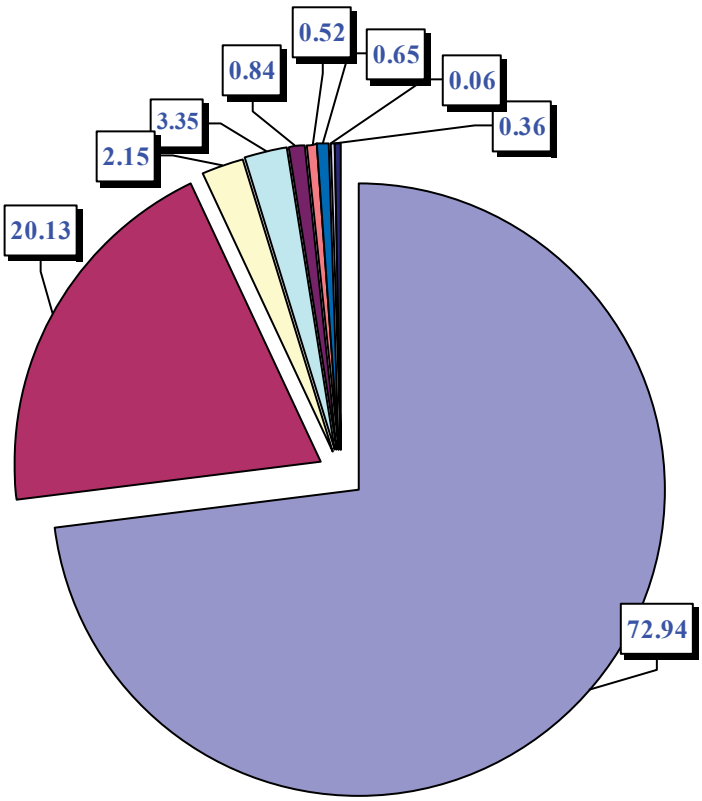
Background: Plaintiff is an attorney and musician and sued for loss of luggage, claiming not only the value of the items but consequential damages relating to his having to obtain new equipment for his performance, and harm to his reputation because he was unable to perform to his usual standards. Damages were generally alleged to be in excess of $25,000. Defendant removed on the basis of diversity. Plaintiff offered to stipulate the damages were less than $75,000 but defendant refused the stipulation. Plaintiff moved to remand.

Issue: Does a post removal stipulation that damages are less than $75,000 divest the court of subject matter jurisdiction thus requiring remand?

Opinion: Sixth Circuit precedent, Rogers v. Wal-Mart Stores, Inc., 230 F3d 868, 872 (6th Cir. 2000) holds "a post removal stipulation reducing the amount in controversy to below the jurisdictional limit does not require remand to state court". Id. However, the Supreme Court subsequently held in Powerex Corp. v. Reliant Energy Servs., 551 US 224, 232 (2007) that a case could be properly removed but have a failure of subject matter jurisdiction that requires remand. Numerous district courts in the 6th Circuit disagreed whether Powerex overruled Rogers. Judge Robert Holmes Bell agreed with the courts holding Rogers still valid but limited after Powerex. Becuse the propriety of removal is determined at the time of removal, the question regarding a post removal stipulation is whether it attempts to reduce a valid jurisdictional damage allegation or merely clarifies indefinite allegations that facially support removal. Judge Bell found that defendant's removal was proper based upon its original arguments interpreting plaintiff's damage allegations, but that the proposed stipulation was not a reduction but merely a clarification of the damages, thereby requiring remand. Though a diversity case, the Baldori reasoning should also be applicable to Carmack removal based upon 28 USC § 1337.

Continued on page 18

2011
TLP & SA CARGO CLAIMS SURVEY



- Visible Damage - 72.94%
- Shortage - 20.13%
- Concealed Damage- 2.15%
- Wreck/Catastrophe - 2.35%
- Theft/Pilferage - 084%
- Water - .52%
- Other - .65%
- Delay .06%
- Heat/Cold - 0.36%

CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	20.13 %	11.98 %
Theft / Pilferage	.84 %	.05 %
Visible Damage	72.94 %	58.30 %
Concealed Damage	2.15 %	2.88 %
Wreck / Catastrophe	2.35 %	.27 %
Delay	.06 %	.07 %
Water	.52 %	.07 %
Heat / Cold	.36 %	.06 %
Other	.65 %	1.01 %
	100 %	74.69 %

Total numbers of claims paid Vs. number of claims filed.	74.69 %
Total dollars paid Vs. total dollars filed.	31.38 %
Net dollars paid Vs. total dollars filed.	32.70 %
% of claims filed to total number of shipments made.	.61 %
Total company claim ratio.	.96 %
Percent of claims resolved in less than 30 days.	82 %
Percent of claims resolved 31-20 days.	13 %
Percent of claims resolved more than 120 days.	5 %

TLP& SA 2012

JOINT CONFERENCE

Donna Wyss Cscsalesnet@earthlink.net is visited by Diane Smid of TLC & Cindy Orr of Sunkist Growers

John O'Dell jodell@ccpac.com shakes hands with John Gibbs of Reverse Solutions -- 2 friends meet again.

Dave Myers dmyers@cargolago.com greets Lisa Monke of Coyote Logistics

John Adams AdamsJ@Regiscope.com - speaks with Robert Gleason of Freight Traffic Management

Ed Loughman of TLP & SA gives an award Donna Wyss of Cargo Salvage Claims for contrributions to the transportation industry.

Ray Fernandez rayf@sealock.com speaks with Tamara Henry & Laura Garrison of Transplace Texas

John Albrecht enforcer@transportsecurity.com is visited by Mike Codianni of New Century Transportation

Ron Maggio & Kathryn Moynihan Kmoynihan@vascorltd.com are visited by Chrissy Geibel of Re Transportation & Cathy Cox of Lorillard Tobacco Co.

Tom Sanderson of Transplace accepts a thank you award as guest speaker at the 2012 Joint Conference from George Pezold of TLC and Bill Bierman of TLP & SA

Ed Loughman Eloughman@tlpsa.org sits with Bill Bierman of Nowell Amoroso Klein & Bierman, P.A. and Alan & Karen McCoury of MartenTransport (Karen's husband Alan was the driver of 'An American Journey.

Although mostly teaching & learning, we also had some fun at the TLP&SA // TLC Joint Conference

Bill Bierman, TLP & SA gives award to John Albrecht of Transport Security for contributions to the transportation industry

John Gibbs jgibbs.100@cfl.rr.com speaks with Tracy Olson & Dean Gobrecht of Marten Transport

22. Golden Logistics, S.A. v. Danny Herman Trucking, Inc. 2011 W.L. 3567521 (S.D. Tex. 2011)

Background: Apparel International hired Plaintiff Golden Logistics to transport a shipment from Torreon, Mexico to Kentucky. Golden received the load in Torreon and delivered it to Nuevo Laredo, Mexico. In Nuevo Laredo, Golden put the load on a tractor-trailer belonging to Defendant Danny Herman. Drayage Company, hired by Golden, took the load through customs and delivered it to Danny Herman's yard in Laredo, Texas. Danny Herman transported the goods from Texas to Kentucky. A claim of loss for approximately $35,000 was made. Golden sued Danny Herman in state court, and Danny Herman removed the case. Danny Herman also filed a motion to dismiss Golden's state and common law claims.

Issue: The District Court stated that if the shipment moved under a through bill of lading from Mexico to Kentucky, Carmack would not apply. If, however, the shipment was not under a through bill of lading, Carmack would apply to the Texas to Kentucky portion of the shipment, and removal of the case would be proper.

Opinion: Focusing on a straight bill of lading that was issued at origin in Mexico, the Court stated that once a through bill of lading has been issued to the carrier who initially receives a load for shipment, the character of the shipment is not affected by connecting carriers' bills of lading. Since the straight bill of lading listed Apparel International as a shipper, Danny Herman as carrier, and Kentucky as the final destination, the Court held that the straight bill of lading sufficed as a through bill of lading. As such, the Carmack Amendment did not apply to the shipment, Carmack did not preempt Golden's state law claims and the Court lacked subject matter jurisdiction. The case was remanded.

F. Carrier-Broker-Third Party Issues

23. Royal & Sun Alliance Insurance PLC v. UPS Supply Chain Solutions, Inc. et al., 2011 U.S. Dist. LEXIS 97636 (SD NY 2011)

Background: Ethicon and UPS had a contract pursuant to which UPS moved cargo for Ethicon under a $250,000 limitation of liability. IMSCO was the staffing services company that provided drivers to UPS. An IMSCO driver was involved in a crash that destroyed Ethicon's cargo with a value over $250,000. IMSCO was sued by Ethicon. Ethicon asserted that, as a sub-bailee under common law, it could take advantage of the liability limitation between UPS and Ethicon, which had already been paid by UPS. This was a motion by IMSCO to bifurcate the liability issue from the damages issue.

Issues: Did the limitation of liability in the bill of lading between Ethicon and UPS apply to limit the liability of the staffing company that provided the driver for UPS?

Decision: The court found that, since there was no Himilaya clause in the contract between Ethicon and UPS and no clause limiting the third party's liability to UPS, it was not entitled to rely upon the liability limitation in the contract between UPS and the shipper. This finding was based on prior law established in this case.

24. Cowan Systems, L.L.C. v. Choctaw Transport, Inc., 2011 U.S. Dist. LEXIS 76321 (D. Md. 2011).

Background: Cowan, a broker, filed a complaint that alleged Choctaw, a motor carrier, breached its contract with Cowan and violated the Carmack Amendment by failing to deliver a shipment of cargo from Connecticut to Georgia. Specifically, Cowan alleged that the shipment was lost, stolen or caused to have gone missing while in Choctaw's care. Consequently, Cowan paid its customer $142,284.67 for loss of the shipment. After Choctaw failed to file an answer or otherwise defend, Cowan filed for entry of default, which was subsequently granted. Cowan then filed for a default judgment.

Issue: Was Cowan entitled to recover from Choctaw under its Carmack Claim? If not, could Cowan recover under its breach of contract claim?

Opinion: The court determined that because Cowan was neither a party entitled to recover from Choctaw under the bill of lading nor did it have any subrogation rights, it did not have standing assert a Carmack claim. However, as it was clear that Choctaw was in violation of the Broker-Motor Carrier Agreement entered into between Cowan and Choctaw, Cowan could recover under its breach of contract claim. Specifically, because the agreement contained language that required Choctaw to reimburse Cowan for any costs or damages incurred for any violation of the contract, Choctaw was liable to Cowan for not only the amount it paid to its customer, but also for Cowan's attorney's fees and costs. In addition, Cowan was also awarded both prejudgment and postjudgment interest based upon applicable Maryland and federal law.

25. Contessa Premium Foods, Inc. v. CST Lines, Inc., 2011 WL 3648388 (C.D.Cal. 2011)

Background: In May 2008, Plaintiff Contessa Premium Foods, Inc. (Contessa) entered into a contract with Defendant CST Lines, Inc. (CST) titled "Motor Carrier Agreement" related to the provision of transportation services. In addition to being a licensed motor carrier, CST was also a licensed broker. Thereafter, Contessa contacted CST to have forty-eight (48) pallets of frozen food shipped from Commerce, California to Indianapolis, Indiana. CST hired Defendant Far East Carrier, LLC (Far East) to carry the goods. CST and Far East had a broker-carrier agreement between them. On the bill of lading issued by Contessa, the driver signed in as "Far East" and Contessa authorized the loading onto a Far East truck. The cargo was temperature sensitive, the driver failed to properly set his refrigeration unit, and the frozen food was delivered in an impaired condition, resulting in the total loss of $97,491.97.

Issues: (1) Whether CST was acting as a motor carrier or as a broker for purposes of the shipment; (2) Whether the Carmack Amendment authorizes the recovery of attorneys' fees.

Decision and Result: On cross-motions for summary judgment, United States District Court Judge Ronald Lew held that, in light of the "Motor Carrier Agreement," CST's holding itself out as a motor carrier rather than a broker (for instance, CST's invoice to Contessa made no mention of its having brokered the load), and CST's employ of Far East as its agent (CST had instructed Far East to have its driver check in as CST), CST had acted as a motor carrier with respect to the subject shipment. The Court was not persuaded by the facts that Contessa controlled the loading at its facility, that Contessa acknowledged on the bill of lading that the "trucker" was Far East, that CST had previously brokered loads for Contessa, or that CST had provided its broker license to Contessa. The Court also determined that the Motor Carrier Agreement authorized attorneys' fees, despite the fact that Contessa had not asserted a breach of contract claim for relief.

26. Navigator's Insurance Company, Inc. v. Freight Tec Management Group, Inc., 2011 U.S. Dist. Lexis 105979 (E.D. Wis. Sept. 19, 2011)

Background: Aero Logistics, Inc. contracted with Freight Tec Management Group for the transportation of certain mining equipment from Milwaukee to Green Valley, Arizona. According to the complaint, the driver deviated from the designated route, causing the cargo to collide with a highway overpass. The cargo was severely damaged and ultimately declared a total loss. Count one of the complaint alleged a claim under the Carmack Amendment. Count two alleged that Freight Tec breached its bailment obligations under state law. Freight Tec moved to dismiss count two on the basis of preemption and the fact that the Plaintiff had alleged that Freight Tec was a carrier.

Issue: Was the breach of bailment claim preempted by Carmack because the Plaintiff had alleged that the Defendant was a carrier?

Opinion: The court held that, just because the plaintiff alleged that Freight Tec was a carrier, did not mean it was a carrier for purposes of the transaction at issue. Because Freight Tec alleged as an affirmative defense that it was a broker, the court found that count two was not preempted by Carmack and denied the motion to dismiss.

27. Merchants Terminal Corp. v. L&O Transport, Inc., 2011 U.S. Dist. LEXIS 1786 (D. Md. July 5, 2011)

Background: Merchants retained L&O to transport a shipment of wild salmon from Delaware to Baltimore, which was damaged in transit. Elmore was the driver and/or owner of the tractor/trailer that was used to transport the shipment. Merchants sued L&O under Carmack and filed a separate breach of bailment/negligence claim against Elmore. This is the response to Elmore's motion to dismiss.

Issue: Does a shipper have a cause of action for negligence against the driver for the motor carrier, separate from the claim against the motor carrier transporting its shipment?

Opinion: The court analyses the complaint to determine whether there were any allegation of a bailment relationship between Merchants and Elmore under Maryland law, which required four elements to establish a bailment: (1) an existing subject matter; (2) a contract regarding the subject matter that includes possession of the subject matter by the bailee; (3) actual or constructive delivery of the subject matter; and (4) actual or constructive acceptance of the subject matter. There were no allegations in the complaint of a contractual relationship between Merchants and Elmore, that the contract between L&O and Merchants contemplated a sub-bailment to Elmore or that Merchants knew of, authorized or ratified the sub-bailment to Elmore. Absent these allegations, based on the fact that the allegations in the complaint established a bailment relationship between Merchants and L&O and the separate contractual relationship between L&O and Elmore to which Merchants was not a party, the court found no bailment and no duty from Elmore to Merchants.

28. Kawasaki Kisen Kaisha, Ltd. et al. v. Plano Molding Co., 2011 U.S. Dist. LEXIS 82335 (N.D.Ill. July 27, 2011)

Background: For a change of pace, this is a case in which the carriers are suing the shipper, or rather the consignee/owner of the goods. Plano, a company in Illinois, ordered two steel molds from China that ultimately are alleged to have caused a train derailment in Oklahoma due to improper packing. Plano hired World Commerce Services, LLC, (World), a non-vessel operating common carrier, which arranged the shipment of the steel molds from China to Illinois by contracting with THI Group, Inc. (THI) to handle the booking of the shipment of steel molds. THI contracted with K-Line (KL), an ocean common carrier, to transport the steel molds from Shanghai to Illinois, with the molds ultimately ending up on a Union Pacific train. World issued a bill of lading identifying Kunshan (the manufacturer) as the shipper and Plano as the consignee. KL issued a waybill that identified THI as the shipper and World as the consignee. Plaintiffs alleged the derailment was caused by the improper loading of the steel molds in their shipping container. Plano did not dispute Plaintiffs' theory as to the cause of the derailment. The derailment damaged KL's shipping containers, as well as the Union Pacific's tracks, railcars and other equipment. Plaintiffs settled virtually all of the cargo claims, and now seek indemnity from Plano under the indemnity provisions of the KL and World bills of lading. Plaintiffs' breach of contract claims rest on obligations they assert Plano owed them under the World and KL bills of lading, while their negligence claims contend that Plano knew, or should have known, that the steel molds posed a significant risk of harm if they were not properly loaded, and that Plano breached its duty to ensure that the molds were safely packed.

Issues: Was Plano liable to the Plaintiffs based upon bills of lading to which it was not a party? Was Plano liable for the negligence of the parties that packed the molds?

Opinion: Plaintiffs argued they were entitled to indemnification, and to recover damages for their own losses, because Plano fell into the definition of "Merchant" as set forth in both the KL and the World bills of lading and would be bound by terms of those bills of lading that imposed indemnity obligations on a Merchant. Plano asserted that it was not a party to either bill of lading and did not accept their terms. Distinguishing this case from Kirby and the cases under it that find a consignee may be bound by the limitations of liability in bills of lading because it had actual or constructive notice of its terms, the Court found that those cases did not apply in a situation in which a carrier seeks to impose liability on a cargo owner for the alleged actions of an intermediary or the shipper of the goods. Because Plano was not a party to the KL bill of lading, nor a principal of a party to the bill of lading, it cannot be bound by it. Similarly, after a discussion of agency principles, the Court found that, as neither World nor THI were Plano's agents, Plano could not be bound through those entities and was entitled to summary judgment on Plaintiffs' claims under the World bill of lading. As to the negligence claims, Plano argued that, if a buyer of products overseas is potentially liable for the incorrect packaging of goods that it did not pack, load, or ship, a party ordering goods overseas could be subject to potentially limitless tort liability. While the Court acknowledged that there are some cases in which a cargo owner with unique knowledge has been held responsible for losses caused by packing of a shipment, that was not the case here.

29. Spence v. The ESAB Group, 623 F.3d 212; 2010 U.S. App. LEXIS 21371 (3rd. Cir. Oct. 18, 2010)

Background: Truck driver sued shipper for injuries sustained when load shifted and tractor trailer overturned. Though federal regulations placed responsibility on the carrier and its driver to ensure cargo was properly loaded and secured, in this case the shipper (1) provided the load securement

devices that were used (2) told the driver blocking and bracing were not needed (3) in response to the driver's objections assured him the devices provided and securement method used were safe (4) which assurances the driver relied upon. The district court granted shipper summary disposition based upon U.S. v. Savage Truck Lines, 209 F2d 442 (4th Cir. 1953) and 49 CFR § 392.9(a) (b), and 49 CFR § 393.100. Id., at 215.

Issue: Does the principle that the carrier and its driver have the primary responsibility for cargo securement and loading/unloading require summary disposition in favor of a shipper who dictated securement devices and loading methods?

Opinion: The Court of Appeals reversed the trial court. It noted that while Savage and its progeny hold that the primary responsibility for loading and cargo securement is the carrier's, Savage does not hold it is the carrier's exclusive responsibility. Shippers involved in the loading process can be liable for latent defects they cause or to which they contribute. Also, in comparative fault jurisdictions such as Pennsylvania, allocation of degrees of fault is properly left to the trier of fact. Thus, given the issues of material fact as to whether there was a latent defect in the loading and the need for determination of comparative fault, summary judgment in reliance on Savage was not warranted.

Though a personal injury case, the rationale and holding of Spence are also applicable to cargo damage cases. However, the comparative negligence discussion is arguably inapplicable in Carmack cases where the act of the shipper defense requires a carrier to prove it was not negligent and that the sole cause of the damage was the act of the shipper.

G. Freight charges

30. Canadian National Railway v. Vertis, Inc. and American Color Graphics, 2011 U.S. Dist. Lexis 91287; 2011 WL 3610452 (D. NJ, Aug. 16, 2011)

Background: CN transported rolled paper from consignor St. Mary's Paper Company to consignees Vertis and American Color Graphics. All the shipments moved in boxcars and were therefore exempt from regulation pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1039.14. All shipments moved under "prepaid" bills of lading based on private tariffs agreed to between CN and St. Mary's. All transportation arrangements were made by St. Mary's directly with CN. Only CN and St. Mary's received the bills of lading. All of St. Mary's invoices to the consignees included the cost of the cargo and the freight charges. The consignees or their customers paid all the invoices to St. Mary's. St. Mary's filed for bankruptcy in Canada before paying CN's freight charges on 57 shipments. CN was able to recover 3% of its claim in the bankruptcy proceeding, then sought recovery of the remaining balance of $263,983.13 from the consignees.

Issues: Did consignee liability under the Interstate Commerce Act apply to exempt boxcar shipments? Did CN have a quantum meruit claim? Could CN recover for unjust enrichment? Was there common law consignee liability?

Opinion: Consignee Liability under the Interstate Commerce Act. CN conceded that consignee liability for payment of railroad freight charges under 49 U.S.C. § 10743 does not apply to exempt boxcar shipments.

Quantum Meruit. CN did not establish "that the services were performed with an expectation that the beneficiary would pay for them, and under circumstances that should have put the beneficiary on notice that the plaintiff expected to be paid." That is one of the four (4) elements required for recovery under quantum meruit as a form of quasi-contract.

A. No contract or agreement between CN and consignees concerning the shipments.
B. Consignor requested the service from CN.
C. Bills of lading were marked "prepaid."
D. Consignees did not receive either the bills of lading generated by consignor or the invoices generated by CN.
E. When a separate transportation agreement is executed, the bill of lading serves only as a receipt for the transfer of the goods.
F. Naming consignees on the bill of lading did not create an expectation on the part of the consignees that they would pay the freight charges. Unjust Enrichment. To recover under a quasi-contract theory of unjust enrichment, the plaintiff must prove that defendant was enriched – received a benefit – and that retention of the benefit without payment for that benefit would be unjust. In this case, the consignees (or their customers) had paid the consignor for the cargo and the freight charges, so they did not retain a benefit "without payment." CN could not employ quasi-contract to substitute one promisor or debtor for another. CN's remedy was with the party with which it had contracted and not a third party who may have benefited from the transaction. Common Law Consignee Liability. CN also argued that, even without statutory liability under § 10743, a consignee who accepts delivery of shipped goods is also liable for the freight charges under federal and state common law. The court found this claim is preempted by the ICA. The fact that a shipment is exempt from regulation [i.e., the boxcar exemption in this case] "does not permit a party to revive common law causes of action preempted by the ICA."

31. Travelers Transportation v. 1415557 Ontario Inc., 2011 ONSC 44 (CanLII)

Background: This concerns a claim brought by a carrier for unpaid freight charges. The corporate defendant was a load broker, having arranged for the goods owned by a third party shipper to be carried by the carrier to destination. The list of defendants included one Anthony Persaud, who was a director and an officer of the defendant load broker. During the material time frame there was a "deemed statutory trust" as concerns money paid by a shipper to a load broker representing freight monies intended to be paid to a performing carrier. (Note: this requirement is now embodied in different legislation in Ontario, being Section 191 of the Highway Traffic Act.).

Issue: To the extent that the load broker entity breached this trust requirement was the defendant Anthony Persaud liable by virtue of his role as an officer, director and alleged "controlling mind" of the corporate defendant?

Opinion: The case was dismissed as against the defendant Anthony Persaud for the lack of necessary evidence. While the deemed statutory trust imposed direct and clear obligations on the broker corporate entity itself, the question as to whether an officer or director might be personally liable is determined from the case law on 'constructive trusts'. An officer or director may be personally liable as a "constructive trustee" on three grounds:

1) Trustee de son tort (e.g. having been specifically mandated as such),

2) Having knowingly assisted in a breach of trust, and

3) Having knowingly received trust property and having used it for one's own benefit.

To be liable on the second ground of potential exposure, being the so called "knowing assistance" liability, the plaintiff must prove 1) that the defendant had actual knowledge of the underlying breach of trust or was reckless or willfully blind to the facts of the case and 2) a "fraudulent and dishonest design" on the part of the trustee.

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The plaintiff argued that it was thereby open for the court to find this particular director had been reckless simply by virtue of the fact that the corporate entity failed to abide by its statutory trust requirements in holding the monies for the carrier, in itself amounting to a "design". The court however cautioned that being an officer or director will not result in liability per se. The plaintiff did not lead any evidence that the individual defendant was involved in the handling of the funds in question. This was not an appropriate case for an 'adverse inference' to be drawn in that regard against the individual defendant. This ground of claim accordingly failed.

As to the third potential ground of exposure, referred to as "knowing receipt" the requisite elements are that the purported constructive trustee defendant 1) had actual knowledge of the underlying breach of trust or was reckless or willfully blind to the facts of the case and 2) had derived a benefit from the monies that were to be held in trust. There was however no evidence that the individual had acted recklessly or had obtained a benefit from the trust funds in question. Accordingly the action was dismissed as against the individual in question. This case emphasizes the necessity of delving into the specific awareness (or duty to have been aware) and involvement of an officer or director a freight broker corporate entity.

32. YRC, Inc. v. Royal Consumer Products, LLC, 2011 U.S. Dist. Lexis 95885 (D. Conn.)

Background: YRC sued to collect $160,000 in transportation charges, alleging breach of contract and open account. Yellow Freight and Mafcote, the parent company of Royal, entered into a transportation agreement in 2000, under which Yellow was the carrier and Mafcote the shipper. Freight bills were to be paid within 30 days. Cargo claims were to be handled in accordance with the Carmack Amendment. All bills of lading were deemed to be uniform straight bills of lading. The agreement was not assignable without the consent of both parties. Yellow went through name changes and mergers to become YRC. The suit was for pre-merger charges. Mafcote contended that it never agreed to the transfer of the contract from Yellow to YRC, so it was not liable to YRC for any charges. It also filed a counterclaim for $657,000 in cargo losses, only $63,000 of which was submitted to YRC on a timely basis.

Issue: Was YRC due the money owed it under the transportation agreement? Could Mafcote offset this claim with its cargo claims?

Opinion: The court ruled in favor of YRC. The rights under the agreement were not "personal," and therefore could be transferred to YRC though the merger without consent of the other party. It noted that the defendants did not object to YRC performing services under the contract. The defendants could not take advantage of the contract benefits and then avoid the obligation to pay. It denied the counterclaim for all but the timely filed cargo claims. They were allowed to proceed. The court did not allow automatic setoff of the one against the other.

H. Damages

33. Bennett Motor Express, LLC, Ace Transportation, LLC, a/k/a Ace Transportation, Inc., Civil Action No. 1:09-CV-2708-ODE (N.D. Ga.)

Background: Ace was hired to transport a large natural gas compressor from Oklahoma to the Texas coast to be loaded onto a ship. Because of its size, the compressor was designated as a "Super Load" and special permits had to be obtained from both Oklahoma and Texas. Ace contacted a freight forwarder (Hockabout), who sent Bennett a work order confirmation and pay confirmation form that provided information about the shipment and the agreed-upon rate of $85,000. However, Ace, Bennett and Hockabout all understood that the dates listed on the form were not the actual pick-up and delivery dates, because the actual dates were contingent on how long the Super Load permitting process took. After filing for the permits, Bennett received a letter from the Texas DOT stating that the proposed date of movement was November 4, 2008. Sometime prior to this date, Ace learned for the first time that there was deadline for the compressor to be loaded onto the ship to protect Ace from owing delay fees to its customer. On or about October 30, 2008, Ace informed Bennett that the shipment had to be delivered by a certain date to meet the ship's schedule. At this point, because the requisite load permits had been issued for Oklahoma but not for Texas, Ace demanded that Bennett go ahead and load the shipment and begin the Oklahoma leg of the haul. Bennett agreed, but only if Ace would provide a written statement that Bennett would not be liable for any delay charges if the shipment did not arrive at the port in time. Ace did not provide any such statement, but Bennett maintained that Ace orally agreed to this condition. On October 31, 2008, Bennett loaded the compressor on a different rig that the one originally intended to transport the load and issued a bill of lading. Once the Texas permit was issued, Bennett transloaded the compressor onto the rig originally intended to transport the load at the Texas border and issued another bill of lading for the Texas portion of the transport. Delivery of the compressor took place after the ship's arrival in port and readiness to depart. As such, Ace's customer invoiced Ace $73,100 for ship detention and port charges. Bennett invoiced Ace in the amount of $85,000, but Ace did not pay Bennett. Bennett filed suit for breach of contract and Ace counterclaimed, alleging both state law and Carmack Amendment claims. Both parties filed motions for summary judgment.

Issues: Was the possibility of Ace's delay damages timely communicated to Bennett or otherwise foreseeable? Were Ace's state law claims preempted by Carmack? Was Ace liable to Bennett for its charges?

Opinion: Ace failed to present any facts indicating that it communicated to Bennett the need to meet a ship's schedule at any point in time early enough to Bennett to ensure the shipment's timely arrival. Furthermore, because Bennett claimed that Ace verbally agreed to hold Bennett harmless for any fees incurred if the shipment did not arrive by the ship's departure date, a genuine issue of fact existed regarding whether Bennett's agreement to begin the shipment early was contingent on Bennett not being held liable for the port and detention fees. Accordingly, Ace's motion for summary judgment was denied. In its motion, Bennett argued that Ace's state law counterclaim for breach of contract was preempted by Carmack and that the undisputed facts showed that Ace could not prove an essential element of its claim under Carmack. Bennett also contended that it proved as a matter of law that Ace breached the contract by failing to pay for the shipment. The Court determined that because all of Ace's state law claims were related to Bennett's alleged failure to timely deliver the shipment, they were preempted. Ace's Carmack claims also failed, as Ace could not show that the detention and port charges were the proximate and usual consequences of a breach that were foreseeable at the time of contracting. Though Ace argued that Bennett knew of the deadline when the bills of lading were signed, the Court pointed out that a contract between the parties was actually formed when Bennett accepted Ace's offer to transport the shipment for $85,000. The Court added that when the deadline was first communicated to Bennett, it elected to fulfill its duties under the contract and even took the extra step of taking good-faith measures to try and speed up the process by commencing transport prior to the issuance of the Texas permit. Accordingly, Bennett's motion for summary judgment was granted and final judgment was entered in favor of Bennett for $85,000 plus interest, attorney's fees and costs.

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34. Vogt Power International, Inc. v. M/V Beluga Constellation, 2011 U.S. Dist. Lexis 100470 (S.D. NY)

Background: Vogt entered into an agreement with Beluga to transport equipment from Korea and China to the

U.S. After the freight was loaded, it was damaged by fresh and salt water used to extinguish on-board fires caused by the defendant. Vogt made a claim for General Average and a claim for general cargo damage. The defendant asked to have its liability limited to $500 pursuant to COGSA. Issue: Could plaintiff make a General Average claim, even though the ship captain did not declare a General Average event? Does COGSA limit the damages available under a General Average claim?

Opinion: The court said that General Average is an ancient maritime doctrine making all participants in a maritime venture ratably responsible for losses incurred for the common good. The plaintiff must establish the occurrence of a General Average act: common peril or danger that is "immediately pending;" voluntary sacrifice for the common good; successful avoidance of the peril. It is usually up to the captain or master to declare a General Average act. Fire on a ship is a classic example, but the fire must actually imperil the ship. Vogt
presented insufficient evidence to prove that occurred here. The Court also held that COGSA's $500 limitation does not apply to a General Average claim. They are two separate theories, based on separate liability and the one does not impact the other.

35. Ensign Yachts v. Jon Arrigoni et al., 2011 U.S. Dist. Lexis 85586 (D. Conn.)

Background: This case is about a Carmack claim for a shipwreck. Ensign purchased a 55 foot Cigarette Super Yacht and brought it to the U.S. through Miami. It was then sailed to Stamford, CT, where it was offered for sail. Sometime thereafter, Ensign allegedly entered into an agreement to sell the yacht to Masterski for $1.2 million, as evidenced by a signed purchase agreement. However, the person who allegedly signed on behalf of the buyer testified that he never saw a purchase agreement, never signed a purchase agreement and never told anyone he wanted to buy the yacht. He had expressed interest in it, but never received the European certificate of compliance he had requested from Ensign, so he dropped the matter. In December, 2007, Ensign contacted Arrigoni to transport the yacht back to Miami by land, allegedly to close the "deal" with Masterski. Ensign claimed that it told Arrigoni about the sale; Arrigoni denied ever being told such a thing. Ensign sailed the boat to New Jersey, where Arrigoni picked it up. During transit the boat fell partially off the trailer, damaging the propeller. It was supposed to be delivered to a Coconut Grove marina, but it was too big, so Arrigoni took it to Ft. Lauderdale instead. Arrigoni advised Cigarette of the damage.

Ensign made a claim against Lloyds, a co-defendant, for the damage. After a "lengthy claims process," coverage was denied in July, 2008. Ensign contacted Norseman to repair the boat and claimed that it lost the Masterski deal because the boat was not fixed in time. Ensign could not pay for the repairs, so Norseman had the yacht arrested to secure its lien (what are the Miranda rights for a boat, anyway?). Eventually Ensign bailed out the boat and sold it for $750,000. Ensign filed a claim under Carmack, alleging two measures of damage. First, it claimed entitlement to diminution in value: the boat was worth $1.25 million before the accident, but only $450,000 after it. It offered as evidence the affidavit of Ross, the owner of Ensign and the person suspected of creating the "sale" to Masterski. Defendants argued that there was no basis for this assertion of value, since no one offered to buy the yacht at that price, even though it had been heavily marketed. Second, Ensign claimed that it was entitled to "loss of sale/loss of profit," which included cost of repair, storage, etc. This amounted to $660,000, the largest portion of which ($450,000) was for loss of sale damage. The defendants counterclaimed against Ensign and Ross for fraud relating to the alleged contract for sale. Ensign filed an SJ motion on its Carmack claim; the defendants filed a similar motion on their fraud claims.

Issues: What is the proper measure of damages? Was there evidence of fraud?

Opinion: The court held that there were genuine issues of material fact that precluded the granting of summary judgment on the fraud claims, but would not dismiss the claims as requested by Ensign. It found plenty of evidence from which a jury could conclude that Ensign and Ross engaged in a fraud. With respect to the Carmack claim, Arrigoni conceded that the yacht was in good condition when it was picked up, and that it was damaged at delivery. However, there were significant questions of fact about the damages, under either of Ensign's theories, due in large part to the credibility of Ross and the existence of the alleged sale. All motions were denied.

H. Miscellaneous

36. Smallwood v. Allied Van Lines, et al., 2011 U.S. App. LEXIS 20988 (9th Cir. Oct. 18, 2011)

Background: This meeting's household goods horror story comes courtesy of Allied Van Lines (and has been reported on previously in other meetings). Allied and its local agent, Atlas, agreed to move Mr. Smallwood from San Diego to Abu Dhabi. Mr. Smallwood also arranged for certain items to remain in storage in California, particularly a box filled with guns and ammo. Allied prepared two different inventories, one for the stored goods and one for the shipped goods, but never prepared a bill of lading. After Mr. Smallwood had settled in, Allied sent him an "Acceptance of Quotation" that included an arbitration clause directing that disputes be adjudicated by the Dubai Chamber of Commerce. Later, for some unexplained reason, Allied shipped him the box of heat. United Arab Emirates Customs took note, the police took interest, and the authorities took Smallwood to jail for smuggling. Lucky for him, he also got deported. Apparently a hearty rant on Yelp! was not enough to get things off his chest, so Mr. Smallwood sued Allied in San Diego. Allied asserted that the suit should be dismissed and sent to arbitration in Dubai. The district court disagreed.

Issue: Was the foreign arbitration clause enforceable for a household goods' move?

Background: The Ninth Circuit ruled that Mr. Smallwood's case was at least partly governed by Carmack and, therefore, the foreign arbitration clause was unenforceable. The shipment was clearly between a place in the United States and a place in a foreign country, triggering Carmack. The foreign arbitration clause was clearly violative of Carmack's stated goal of affording the shipper his "inalienable right" to a choice of forum. This result also came about because the Court found that 49 U.S.C.§14101(b) precluding contracting out of Carmack for a household goods move and held that household goods arbitration under §14708 could not be required before the claim arose and was optional with the shipper. Finally, Allied tried to anologize Sky Reefer but the Court did not but it because COGSA does not contain the shipper-friendly venue policy engrained in Carmack and Sky Reefer was a COGSA case.

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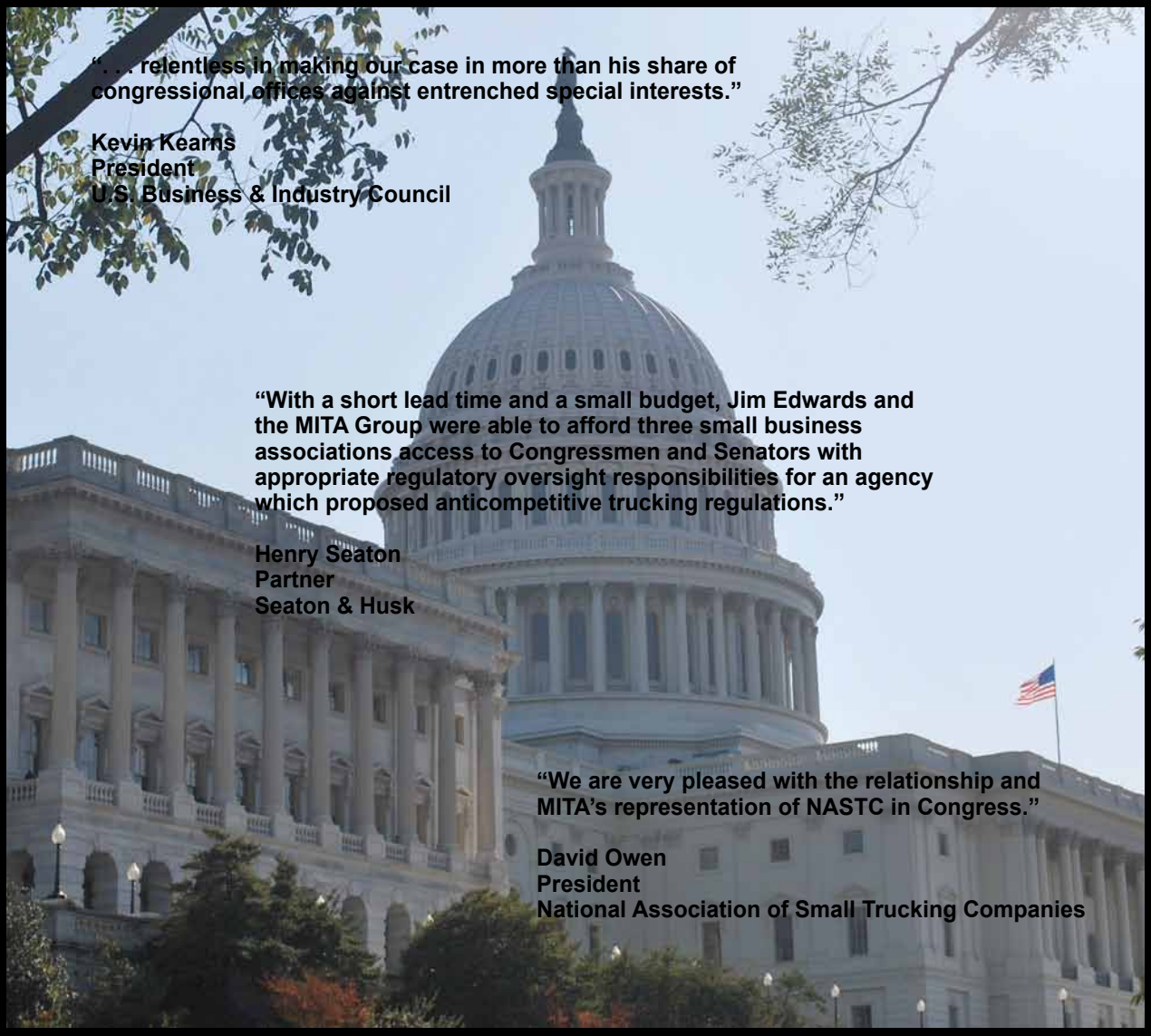

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