IN TRANSIT

Transportation Loss Prevention & Security Association November 2003

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Transportation Loss Prevention & Security Association

&

Transportation Consumer Protection Council

are preparing for our fourth annual JOINT conference.

If you think you've "seen it all" - wait until you see what we have in store for you!

MARCH 21—MARCH 24, 2004

At the Hotel Royal Plaza in Orlando, Florida

We have successfully brought together

CARRIERS • SHIPPERS • RECEIVERS • INSURERS
LAW ENFORCEMENT • LOGISTICS • TRANSPORTATION LAWYERS

in one room for three days, working *together* to address the ever-changing conditions and problems of the transportation community.

YOU should be there, too!

YOUR RESERVATION IS WAITING...
...MARK THE DATE

EXHIBIT SPACE GOING FAST!

In preparing for our Fourth Annual Joint Conference with the TCPC, we have already received notice of eight Exhibitors who will display their products and services:

CENTERLOAD SHIPPING TECHNOLOGIES
MARK J. CAIRES

LOCK AMERICA INC.
CHRISTOPHER SHOPE

M&S INSPECTIONS
STEVE SIMONDS

SENTRY DOGS OF COLUMBIA
BILL MULLIS

SMART INTERACTIVE SYSTEMS
STEVE WACHTEL

TRANSOLUTIONS
PETER CELESTINA

TRANSPORT SECURITY
JOHN A. ALBRECHT

WINSTON SCIENTIFIC CONSULTANTS
MARVIN E. WINSTON

FROM THE EXECUTIVE DIRECTOR...

Many years ago there was a best selling book entitled, "HOW TO WIN FRIENDS AND INFLUENCE PEOPLE" by Dale Carnegie, one of the first celebrated business gurus. Dale Carnegie wrote, lectured and devised courses to teach successful business strategies. In today's transportation environment, we could all do well to take a lesson from the likes of Dale Carnegie. We should all adopt a new mantra, "HOW TRUCKING COMPANIES CAN WIN FRIENDS AND INFLUENCE THE GENERAL PUBLIC."

TRUCKS GET A BAD RAP

Whether it's questioning jurors who say, " I'm afraid of those big trucks on the highway. They go too fast and follow too close," to your state's Department of Transportation who believes that any accident involving a truck was the truck's fault, the trucking industry gets a bad rap. It was only a generation ago that truck drivers were known as the "Knights of the Road" and that anyone stuck on the highway would welcome the help generously given by a passing truck driver. Where have we gone wrong and what difference does it make?

Well, we have gone wrong by ignoring the necessity to communicate with the public and let them know how important the trucking industry is. What difference it makes is that laws and regulations are being passed to curb "killer trucks" and juries render unreasonable verdicts if the defendant is a trucking company. How much money this costs the trucking industry is beyond calculation.

RECOMMENDATION

So how does the trucking industry win friends and influence the general public? While there is no easy answer to this pressing question, we recommend various things the industry can do:

1. All industry trade groups and individual companies should emphasize and publicize their "good deeds" i.e. community service; food drives; organized blood donations; receipt of awards and recognition; assistance provided to the poor, homeless and less fortunate, etc.

2. Maintain an ongoing relationship with your State DOT and your State Police. Engage them regarding how the industry is addressing their concerns about highway safety and how reputable trucking companies run their safety departments. Find out what most concerns your state officials and offer to devise programs to work on those issues.

3. Include State DOT officials and State Police in industry educational seminars and conferences so that these state officials can see how the industry is focusing on issues important to the general public.

4. Offer to participate in school Driver's Education classes in an effort to show the next generation of drivers how to co-exist in harmony with tractor-trailers on the highways. Bring a big rig to the school and demonstrate all the safety procedures the drivers must follow.

5. Approach DOT officials with proposed additions to the state Driver's Manual which include expanded information on how to drive safely alongside trucks.

6. Develop an overall, ongoing publicity campaign which links truck safety with the economic realities of how important trucks are to the public, how much revenue trucks bring in to your state, how many people the trucking industry employs and how trucking accidents have steadily decreased over the last several years.

Of course, these suggestions are only representative of many ideas that can be implemented to achieve the goal of humanizing the trucking industry and showing the public that the industry is made up of their friends and neighbors who are trying to work with the public to bring safety and prosperity to their community. Nevertheless, for these concepts to work, they must be part of a continuing effort to educate and work with the public in order to dispel the myth of the dangerous trucks. Only then can we hope to win friends and influence people as to the benefits of the trucking industry and perhaps our truck drivers will once again be thought of as the "Knights of the Road."

HOORAY! THEY FINALLY GOT IT RIGHT

THE FIFTH CIRCUIT SUPPORTS COMPLETE PREEMPTION

There was an old song with a lyric that said "First you say you will...and then you won't. Then you say you can...and then you don't. You're undecided now, so what are you going to do?" Some speculated that this was the theme song for the Fifth Circuit.

CONFLICTING DECISIONS

In the case of Beers v. North American Van Lines, Inc. 836 F. 2d 910, 912 (5th Cir. 1988), the Court found that removal was improper where the plaintiff's state law complaint "was based entirely on state law." In a subsequent case, Moffit v. Bekins Van Lines Co., 6 F. 3rd 305 (5th Cir. 1993), the Court affirmed the district court's grant of summary judgment to the defendant common carrier on each of the plaintiff's state law claims arising from an interstate move, based upon the pre-emptive effect of the Carmack Amendment. Although the plaintiff's case, which consisted solely of state law claims, was removed to the federal court based on federal question jurisdiction, the Court did not address the propriety of that removal. The decisions in Beers and Moffit resulted in conflicting decisions among district courts within the Fifth Circuit regarding the complete pre-emptive effect of the Carmack Amendment and provided fodder for shippers to continue to assert overreaching state law claims against carriers throughout the country citing the Fifth Circuit. Nevertheless, the Fifth Circuit in Hoskins v. United Van Lines, 2003 WL 22004097 (5th Cir. 2003) decided on September 10, 2003, has now joined the choir and is singing with one voice. The song and the law is that shipper's claims are completely preempted by the Carmack Amendment.

SHIPPER CLAIMS COMPLETELY PREEMPTED BY CARMACK

According to the Court, the reasoning in Hoskins derived from the recent Supreme Court case of Beneficial Nat'l Bank v. Anderson, — U.S. —, 123 S. Ct. 2058, 2062, 156 L. Ed 2d 1 (2003) wherein the Supreme Court expressly overruled the analysis used in Beers to reject the complete pre-emptive effect of the Carmack Amendment. The Court in Hoskins stated, "Because the legal landscape surrounding the complete preemption doctrine has shifted, we are no longer bound by our holding in Beers."

CONGRESS INTENT

The Fifth Circuit viewed the Beneficial case "...as evidencing a shift in focus from Congress's intent that the claim be removable to Congress's intent that the federal action be exclusive." The Court concluded that "We are persuaded ...that Congress intended for the Carmack Amendment to provide the exclusive cause of action for the loss or damages to goods arising from the interstate transportation of those goods by a common carrier." Thus, when the federal statute completely pre-empts the state-law

"We are persuaded ...that Congress intended for the Carmack Amendment to provide the exclusive cause of action for the loss or damages to goods arising from the interstate transportation of those goods by a common carrier."

cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.

NO SUPPORT FOR THE "WELL-PLEADED" COMPLAINT

Hopefully, the Hoskins decision will go far to end the legal ploy of the "well-pleaded complaint," which complaint was designed to do an end run around the Carmack Amendment and interject various and sundry state causes of action providing for double, treble and punitive damages. Such causes of action were never envisioned to address transportation issues. Clearly there must be a balance between competitive freight rates on the one hand and foreseeable damages on the other. The Fifth Circuit has now concluded that Congress had provided a comprehensive system which covers all cargo claims throughout the country and avoids different results based on parochial state laws. This system is the Carmack Amendment.

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.

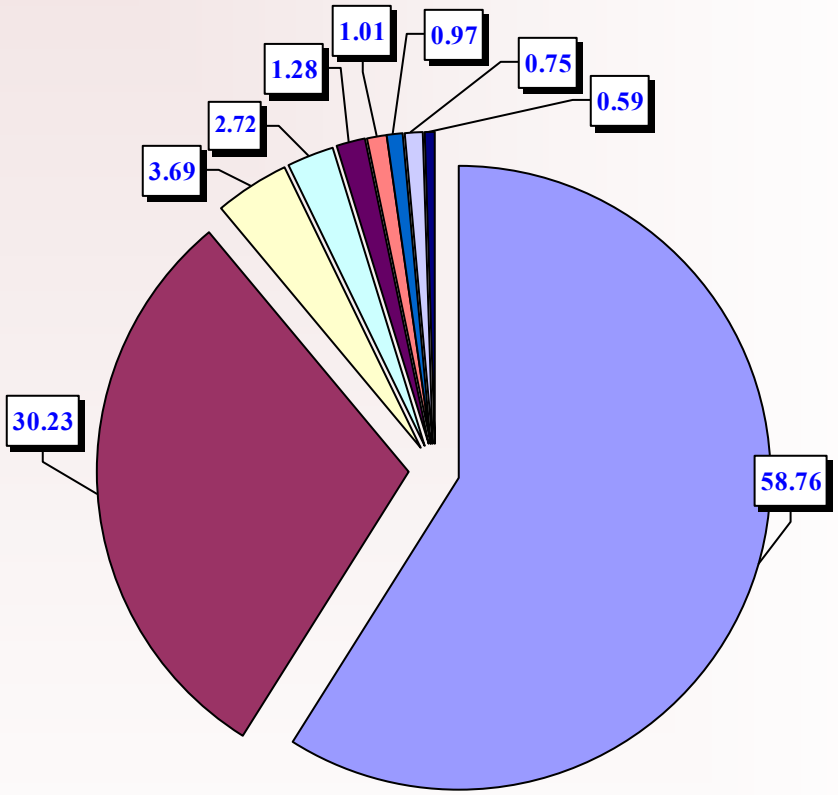
The TLP&SA is also available to assist its member carriers in these endeavors along with cargo claim and security problems. Contact us through our website at www.tlpsa.org or by phone at 201-343-1652 (T, W, Th 10am-2pm).

CLAIM CATEGORY	TOTAL GROSS % OF $ PAID		% OF CLAIMS PAID VS FILED	
	2001	2002	2001	2002
Shortage	30.23%	29.54%	21.02%	20.04%
Theft/Pilferage	1.28%	1.55%	.12%	.10%
Visible Damage	58.76%	60.08%	45.68%	42.66%
Concealed Damage	3.69%	4.10%	4.86%	5.13%
Wreck/Catastrophe	2.72%	2.17%	.16%	.14%
Delay	.75%	.49%	.03%	.02%
Water	1.01%	.55%	.23%	.18%
Heat/Cold	.59%	.31%	.04%	.01%
Other	.97%	1.21%	.12%	.48%

	2001	2002
Total number of Claims Paid vs. Number of Claims Filed	72.27%	71.23%
Total Dollars Paid vs. Total Dollars Filed	43.82%	38.70%
Net Claim Dollars Paid vs. Total Dollars Filed	36.86%	33.43%
Percent of Claims Filed to Total Number of Shipments Made	.87%	.82%
Total Company Claim Ratio	1.29%	1.07%

	2001	2002
Percentage of Claims Resolved Less than 30 days	82.09%	79.31%
Percentage of Claims Resolved 31-120 days	14.27%	16.90%
Percentage of Claims Resolved more than 120 days	1.55%	1.97%

TLP&SA
CLAIMS SURVEY CHART



- Visible Damage - 58.76%
- Shortage - 30.23%
- Concealed Damage - 3.69%
- Wreck/Catastrophe - 2.72%
- Theft/Pilferage - 1.28%
- Water - 1.01%
- Other - 0.97%
- Delay - 0.75%
- Heat/Cold - 0.59%

SHOW ME THE MONEY!

What charges must be contested within 180 days?

It seemed so simple. The Interstate Commerce Commission Termination Act, 49 U.S.C. Sec. 13710(a) (3) (B) provided "If a shipper seeks to contest the charges originally billed or additional charges subsequently billed.....A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges." Even this "legislative language" appeared to be straightforward and direct.

QUESTIONING "CONTESTED CHARGES"

In a recent case tried in the Southern District Federal Court in New York, the shipper questioned: (1) what does "contest" mean; (2) does a contest have to be in writing and, if so, what does the writing have to say; (3) are incentives and/or rebates charges covered under the Statute.

> "...one can only conclude that a shipper must contest in writing all carrier charges that it disputes within 180 days of receipt of the contested billing."

The facts of this part of the case are relatively simple. Based on a negotiation between the shipper and the carrier, the carrier created a tariff which provided for an on-bill discount of 50%; an off-bill discount of 16%; and a rebate of 5%. According to the tariff, the off-bill discount and the rebate were off of net freight charges. After approximately six months, the shipper claimed that there was a mistake and that the off-bill discount and the rebate were supposed to be off of gross freight charges. The carrier sued for its unpaid freight charges and the shipper counterclaimed for return of paid charges after a recalculation based on discounts off of gross freight charges.

OFF-BILL DISCOUNTS & REBATES

The carrier moved for summary judgment based on the fact that the shipper did not contest the alleged "overcharges" within 180 days. The shipper defended by arguing that the off-bill discount and the rebates were not "charges" under the statute and, in the alternative, that an ambiguous fax saying "off-bill discounts and rebates should be off of gross" sent to the carrier constituted a written contest. The court denied carrier's motion for summary judgment holding that the fax created a question of fact as to whether that document was a "contest" within 180 days under the statute. The court would later find at trial that the 180 day rule does not apply to off-bill discounts and rebates and the judge refused to send the issue to the jury. Nevertheless, the jury ultimately brought in a verdict in favor of the carrier and against the shipper on the interpretation of the tariff. The shipper appealed the verdict to the Second Circuit and the carrier cross-appealed on the 180 day rule. The matter is presently pending before the Second Circuit.

WHAT IS A CONTEST?

The points raised in this case reveal several unresolved issues concerning the so-called 180 day rule. Initially, the statute does not define the meaning of the term "contest." What must a shipper do to "contest" charges in 180 days? Must the shipper use the magic word "contest" to comply with the statute? To date we have not found any opinion directly on point. Yet one can make several practical suggestions based on how the courts have viewed similar matters. We would think that the court would apply a liberal standard for a shipper to meet in order to "contest" charges. If a shipper objected to a specific charge and indicated the nature of the objection i.e. miscalculation, mistake, or a substantive dispute, such an objection would qualify as a "contest." We do not believe that a shipper must use the word "contest" to fall within the statute.

STB DECISIONS

Next is the matter of how a shipper must contest charges. Must such contest be in writing? The most instructive information on these issues can be found in two STB decisions: National Association of Freight Transportation Consultants, Inc., Petition for Declaratory Order, "STB" Decision No. 41826, service date April 21, 1997, decided April 9, 1997 and Carolina Traffic Services of Gastonia, Inc.– Petition for Declaratory Order, STB No. 41689,

June 7, 1996. These decisions conclude that the 180 day rule applies to all original freight bills issued after August 26, 1994, that a shipper must notify a carrier in writing that it contests a billing or re-billing within 180 days of the contested billing, and that the rule applies to all billing errors and billing disputes.

A requirement that the contest be in writing is referred to in the STB decisions wherein the Board states that the contest may be accomplished by facsimile or mailing. The Board goes on to state that "a document that is faxed or postmarked on the 180th day, in our view, is timely." This language in the Board's decision clearly contemplates that a contest must be in writing.

CONGRESSIONAL MEANING

Perhaps the most serious issue raised by the shipper in the New York federal court case was that off-bill discounts and incentive rebates were not "charges" under 49 USC 13710. It would appear that this argument clashes with the intent of the statute and does not comport with common sense. When Congress enacted ICCTA, one of the moving factors was to clearly define the rights and liabilities among carriers, shippers and consignees for the carriage of goods in interstate commerce and to put an end to the undercharge controversy. We do not believe that Congress intended to create a whole new fertile area of disputes between the parties in interstate commerce based on different definitions of the term "charges."

ADDITIONAL CHARGES

The statute on its face contemplates not only charges originally billed but any other "additional charges subsequently billed" which would constitute charges whether they be charges invoiced by the carrier or adjustments made by the carrier in the form of an off-bill discount or rebate set forth in the tariffs. This is evident by the inclusion of the phrase "additional charges subsequently billed" in the statute. If the statute intended to apply only to those charges set forth in the original invoice, then the phrase "additional charges" would not be necessary. As many tariffs contain off-bill discounts and incentive pricing, any interpretation of the statute that would not result in resolutions of disputes between carriers and shippers involving these type of charges would be contrary to the intent of Congress and thus would create chaos in the industry.

CONCLUSION

After a review of the statute providing for the 180 day rule to contest charges, and in light of the reasonable intent of Congress together with the STB decisions dealing with the statute, and considering the realities of the transportation industry, one can only conclude that a shipper must contest in writing all carrier charges that it disputes within 180 days of receipt of the contested billing. Such written contest must at least refer to the specific bill contested and give the reason for such contest.

Finally, the statute contemplates that any charge made by the carrier must be contested within 180 days as a condition precedent to the eighteen month statute of limitations to sue. The 180 day rule does not distinguish between substantive disputes and clerical mistakes.

Therefore, what appeared at first to be a simple statute may be subject to the rule of unintended consequences. Nevertheless, a common sense interpretation of the statute should operate to fulfill the intent of Congress and provide a predictable procedure to resolve all disputed charges.

(See also Sorkin, GOODS IN TRANSIT, Volume 4, Sec.31.08 (1)(c), Matthew Bender & Company)

MEMBERSHIP ADDITIONS

The TLP&SA wishes to welcome three new members: Eric Zalud, Esq., of Benesch, Friedlander, Coplan & Aronoff, LLP; Michael Willis of FedEx Freight East; and Marvin Winston of Winston Scientific Consultants.

We also welcome back three members: Karen McCoury, CCP of Marten Transport; John Tabor of National Retail Systems; and Lois Beggs of Pitt Ohio Express.

FREIGHT CLAIM CASE UPDATE—OCTOBER 2003

BY WESLEY S. CHUSED, ESQ.

Wes Chused, Esq. of Looney & Grossman in Boston, one of the country's finest transportation attorneys, will edit a new column on current Cargo Claim Cases which will now appear in our **IN TRANSIT** newsletter. The Transportation Lawyers Association recently awarded Wes its 2003 Distinguished Service Award for his many years of service to the transportation industry. We welcome Wes aboard and look forward to his reports and insight.

The following are summaries of recent decisions involving carrier liability for interstate freight loss and damage claims.

1. ***Hoskins v. Bekins Van Lines***, 343 F. 3d 769 (5th Cir. 2003). (removal) This case involved a Carmack Amendment lawsuit filed against Bekins in Texas, which Bekins then removed to federal court. This case is significant because the Fifth Circuit reversed its earlier position and ruled that removal by Bekins was proper under the complete preemption doctrine. The Court recognized "a (recent) shift in focus from Congress's intent that the claim be removable, to Congress's intent that the federal action be exclusive." Since the Carmack Amendment provides the exclusive cause of action for claims arising out of the interstate transportation of goods by a common carrier, the action was therefore properly removed under the complete preemption doctrine. (See detailed article "The Fifth Circuit Supports Complete Preemption" on page 3 of this newsletter).

2. ***Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.,*** 331 F. 3d 834 (11th Cir. 2003). (released rates) Court rejected defendant motor carrier's released rate defense because it failed to give the shipper "a reasonable opportunity to choose between two or more levels of liability." The court continued to apply the archaic "four-prong" test for released rate applicability and ruled that since the bill of lading issued by Watkins did not include a place where the shipper could indicate its request for "excess coverage," Watkins could not enforce its individual tariff item that would have limited its liability on items of extraordinary value. The court felt that because the tariff required the shipper to do something more than simply fill in the declared value box on the bill of lading, the failure of the bill of lading to contain a space for requesting excess "liability coverage" was tantamount to failing to offer the shipper a reasonable opportunity to choose between two or more levels of liability.

3. ***Molloy v. Allied Van Lines, Inc.,*** 267 F. Supp. 2d 1246 (M.D. Fal. 2003). (sufficiency of claim) The court upheld the sufficiency of a shipper's claim over the carrier's objection that the claim was defective for failing to demand a "specified or determinable" amount of money as required by the claim-filing regulations. The shipper's claim letters to the carrier sent within the nine (9) month claim-filing period, provided specific dollar values for approximately 93% of the lost or damaged articles. The court ruled, over the defendant's objection, that the plaintiff's letters were sufficient to constitute a claim for a "specified or determinable" amount of money within the meaning of the claim filing rules. The court also rejected the defendant's argument that the plaintiff's claim was barred due to their failure to have paid the defendant's freight charges.

4. ***Nichols v. Mayflower Transit LLC***, 2003 Fed. Carr. Cases ¶84, 291 (D. Nev. 2003). (preemption, released rates) Court granted defendant interstate household goods carrier's motion to dismiss numerous state law claims, including unfair and deceptive trade practices claims filed by plaintiffs, ruling that all the claims, including state insurance claims, were preempted. The court also ruled that "declared value" on an interstate bill of lading is not an insurance agreement nor is it anything analogous to one, and that the plaintiff's state or common law based claims for attorney's fees was also preempted, indicating that a shipper can recover attorney's fees in a Carmack claim only in certain limited circumstances (under 49 U.S.C. § 14708). Finally, the court dismissed the plaintiff's claims against the defendant's disclosed household goods agent, in reliance upon 49 U.S.C. § 13907. When the dust finally settled, only the plaintiff's Carmack Amendment claims remained.

5. ***Kesel v. United Parcel Service, Inc.***, 339 F. 3d 849 (9th Cir. 2003). (released rates) The Ninth Circuit, in a 2 to 1 decision, upheld the district court's grant of summary judgment for the de-

fendant motor carrier, limiting its liability to $558 in accordance with the defendant's service guide and tariff. The plaintiff, who was shipping paintings from Russia to California and had declared their value as $13,500 for U.S. customs, sought to "insure' them with UPS for $60,000 during transportation to California. The UPS clerk refused to insure the painting for more than $558 based upon a Customs permit form that listed the value of the paintings as $558. When the paintings failed to arrive in California the plaintiff sued UPS for $60,000. The court, applying federal common law, upheld UPS's liability limitation of $558 and rejected the plaintiff's arguments that he was entitled to the full value for the paintings. The court held that the released valuation doctrine "only requires a fair opportunity to purchase a higher liability, not necessarily up to the full value of the item."

6. ***J.C. Research, Inc. v. Global Overland Delivery, Inc.***., 2003 Cal. App. Unpub. LEXIS 8769 (Calif. 2003). (released rates) The Court of Appeals of California upheld the lower court's grant of the defendant freight forwarder's and motor carrier's motions for summary judgment limiting their liability to $.50 per pound as stated on the airbill. The plaintiff had a history of using the airfreight forwarder, Global, for 69 shipments over a four (4) month period, on each of which the plaintiff's vendor had not declared an excess value. Then, when two (2) shipments were stolen in transit, the shipper claimed Global and the motor carrier, Covenant, had breached their duties under the Carmack Amendment and should be liable for the full amount of the loss ($176,109) because a Global sales representative allegedly had told the plaintiff that Global was "fully insured." The court rejected the plaintiff's arguments, upheld the $.50 per pound limitation, rejected the plaintiff's argument that it did not have a reasonable opportunity to choose a greater valuation, and held that under the Carmack Amendment the plaintiff was charged with knowledge of Global's released rate as a matter of law. The court concluded that the fact that the plaintiff was a substantial commercial enterprise capable of understanding the agreements it signed was enough to bind it to the limited liability level.

7. ***D. M. Diamond Corporation v. Dunbar Armored, Inc.***, 2003 Tex. App. LEXIS 4924 (Tex. App. Houston 14th Dist. June 23, 2003). (preemption) The lower court had granted summary judgment in favor of the defendant, Dunbar, who lost a shipment of diamonds that it transported pursuant to an airbill from Texas to New York. The plaintiff claimed that the lost diamonds were worth $172,000 but the trial court granted summary judgment to Dunbar, dismissing the plaintiff's numerous claims including a claim under the Texas Deceptive Trade Practices Act, and denied the plaintiff's motion for partial summary judgment. In reversing that decision, the Court of Appeals of Texas held that the Airline Deregulation Act, not the Carmack Amendment, applied and, based on the 1980 Texas decision in *Brown v. American Transfer & Storage Co.*, ruled that it was not required to follow the preemption decisions of various district and circuit courts of appeals upholding Carmack Amendment preemption. The court held that those decisions were not controlling and that the plaintiff could pursue claims for pre-contract deceptive trade practices against the defendant carrier.

8. ***A.I.G. Uruguay Compania De Seguros, S.A. v. AAA Cooper Transportation***, 334 F. 3d 997 (11th Cir. 2003). (burden of proof) The defendant motor carrier was held liable for the disappearance of $126,000 worth of cell phones lost in transit between Illinois and Miami. The cell phones had been shipped in three (3) sealed containers. In affirming the district court's judgment for the plaintiff for the full value of the shipment, the Circuit Court reviewed the plaintiff's *prima facie* burden of proof as to goods packaged in a sealed container and noted that the bill of lading, by itself, is never sufficient to establish a *prima facie* case. Nonetheless, the court agreed with the lower court's judgment because the plaintiff had submitted sufficient direct, pre-shipment evidence of the contents of the containers. The court noted that because of modern day production line specialization, the shipper's pre-shipment documents "can be more reliable than eye witness testimony, and it is unfair and impracticable burden to require a Carmack Amendment plaintiff to obtain eyewitness testimony as to the contents of a particular shipment... when such testimony will rarely, if ever, be available..." The court found that documents such as packing lists, which incorporate pre-loaded serial numbers scanned during the process of filling the order "are sufficient direct evidence of the contents of the shipments to sustain [the plaintiff's] *prima facie* burden of proof." Finally, the court rejected the defendant's argument that its liability should be limited to a released rate limitation because the goods were misdescribed by the shipper in order to get a lower shipping rate. The court found that the only effect of re-classification to the appropriate NMFC item number would be that the defendant carrier would have charged more to transport the shipment.

9. ***Kvaerner E&C (Metals) v. Yellow Freight Systems, Inc.***, 266 F. Supp. 2d 1065 (N.D. Cal. 2003). (sufficiency of claim) After the defendant delivered a shipment of pumps to the plaintiff in dam-

aged condition, the plaintiff sent the defendant a letter entitled "Notice of Freight Claim" in which it stated that some of the damage was substantial, would be costly to repair, that the plaintiff faced "time related liquidated damages" and "intend(ed) to submit a damage claim to recover all costs." The plaintiff's claim should have been filed by mid-September 2000, but it was not until December 2000 that the shipper sent the completed claim form with a spreadsheet identifying its actual damages to the defendant. The district court, granting the defendant's motion for summary judgment, recognized that even under the liberal claim-filing standard of the Ninth Circuit, the shipper's difficulty in completing a claim form or his uncertainty as to whether he had identified all the damage did not excuse or extend the nine (9) month claim-filing period. The court granted the defendant's motion for summary judgment.

10. ***Massimo Martino, S.A. v. Transgroup Express***, 2003 U.S. Dist. LEXIS 11212 (S.D.N.Y. 2003). (released rates) The plaintiff shipped a painting, claimed to be worth some $3 million, from New York to Texas under a bill of lading listing the carrier's liability as $.60 per pound. In route to Texas the painting was damaged resulting in a $500,000 decrease in its value and the plaintiff brought suit alleging negligence and breach of contract against the defendant motor carrier. The court upheld the carrier's released rate limitation of liability on the basis of the bill of lading signed by the plaintiff's agent on which he did not declare a higher value. At her deposition, the plaintiff acknowledged that she had her own insurance. The court found that the bill of lading limitation was "reasonably communicative" and limited the defendant's liability accordingly.

11. ***Mercer Transportation Company v. Greentree Transportation Co.***, 341 F. 3d 1192 (10th Cir. 2003). ("logo liability") The district court had granted summary judgment to the plaintiff, Mercer, a transportation broker, against a carrier, Greentree, on the basis that Greentree's name and logo were on the tractor-trailer that had been leased to the motor carrier (McClellan) to whom the plaintiff had brokered the shipment in question, even though the lease of the vehicle to Greentree had expired prior to the shipment. The plaintiff/broker had paid the shipper for its loss and then sought recovery against Greentree under the theory of "logo liability" based on the FMCAS's leasing and insurance regulations. The Tenth Circuit reversed and ruled that the "logo liability" rule did not exist in Carmack Amendment actions (as it does in personal liability actions) and should not extend to indemnification suits between motor carriers for freight loss and damage under the Carmack Amendment. The Circuit Court distinguished the purpose of "logo liability" under the Carmack Amendment, where "the interests of shippers are adequately protected by the liability scheme set out in the statute itself."

12. ***Penske Logistics, Inc. v. KLLM, Inc.***, 2003 U.S. Dist. LEXIS 16994 (D. N.J. 2003). (contractual limitations; released rates) Plaintiff, a third-party intermediary, had a contract with the defendant motor carrier, which adopted Carmack Amendment freight loss and damage liability provisions and otherwise waived any rights and remedies (pursuant to 49 U.S.C. § 14101). The plaintiff paid its shipper/customer $59,000 for alleged damage to a perishable commodity that the defendant transported under a bill of lading, which provided that carrier's liability would be limited to $1.50 per pound. In granting the defendant carrier's motion for summary judgment and denying the plaintiff's motion for summary judgment, the court first held that the plaintiff had failed to produce any direct evidence that the shipment arrived in a damaged condition (the only apparent reason for the rejection of the load was because the refrigeration unit was not working at the time of delivery). The court also ruled that the defendant's $1.50 per pound limitation of liability on the bill of lading was enforceable and was not waived by the waiver language in the contract. Moreover, the court noted that the "four-prong" test for the application of a released rate is no longer required and that the defendant carrier could invoke the limitation because it demonstrated that a reasonable rate existed and its tariff was available to the shipper upon request.

ALERT!

Transport Security, Inc—Waconia MN recently prevented a major theft in West Virginia because the "would be thieves" tried, without success, to drill a hole in Transport Security's **Cargogard** lock (but the drill bits broke in the attempt—the lock was too good to be true).

According to Transport Security's client: "On the second weekend of our Cargogard use, someone attempted to break into one of our trucks. A crowbar, or similar tool, was used to try to bend the top of the Cargogard open to gain access to the Abloy padlock underneath. They succeeded in bending the top of the guard out about 25-30%, which was not sufficient for them to gain access to the lock. The truck itself sustained no damage, and we were able to straighten the guard for future use. Thanks for providing us with a solution to our weekend security concerns."

The ENFORCER ™

ENFORCER™
Adjustable Door Lock
**Totally portable and requires no permanent installation*

ENFORCER™
Roll-up Door Lock
**Locks automatically without decision from driver*

ENFORCER™
King Pin Lock
**Locks without a key*

ENFORCER™
Air Cuff Lock
**Prevents tractor theft*

We also have:

ENFORCER™
Rear Door Lock
**Bolt cutter resistant*

TRANSPORT SECURITY, INC.

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Anyone who wishes to advertise in our **In Transit** *quarterly newsletter can do so by completing this form and sending it, along with a copy of your advertisement and your company check to:*
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TLP&SA's 4th ANNUAL JOINT CONFERENCE

WITH TCPC IS JUST AROUND THE CORNER!

PUT IT ON YOUR CALENDAR.

MARCH 21—MARCH 24, 2004

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