In Transit

Transportation Loss Prevention & Security Association

Winter–Spring 2009–10

In This Issue...

Transportation Loss Prevention and Security Association

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See pages 10 & 11 for TLP&SA's 2009 Motor Carrier Claims Survey & Claims Survey Chart

Transportation Loss Prevention & Security Association, Inc.

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TLP&SA WELCOMES NEW MEMBERS . . .

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and

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YES WE CAN!

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

A statement . . . a rallying cry . . . a signature motto. It is short and sweet and sounds good. Yes we can! Yes we can . . . what? No one asked. No one inquired. No one seemed to care. A little more than a year later, inquiring people want to know.

Specifically, where does transportation stand? Both carriers and shippers need to know. Will the economy rebound? If so, when? Will our infrastructure be addressed? If so, how? What can we expect from our new Secretary of Transportation? How does globalization affect all of us? These are but a few of the pressing questions facing our industry and our members.

It is the mission of both TLP&SA and TLC to educate their members and provide information which can be used to improve their condition. One of the ways we do this is through our annual Conference. This year the broader picture will be addressed with Sessions such as "*The Economy—The Good, the Bad, & the Ugly*" featuring industry experts who will bring us up to date on the world of transportation and provide their predictions of future events. More specific problems will be explored by attorneys and industry professionals in workshops identifying everyday concerns and offering solutions. Special full day seminars are optional for those who wish to study specific areas in more depth.

We suggest to all that staying home is not an option. The world has become too complicated to handle alone. There is just too much information out there.

Recently a federal judge in California deciding a cargo claim stated in her opinion the parties should not be "struthious" on an issue. We were moved to find out what she meant.

> **stru·thi·ous** ('strü-thē-əs, -thē-)
>
> *adj.* Of or relating to the ostriches and related birds.
>
> [From Late Latin *struthio* ostrich, irregular from Greek *strouthos*.]

Therefore, we suggest the transportation industry not be struthious when it comes to education. Don't put your head in the sand. The more you know the more valuable you will be to your company.

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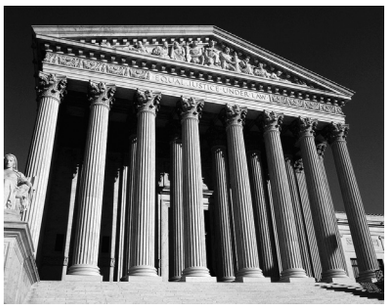

Recent Court Cases

as analyzed by the Conference of Freight Counsel

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

A. Carrier Liability

1. Ace Motors, Inc. v. Total Transport, Inc., 2009 U.S. Dist. LEXIS 112492 (N.D. Ill. 2009)

This somewhat unusual case involved a lawsuit by plaintiff Ace Motors against defendant Total Transport and several of its principals for damage resulting from an accident during Total's transportation of a shipment of nine motor vehicles from Illinois to New Jersey. One Abdildaev, who owned two of the destroyed vehicles, intervened in the case and filed claims against both Ace and Total for the loss of his vehicles worth approximately $68,800. The court granted Abdildaev's motion for summary judgment against Ace, ruling that although Ace was not a licensed freight forwarder, by entering into a contract for the transportation and shipment of Abdildaev's two vehicles it was clearly providing "transportation" within the meaning of 49 U.S.C. §13102(23), and hence, was liable to Abdildaev under the Carmack Amendment. The court rejected Abdildaev's request for attorney's fees and rejected Ace's affirmative defense of accord and satisfaction which had been based upon the parties' oral agreement to settle the dispute for $40,000 but which Abdildaev never signed and Ace never paid the $40,000. Although Ace provided subsequent services worth $23,200 for Abdildaev, for which he did not pay, the court concluded Ace never "satisfied" the agreement and hence there was insufficient evidence from which a jury could conclude Ace was entitled to prevail on its accord and satisfaction defense. The court ruled Ace liable to Abdildaev under the Carmack Amendment.

As to defendant Total Transport, it conceded it was a carrier within the meaning of the Carmack Amendment and Abdildaev's motion for summary judgment as to Total Transport was granted, although it was denied as to the individual defendants. Finally, the court concluded the Carmack Amendment would not allow Abdildaev to recover his damages from *both* Ace and Total Transport and ruled liability would be joint and several as to the first $68,800 of damages.

2. Air Express International, USA, Inc. d/b/a DHL Global Forwarding v. FFE Transportation Services, Inc., et al., 2009 U.S. Dist. LEXIS 68503, C.D. Calif. (July 30, 2009)

This rather cryptic opinion concerns the efforts of a Defendant/Cross-Plaintiff/Third Party Plaintiff delivering or originating carrier, who was liable to the shipper for lost cargo, to obtain statutory indemnity under Carmack from the carrier alleged to be in possession of the cargo at the time of the cargo loss or damage.

49 USC §14706(b) provides that a bill of lading issuing carrier or delivering carrier who has paid a judgment to a shipper is entitled to statutory indemnity from the carrier who was in possession of the cargo at the time of the cargo loss or damage. However, the bill of lading issuing carrier or delivering carrier must prove, by a preponderance of the evidence, that the cargo loss or damage did not occur while cargo was in its possession, but instead occurred while the cargo was in possession of the carrier it is suing for indemnity. Here, the Third Party Plaintiff carrier could not produce any evidence that the cargo of frozen shrimp was ever in the possession of Third Party Defendant; Third Party Defendant produced evidence that the shrimp was not in its possession as it had ceased operations approximately one month before the shipment was tendered to Third Party Plaintiff. Thus, Third Party Defendant was granted summary judgment on the Carmack indemnity claim.

The opinion itself does not indicate why Third Party Plaintiff alleged Third Party Defendant had carried the freight when in fact it had ceased operations the month prior to the shipment.

3. Boles v. Destination Movers, Inc., Civil Action No. 1:09-CV-19 (United States District Court, E.D. Virginia) (July 6, 2009)

Household goods shipper Boles hired motor carrier Destination to haul her stuff from Massachusetts to Virginia. The carrier gave her a hard quote of $1,000.00. When the Destination truck arrived in Virginia, it demanded an additional $1,647.00 in freight charges to release the freight. Having no options, Boles agreed. Some of her stuff was missing.

Boles sued Destination in the Eastern District of Virginia, and Destination defaulted. That's too bad for the carrier (assuming it's anywhere to be found to pay the judgment,) as its bill of lading effectively limited its liability for the lost freight. But absent a presentation in court that the carrier had jumped all hoops necessary to limit liability (i.e., maintenance of a tariff; offering the shipper an opportunity to choose between two or more levels of liability; obtaining the shipper's agreement as to the level of liability; and issuance of a bill of lading prior to the movement), the court refused to limit Destination's liability.

The court also found the hard quote to be a binding estimate, and awarded Boles the additional charges she was forced to pay. It even lowered the original payment by the proportion of the freight that was lost. Oh, and add in attorneys' fees based on the carrier's failure to advise its household good shipper of a dispute resolution program.

4. Illinois Bulk Carrier v. Jackson, 908 N.E. 2d 248 (Court of Appeals of Indiana, June 16, 2009)

Illinois Bulk Carrier, Inc. and Illiana Disposal Partnership d/b/a Allied Waste Services ("Allied Waste"), a motor carrier, filed an interlocutory appeal of the trial court's denial of its motion for summary judgment in a personal injury case. The Illinois Court of Appeals reversed the trial court and granted summary judgment to the carrier.

The issue was whether the carrier could be liable for the negligence of its independent contractor, Wireman Trucking & Excavating, Inc. ("Wireman") and Wireman's employee, Allan Irvine, under Regulations promulgated by the Federal Motor Carrier Safety Administration or under the Indiana common law.

The case arises from a multi vehicle accident occurring in Indiana on October 26, 2005. The truck involved was owned by Wireman and was operated by Irvine.

Allied Waste, a federally registered motor carrier, subcontracted a purchase order to transport sludge to Illinois Bulk Carrier, Inc. ("IBC"). IBC is also a federally licensed motor carrier. Allied Waste had an oral agreement with IBC to pay on a per-ton basis. In turn, IBC orally sub-subcontracted the job to Wireman. The vehicle accident occurred while Wireman was transporting the sludge pursuant to Allied Waste's purchase order.

Plaintiffs sued Allied Waste and IBC alleging failure to hire properly licensed carriers, failing to ensure that the vehicle was operated by a competent driver, failing to require that the truck was properly maintained and failing to require the driver to file a certificate of insurance.

Allied Waste moved for summary judgment on the basis the plaintiffs had no rights under its purchase order for the transport, Allied had no control over Wireman or Irvine, Irvine was not a borrowed servant of Allied and there were no facts to support an allegation of negligent hiring of IBC.

For its part, IBC asserted it was not liable because Wireman was an independent contractor, Irvine was not a borrowed servant of IBC, IBC was not charged with a non-delegable duty, and the plaintiffs are not third party beneficiaries to the Allied Waste purchase order.

The Plaintiffs opposed summary judgment on the basis Wireman was a statutory employee and Allied and IBC are therefore vicariously liable and that certain exceptions applied to the general rule of non-liability of a principal for the negligence of its agent.

Under the Federal law, the Court reviewed the FMCSA Regulations indicating motor carriers can be held liable for the negligence of independent contractors under certain circumstances requiring written leases and contracts under 49 C.F.R. §§ 376.11, 376.12 and 376.2.

49 C.F.R. § 390.5 defines employees as "individuals." Regarding Allied Waste, IBC and Wireman are not "individuals," and therefore they cannot be employees of Allied Waste. Also, the purpose of the Regulations is to ensure operators are licensed. In this case, Wireman was a licensed motor carrier and so the purpose of Regulations was met. Moreover, § 376.12 places the burden of maintaining equipment upon the carrier having "exclusive possession" of the equipment. To allow the Plaintiffs to hold a carrier such as Allied Waste responsible for maintaining equipment not it its "exclusive possession" would be contrary to the Federal Regulations. Additionally, neither Allied Waste nor IBC took possession of the Wireman truck, nor did either of them control, possess or maintain the Wireman truck.

Under Indiana State law, the Court examined cases involving the concept of a non-delegable duty and the exceptions thereto. Plaintiff asserted under Indiana law that Allied Waste and IBC were liable for Wireman's negligence (and that of its driver) because the Purchase Order had language to the effect that Allied Waste had to exercise reasonable care in selecting Wireman and owed a duty of care extending to third party motorists on public roads. The Court disagreed and found the purchase order only required Allied Waste to have the required permitting, which it did.

The other exception to the rule that an employer is not liable for the negligence of an independent contractor is when the act performed will probably cause injury to others unless due precautions are taken. The Court rejected that argument on the basis the risk of operating a vehicle does not necessarily rise to the level of an act that will probably cause injury.

In a concurring opinion, one of the Judges on the Indiana Court of Appeals determined there were issues of fact over the scope of the duty owed by Allied Waste and IBC to the plaintiffs. Otherwise, the Judge concurred with the remainder of the Court's ruling.

5. Montanile v. Botticelli, 2009 U.S. Dist. LEXIS 65140 (United States District Court for the Eastern District of Virginia) July 28, 2009

Dispute over vintage baseball cards allegedly shipped via United Parcel Service. Denise Montanile (shipper) sued Botticelli and United Parcel Service, Inc. alleging that she shipped certain vintage baseball cards to Botticelli and he failed to pay for them and, alternatively, that UPS failed to deliver.

Dispute burgeoned when Botticelli accused Montanile of defrauding him. Montanile was arrested and extradited from New Jersey to Virginia and then Montanile sued Botticelli for malicious prosecution and false arrest and sued UPS under Carmack.

After lengthy recitation of bizarre accusations, discovery violations and report of the Suffolk County, Virginia police department showing Montanile defrauded others in similar scams, the Court barred the plaintiff shipper from testifying on her own behalf at the trial. UPS moved for summary judgment and the court granted the motion finding "a reasonable jury could only find that Montanile lied about sending the baseball cards . . . the claim . . . relied on Montanile's allegations that she actually sent the baseball cards. She did not do so." With no proof of a Carmack case, the Court granted Summary Judgment to UPS.

B. Limitation Period & Notice

6. Foam Fair Industries v. J.K. Hackl Transportation Services, United States District Court, District of New Jersey (Case No. 08-3205) (August 28, 2009)

Recipient of damaged goods satisfied the written notice requirement to the shipper under the Carmack Amendment, 49 U.S.C. § 14706, by sending a repair estimate; although the document does not use any "magic words" to demand payment of a specified amount, its very purpose—readily apparent to a reasonable person—is to convey an estimate of the cost plaintiff sought to recover.

7. Landair Transport, Inc. v. Schneider National Carriers, Inc., 2009 Westlaw 3423037 (N.D. Tex.)

Walmart requested Landair to transport a shipment from Mississippi to Texas. Landair did not have capacity to transport the shipment and contracted with Schneider. Schneider picked up the shipment and signed the bill of lading. The shipment was stolen from Schneider. The value of this shipment was in excess of $91,000. Walmart deducted the value of the shipment from Landair's receivable account in the amount of the claim. Landair sued Schneider for the full value of the claim. On cross-motions for summary judgment, Schneider contended that Landair's claim was time barred because it failed to notify Schneider of the claim within the nine month filing deadline in Schneider's tariff. Landair contended that Schneider's tariff did not apply, but rather, a transportation agreement containing a 12 month limitations period was incorporated into the bill of lading, and governed this claim. Further, Landair contended that its claim was governed under 49 U.S.C. § 14706(b), Carmack's indemnity provision. Under § 14706(b), Landair contended that its claim could not have accrued until there was an amount paid to the owners of the property. The court determined that Landair's claim for indemnity against Schneider did not accrue until July 2007, when Walmart deducted the value of the shipment from Landair's accounts receivable. The court granted Landair's motion for summary judgment for indemnity, since Landair met its burden of proof by demonstrating that the loss occurred while the property was in Schneider's possession, together with the amount of Landair's damages.

C. Limitation of Liability

8. Diageo North America, Inc. v. Con-Way Truckload, Inc., 2009 WL 3681665 (N.D. Cal. 2009)

Cargo loss of $98,571.00 for 16 missing pallets of tequila transported by a Mexican carrier (Transportes Rodella) in a sealed trailer from Jalisco, Mexico to the U.S. border and trailer was then received by Con-way in Laredo, Texas for transport to California. The shipment was to consist of 22 pallets but upon delivery in California, only 6 pallets were in the sealed trailer.

Plaintiff owner of the goods filed lawsuit against the U.S. carrier, Con-way in California state court, which lawsuit was removed to the Federal Court. The parties cross-moved for summary judgment. The Defendant carrier asserted the parties waived the Carmack Amendment and instead contractually agreed to the Defendant's tariff which includes a limitation of liability imposed by Mexican law. Plaintiff cross-moves that Mexican law is inapplicable and that the Defendant's liability is not limited to anything less than $98,571.00. The Court denied the Defendant's motion and granted the Plaintiff's motion.

Defendant contended the Bill of Lading incorporated its tariff which states it is not liable for losses occurring in Mexico and that absent clear and convincing proof, losses are deemed to have occurred in Mexico.

Plaintiff countered that the tariff was not part of the agreement of the parties, that the loss occurred on a domestic U.S. Bill of Lading and that the Defendant's own rate schedule provides for a $100,000.00 limitation of liability anyway.

Referencing *Kirby* and *Regal-Beloit*, the court found there was no evidence of an actual "through bill of lading" that specifically mentioned the Mexican limitation of liability (which amount is approximately $0.03/lb). Factual disputes existed whether the limitation of liability and waiver provisions were incorporated through the Bill of Lading. The Court ultimately agreed with the Plaintiff that the allegations were for cargo loss occurring within the U.S. under a domestic Bill of Lading and that the only applicable limitation of liability was the $100,000.00 limit in the carrier's rate schedule. The Court rejected the carrier's argument that there was not proof the loss did not occur in Mexico, as the carrier's tariff presumes. The Court did not answer that question because it was undisputed that if the loss occurred in the U.S. the limitation of liability would be $100,000.00.

It "would be struthious to deny" the limitation of $100,000.00 if plaintiff can prove the loss occurred in the U.S. Partial summary judgment, on that narrow issue was granted to the Plaintiff.

9. Miller Fence Company v. Dohrn Transfer Company, Black Hawk County, Iowa, District Court No. SC132316

Plaintiff fence company sued for damages to a flag pole. Carrier admitted liability but claimed that its liability was limited to 50 cents per pound, as provided in its tariff. Court found that information regarding the carrier's limits of liability were available to the plaintiff Upon request prior to shipping. Court further stated that tariff information was available to the plaintiff Had the plaintiff simply asked the carrier to provide it. Plaintiff failed to ask for the tariff and carrier was not required to provide actual notice to plaintiff regarding limits of liability. Damages limited to 50 cents per pound. The court also awarded replacement shipping costs.

10. Regal-Beloit Corporation v. Kawasaki Kisen Kaisha, Ltd., 2006 U.S. 9th Cir. Briefs 56831; 2007 U.S. 9th Cir. Briefs LEXIS 1272 (United States Court of Appeals for the Ninth Circuit) (August 27, 2007)

The Supreme Court has granted review of the Ninth Circuit's Regal-Beloit decision involving the "Altadis/Sompo" circuit split (i.e., COGSA versus Carmack and separate domestic bill of lading issues), the "10709/10502(e)" issues, and the "non-adjacent foreign country" issue. As the Court granted Kawasaki Kisen Kaisha's petition, the review will also include scrutiny of the Ninth Circuit's determination that the ocean carrier and its agent (K-Line) functioned as a railroad subject to Carmack. The opening brief is due December 4th.

11. Sompo Japan Insurance Company of America v. Union Pacific Railroad Company, Appeal Docket No. 07-5190-CV

These are two Second Circuit Decisions for the Sompo Appeals. Union Pacific has authorized the filing of a petition for rehearing en banc. If the petition is unsuccessful Union Pacific will petition the Supreme Court for Certiorari.

12. Texas Tape & Label Co. v. Central Freight Lines, Inc., 2009 Tex. App. LEXIS 9602 (Tex. 2009)

Plaintiff Texas Tape & Label sued defendant motor carrier Central Freight Lines to recover $24,930 for loss of a package. Central claimed its liability was limited to $25 per pound under the bill of lading, on which no value was declared, and because its tariff limited its liability to $25 per pound in the absence of an agreed upon excess declared valuation. Following a bench trial in which the trial court ruled in favor of Central, the Court of Appeals of Texas affirmed. The Court of Appeals concluded the plaintiff did have a reasonable opportunity to choose, notwithstanding an alleged pricing agreement which was determined not to have been enforced since it was not signed. The Court concluded Texas Tape had the opportunity to declare a value on the bill of lading which would have controlled. An unsigned pricing agreement, which was not enforceable, did not nullify Texas Tape's reasonable opportunity to choose. The Court also rejected plaintiff's attempt to avoid the limitation by claiming it relied on the pick-up driver's statements which, plaintiff argued, essentially told it not to fill in a declared value on the B/L.

"As a general rule, a shipper is conclusively bound by tariff rules of a carrier and parole evidence cannot be received to vary the terms thereof." The court also cited *Sassy Doll and Hollingsworth & Vose* in affirming the trial court's judgment.

D. Preemption

13. Akin v. Williams Transfer and Storage Company, Inc., 2009 U.S. Dist. LEXIS 94122 (N.D. Miss. 2009)

In this household goods case, originally filed in state court and subsequently removed to federal court, defendant Williams, a disclosed interstate household goods agent of defendant United Van Lines, moved to dismiss plaintiff's state common law claims on grounds of Carmack Amendment preemption. The court, citing Fifth Circuit precedent in *Hoskins v. Bekins Van Lines,* granted the motion dismissing all state law claims but reserving for summary judgment defendant Williams' motion to dismiss all claims against it on the basis of its status as a disclosed interstate household goods agent.

14. O'Boyle v. Superior Moving & Storage, Inc., 2009 U.S. Dist. LEXIS 71437 (S.D.W.V. 2009)

Plaintiffs Marty O'Boyle and Shelia O'Boyle sued Defendant Superior for damages in excess of $10,000 associated with the transportation of their household goods from Florida to West Virginia. Superior removed the case and simultaneously filed a Motion to Dismiss, complaining the O'Boyles' state law claims of breach of contract and negligence were completely preempted by Carmack.

(continued on page 9)

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In response the O'Boyles filed a Motion to Remand and a Motion to Amend their Complaint. In their Motion to Amend, the O'Boyles acknowledged that the Carmack Amendment governed the transportation services provided, however, Plaintiffs in their Amended Complaint, in addition to asserting a Carmack cause of action also kept the breach of contract and negligence counts. Further, Plaintiffs argued that the Court was without federal jurisdiction to adjudicate the claims in the Amended Complaint.

The Court granted Plaintiffs' Motion for Leave to Amend the Complaint, denied Plaintiffs' Motion to Remand, and granted Defendant's Motion to Dismiss for the state law counts on the basis of complete preemption.

15. Pennsylvania Lumbermens Mutual Insurance Company v. Cripe Mobile Home Transport, LLC, 2009 U.S. Dist. LEXIS 104798 (N.D. Ind. 2009)

Plaintiff subrogee sued defendant motor carrier, Cripe, for $220,434 in damage to mobile office trailers damaged in transit from Indiana to Louisiana. The complaint alleged a claim in negligence. Defendant Cripe moved to dismiss on grounds of Carmack Amendment preemption. Interestingly, plaintiff did not respond to the motion. Nonetheless, the court, in spite of its recognition that the Carmack Amendment bars a shipper from seeking state or common law remedies, concluded that under the liberal notice pleading régime, the complaint alleged fficient facts to articulate a claim for damages arising from an interstate carrier's "negligent delivery of goods," and ruled it fell squarely within the authority of the Carmack Amendment. The court therefore held the plaintiff's complaint sufficiently stated a claim under the Carmack Amendment and denied the motion to dismiss.

E. Jurisdiction/Removal

16. Black v. Xpress Global Systems, Inc., 2009 Westlaw 3834419 (S.D. Tex.)

Black contracted with Xpress to move and store carpet from 1997 through 2005. When Black sought to remove the carpet from storage in 2005, Xpress told Black the carpet could not be located. Black eventually sued Xpress in state district court, and Xpress removed the case. Plaintiff moved to remand, claiming that the claims did not fall under Carmack because the goods were placed in storage, and not transported. The court determined that the Plaintiff only alleged that the Defendant was deficient in storing the goods, as opposed to shipping them. In the absence of an allegation that the goods were shipped, the court determined that the Carmack Amendment was not applicable, and the case was remanded. The court noted that Xpress sought discovery to determine whether Carmack would apply if Xpress also shipped the carpet in addition to storing it. The court ruled that the Xpress failed to raise that argument in its notice of removal, and the argument was waived.

17. Lopez v. BNSF Railway Company, United States District Court, Eastern District of California (Case No. 1:07-CV-01417 OWW GSA) (December 7, 2007)

A national railroad passenger corporation and a railway company were not required to get the consent of the other named defendants prior to the removal of the plaintiffs' action arising from fatal accident involving a truck and a train. The railroad defendants exercised reasonable diligence by checking the state court docket to ascertain whether the other defendants had been served with the plaintiffs' complaint. The railroad defendants were under no obligation to contact the plaintiffs' counsel to determine whether the other defendants had been served.

18. Smithfield Beef Group-Tolleson, Inc. v. Knight Refrigerated, LLC., 2009 WL 1651289, Fed. Carr. Cas. P 84,609 (D. Ariz.) (June 12, 2009)

Defendant Knight Refrigerated, LLC ("Knight") transported beef for Plaintiff Smithfield Beef Group ("Smithfield") pursuant to a transportation agreement. This case arises out of a July 2007 shipment where Knight allegedly failed to deliver the beef to the consignee by the specified date, causing the beef to spoil. Smithfield filed an action in state court for breach of contract and unjust enrichment claims. Knight removed the case and filed a motion to dismiss the complaint on the grounds that the Carmack Amendment preempted Smithfield's state law claims. Smithfield then filed a motion to remand, arguing that the parties had contractually waived the application of the Carmack Amendment. The Court agreed with Smithfield, and remanded the case to state court.

Although in the initial recitals of the transportation agreement the parties "expressly waive[d] any and all rights and remedies under the ICC Termination Act for the transportation provided hereunder pursuant to 49 U.S.C. § 14101(b)(1)," the Court conveniently ignored (and even failed to quote) section 7(a) of the transportation agreement regarding liability for loss, damage, or delay for shipments, which provided:

> CARRIER [Knight] agrees that, in the transportation of all goods hereunder, it assumes the liability of a common carrier for full actual loss, **subject to Provision 49 U.S.C. § 14706 (Carmack Amendment)** and 49 C.F.R. § 370 (Claim Regulations), and such liability to exist from the time of the receipt of any said goods by [Knight] until proper delivery has been made.

(Emphasis added.) Based on section 7(a) and the parties' reference to ICCTA provisions in at least four other places in the transportation agreement, Knight argued that the parties did not expressly waive the application of the Carmack Amendment. Specifically, Knight argued that the parties' reference to the Carmack Amendment throughout the transportation agreement directly contradicted the recital at the beginning of the agreement purporting to waive these provisions and, at the very least, demonstrated the intent of the parties to incorporate certain provisions of ICCTA (including Carmack) back into the transportation agreement.

The Court rejected Knight's position, finding that "the parties agreed to waive the Carmack Amendment as a whole, but chose to selectively incorporate certain aspects of it back into their agreement without adopting it as a whole." It appears that the Court mistakenly believed that all provisions under ICCTA are part of the "Carmack Amendment." Although various provisions of ICCTA are found throughout the transportation agreement, such as 49 U.S.C. § 13708 and 49 U.S.C. § 14709, the Carmack Amendment (i.e., 49 U.S.C. § 14706) is mentioned as a whole, not in parts (as the Court suggests).

19. Techdisposal.com v. Ceva Freight Management, United States District Court, Southern District of Ohio, Eastern Div7ision; Case No. 2:09-CV-356 (November 30, 2009)

Plaintiff Techdisposal.com was a technology waste company who brought suit in state court against motor carrier Ceva alleging multiple instances in which Ceva mishandled, lost or incorrectly shipped various waste shipments from Techdisposal's clients. Techdisposal claimed to have lost several clients as a result of these mishaps, including a client that had provided Techdisposal with over $150,000.00 per year in business. Ceva removed the case based upon

(continued on page 12)

TLP&SA MOTOR CARRIER CLAIMS SURVEY — 2009

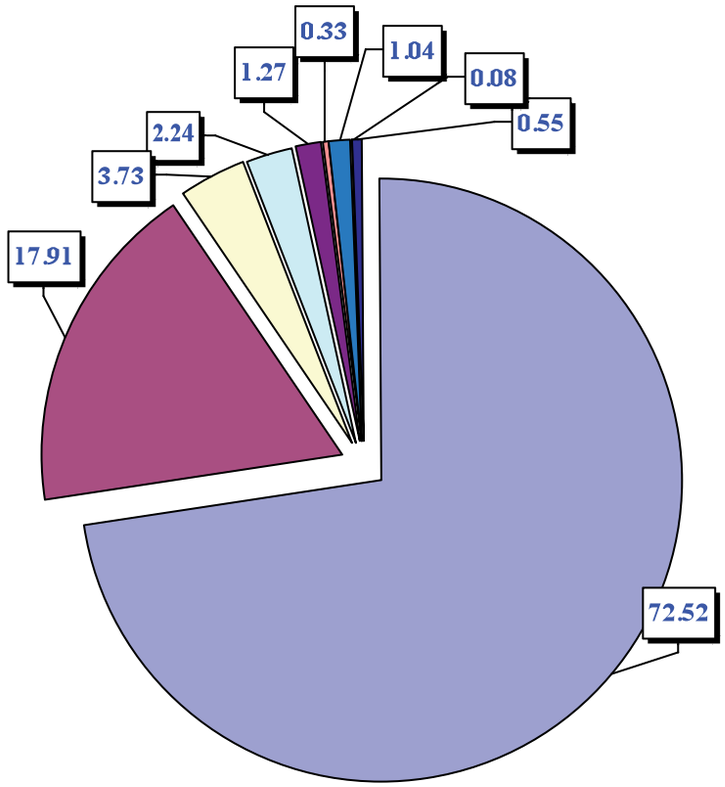
CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	17.91 %	12.15 %
Theft / Pilferage	1.27 %	.09 %
Visible Damage	72.52 %	58.05 %
Concealed Damage	3.73 %	4.00 %
Wreck / Catastrophe	2.57 %	.20 %
Delay	.08 %	.03 %
Water	.33 %	.10 %
Heat / Cold	.55 %	.07 %
Other	1.04 %	.16 %
	100.00 %	74.85 %

****

Total numbers of claims paid Vs. number of claims filed.	*74.85 %*
Total dollars paid Vs. total dollars filed.	*42.38 %*
Net dollars paid Vs. total dollars filed.	*37.45 %*
% of claims filed to total number of shipments made.	*.60 %*
% of claims paid to total number of shipments made	*.44 %*
% of claims paid to total number of claims filed	*74.85 %*
Total company claim ratio.	*1.04 %*
Percent of claims resolved in less than 30 days.	*79 %*
Percent of claims resolved 31-120 days.	*16 %*
Percent of claims resolved more than 120 days.	*5 %*

2009

TLP&SA
Claims Survey Chart



Visible Damage - 72.52%	Shortage - 17.91%	Concealed Damage - 3.73%
Wreck/Catastrophe - 2.57%	Theft/Pilferage - 1.27%	Water - .33%
Other - 1.04%	Delay .08%	Heat/Cold - 0.55%

(continued from page 9)

Carmack. Plaintiff opposed Ceva's Motion, alleging that the Court lacked jurisdiction because no single bill of lading exceeded $10,000. Alternatively, the Plaintiff contended that the Complaint alleged sufficient facts to make a Carmack Amendment claim and the Court should grant leave to amend the Complaint. Supplementally, Ceva had received a settlement demand from Plaintiff's counsel, at Ceva's request, that exceeded the $10,000 jurisdictional threshold. The Court found that the amount of the particular bill of lading was not indicative of the amount of controversy in a Carmack case. The Court also *did* consider the supplemental settlement demand as "other paper" and found that the Plaintiff had no claim due to preemption and its failure to appropriately amend its Complaint.

20. Totran Transportation Services, Ltd. v. Fitzley, Inc., 2009 Westlaw 3079246 (S.D. Tex.)

Totran sued Fitzley arising from damage to industrial equipment transported from Canada to Mexico. Fitzley brought claims against a third-party defendant, Ragat. Totran transported the subject equipment from Canada to Laredo. Totran then contracted with Fitzley to transport the equipment to San Luis Potosi, Mexico. Fitzley hired a Mexican motor carrier to transport the shipment within Mexico. The Mexican carrier, Ragat, moved to dismiss the third party complaint against it based on Carmack preemption. The court determined from the shipping documents that Ragat received the load at its yard in Nuevo Laredo, Mexico. Ragat then picked up the load and transported it to the consignee within Mexico, during which transportation the load was allegedly damaged. Because Ragat picked up the goods in Nuevo Laredo under a bill of lading that only covered the goods' transit within Mexico, the court determined that the bill of lading was not a through bill of lading covering transportation from the U.S. to Mexico, but instead covered transportation wholly within Mexico. The court determined that the Carmack Amendment was not applicable, and Fitzley's state law claims against Ragat were not preempted. Ragat also moved to dismiss the case on forum non conveniens grounds. After conducting analysis of the applicable factors, the court granted Ragat's motion to dismiss based on forum non conveniens.

F. Forum Non-Conveniens

21. Meritz Fire & Marine Insurance Co., Ltd. v. Hapag-Lloyd (America), Inc., 2009 WL 2916799 (C.D. Cal. 2009)

Subrogated cargo damage claim for $183,142.05 worth of frozen cheese shipped by ocean vessel from Seattle, Washington to South Korea.

The subrogor, Koho, contracted with World Class Logistics, Inc. (an NVOCC) to ship 72 pallets of cheese. In turn, World Class contracted with non-party Hapag-Lloyd AG (a vessel operating common carrier). Hapag-Lloyd (America) the domestic agent for Hapag-Lloyd AG issued a sea waybill to World Class specifying the temperature control at –23.3 degrees Celsius. The sea waybill contained a forum selection clause to Hamburg, Germany and extended COGSA to apply "before the Goods are loaded on or after they are discharged form the vessel." Plaintiff alleges the temperature control on the waybill was incorrectly listed and this allowed the cheese to freeze.

Hapag-Lloyd (America) moved to dismiss pursuant to the forum selection clause. The issue was whether the forum selection clause on the reverse side of the sea waybill should govern even though the subrogor was not a party to the sea waybill. Under COGSA, the Court would apply the forum selection clause. Plaintiff asserts Carmack applies instead and not the sea waybill because the parties did not formally opt out of Carmack.

The Court reviewed *Regal-Beloit* and examined COGSA extension "beyond the tackles" and Carmack. The Court declined to apply *Regal-Beloit* because that case was a "maritime case about a train wreck" and the instant case is strictly a maritime case. The sea waybill was not a through bill. Accordingly, based upon the reading of the waybill and the allegations of damage occurring on the ocean voyage, the Court found that COGSA applied pursuant.

The Court then found the forum selection clause on the reverse side of the sea waybill was not unreasonable under the circumstances. Plaintiff failed to even challenge that point. The Court also applied the terms of the sea waybill to the plaintiff's subrogor, Koho, event though it was not a party to the waybill because Koho "accepted" the waybill by suing on it, citing *Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty*, 408 F.3d 1250, 1254 (9th Cir. 2005) and *All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1432 (9th Cir. 1993).

Finally, the Court denied the Plaintiff's request for limited discovery on the issue of how, when and where the temperature was changed to -23.2 degrees Celsius and whether Defendant properly opted out of Carmack. The forum selection clause pertains to "any claim or dispute" and the court already determined COGSA, not Carmack, applies.

22. Royal Sun Alliance Insurance v. National Consolidation Services, 2009 WL 3048392 (D.N.J.)

This case arose from the theft of a shipment of goods during transportation from Pennsylvania to Illinois. Plaintiff sued the defendant motor carriers in federal court in New Jersey and the court issued an order to show cause why the action should not be transferred to the United States District Court in Illinois. Notwithstanding defendant Roadco's argument that the action should be transferred to Illinois because the main parties, including Roadco and co-defendant NCS were located in Illinois and the majority of witnesses and documents were located in Illinois, the court concluded nonetheless that private interests did not favor transfer to Illinois. The court ruled the plaintiff's choice of forum weighed against transfer because it had selected a New Jersey forum and the convenience of the parties also weighed against a transfer because Roadco would not be greatly inconvenienced by litigating in New Jersey since it did business in that state. Finally, the court noted public interest factors weighing against transfer to Illinois and that there were no public policy concerns or practical considerations favoring transfer.

G. Freight Forwarder/ Broker Liability

23. Huntington Operating Corp v. Sybonney Express, Inc., (2009 WL 2423860 (S.D. Tex.)

Plaintiff Huntington employed Custom, a transportation broker, to arrange a shipment of perfume from Florida to Texas. Custom hired Sybonney Express to transport the shipment from Miami to Houston. This shipment was stolen at a truck stop in Florida. Huntington sued Custom for failing to ensure that Sybonney had adequate insurance to cover the cargo. Huntington also sued for violations of the Texas Deceptive Trade Practices Act, negligent misrepresentation, fraud, negligence, negligent entrustment, breach of fiduciary duty and breach of contract. Custom moved for summary judgment. Custom argued that its actions as broker were not a producing cause of the shipper's damages.

The court determined that producing cause, which is the statutory standard under the Texas DTPA, is not primary cause, and held that the transportation broker bore the responsibility of ensuring that the carrier had insurance to cover the shipper's cargo, and that the broker cannot

escape liability by claiming it relied upon the carrier's misrepresentations regarding coverage. While noting that there is scarce authority on what duty is owed by broker to a shipper, the court ruled that even though as a broker, Custom did not have custody or control of this shipment at any time, Custom owes duty to prevent loss by ensuring that the carrier had insurance and was a reliable carrier. The court found that fact issues precluded summary judgment under this standard. The court granted Custom's motion on the fraud and negligent entrustment claims and denied the motion with respect to breach of contract.

24. Suzlon Wind Energy Corporation v. Fitzley, Inc., 2009 U.S. Dist. LEXIS 104782 (S.D. Tex. 2009)

Plaintiff Suzlon was the owner of a windmill nacelle worth $1 million that was damaged during transportation from Texas to Wyoming. Apparently, Suzlon had entered into an agreement with several of the ATS defendants for the inland transportation of the equipment. Defendant ATS Logistics contracted with Fitzley, a motor carrier, to handle the actual transportation of the equipment. In this decision, the court was presented with ATS' motion to strike the testimony and opinions of Suzlon's liability expert, one Whitney Morgan, concerning, *inter alia*, Fitzley's out-of-service percentages, the bill of lading, the cause of the damage and the driver's qualifications. Although the plaintiffs abandoned most of their Morgan's proposed opinions, there remained his opinion concerning alleged negligence of the ATS defendants in subcontracting with Fitzley. After reviewing the *Daubert* and *Kumho Tire* criteria, the court ruled that since plaintiff's amended complaint did not allege a claim or facts suggesting a claim for negligent hiring of Fitzley, they had failed to show Morgan's testimony and opinions to be relevant and ruled the testimony inadmissible. Moreover, the court noted that Morgan acknowledged he had never hired any carriers to transport freight and had no personal knowledge of motor carrier industry standards for evaluating carriers generally as he had merely worked in companies that hired motor carriers many years ago. For those reasons the court concluded Morgan would not be permitted to testify.

H. Damages

25. Dubey v. Public Storage, Inc., 2009 Ill.App.LEXIS 1049 (2009)

Storage company gave its customer a receipt for storage of goods. The receipt had the wrong unit number on it. Although customer paid all of the storage bills, the storage company apparently assigned payment to the storage number shown on its documents, not the number of the unit in which the goods were actually stored. Since the storage company's records showed that customer had not paid storage charges ($191.00), storage company auctioned off plaintiff's goods. Plaintiff sued and a jury awarded damages for breach of contract and conversion ($5,000.00 on each count) and punitive damages ($745,000). In a separate trial, the trial court awarded damages under the Illinois Consumer Fraud Act ($69,145.00) and punitive damages ($207,435). Both the storage company and the plaintiff appealed. The court allowed the pleading of multiple causes of action but stated that plaintiff could only recover for one of the two claims at the jury trial: either breach of contract or conversion.

The appellate court reduced the jury's award of compensatory damages to one award of $5,000.00 based on the conversion claim. However, the appellate court also found that the compensatory damages awarded on the violation of the Illinois Consumer Fraud Act could stand. The appellate court affirmed the decision of the lower court to apply the Illinois Landlord and Tenant Act to void the storage company's limitation of liability ($5,000.00). The appellate court further found that the rental agreement was unconscionable, in part because the storage company's employee had failed to explain the limit of liability in detail after plaintiff told the employee that she intended to store goods worth more than $5,000.00 in the unit. The case was remanded for reconsideration of the conversion and the amount of punitive damages awarded. A punitive damage ratio of 149 to 1 appeared excessive, even to this court.

26. Ensign Yachts, Inc. v. Arrigoni, 09-CV-209 (D. Ct. 2009)

Motion granted for Plaintiff's prejudgment attachment and order of garnishment against Defendant personally and against his trucks, trailers and equipment in the amount of $728,726.72.

Cargo loss case involving interstate transportation of a 55' Cigarette Super Yacht from New Jersey to Florida in December 2007. Plaintiff sought damage to the vessel and consequential damages for loss of a pending sale of the vessel. The vessel was ultimately repaired and sold for lesser value.

Plaintiff filed timely claims with the Defendant, which claims were refused. Defendant's insurance company declined coverage for the loss on three bases, as follows (1) insurance was available for damage from an "external cause" and it was not clear the damage was the result of an "external cause," (2) consequential damages were excluded from insurance coverage and (3) the insurance policy covered loss to goods shipped in transit without a charge, not for goods carried by the Defendant for a charge (as was the case herein).

Shortly after filing the lawsuit, the Plaintiff moved for prejudgment attachment. The District Court denied the motion because the question of Defendant's insurance appeared to be still open. After the insurance company denied coverage, Plaintiff moved for Reconsideration and the Court granted prejudgment remedies to the Plaintiff.

Defendant argued Plaintiff was exaggerating the damages and was seeking consequential damages which were barred under Carmack. Consequently, the Defendant argued, damages were limited to only the difference in market value and thus an attachment of $971,653.63 was unwarranted. Besides, Defendant had no assets to dissipate, which is one of the factors in considering whether to award a prejudgment remedy.

At a hearing on the motion, the Defendant admitted he did not have the required transportation permits and that he damaged the vessel en route. Based on the testimony the Court found probable cause for liability on the merits.

As for damages, the Court found there was probable cause to award consequential damages under Carmack. Plaintiff testified he verbally told the Defendant about the Plaintiff's pending sale and that the Plaintiff required the Defendant to provide proof of insurance of at lease $1,000,000.00.

Citing *Project Hope v. M/V IBN SINA*, 2001 WL 1875854 (S.D.N.Y. 2001) and *Consolidated Rail Corp. v. Primary Indus. Corp.*, 868 F. Supp. 566 (S.D.N.Y. 1994), the Court found that for the purposes of a prejudgment remedy of attachment, the Defendant was on notice of the need to deliver the vessel promptly and the value of the vessel. That knowledge on the part of Defendant was sufficient for a finding of probable cause on a motion for prejudgment attachment that the Defendant may be liable for consequential damages.

The Court granted the motion for prejudgment attachment in the amount of $728,726.72 for actual and consequential damage plus 10% statutory interest. The Court declined Plaintiff's request to include counsel fees and costs in the prejudgment attachment amount.

27. Fireman's Fund Insurance Company v. Never Stop Trucking, Inc., 2009 U.S. Dist. LEXIS 95165 (E.D.N.Y. 2009)

In this subrogation case, plaintiff Fireman's Fund moved for a default judgment against the defendant motor carrier who had failed to deliver a shipment moving from Florida to New York. Fireman's Fund had paid its insured $356,112 but also sought interest from the date of loss, plus attorney's fees. The court ruled Fireman's Fund was not entitled to interest because it had not paid any interest to its insured and an interest award would over compensate plaintiff. The court also denied Fireman's Fund's request for attorney's fees and expenses under the Carmack Amendment although it did award costs of bringing suit plus interest as of the date Fireman's Fund paid its insured.

28. Osman v. International Freight Logistics, Ltd., et al., 2009 WL 3273840 (E.D. Mich.) October 9, 2009

The first two opinions appeared on the June 2009 Agenda.

Co-defendant Towne Air was granted summary judgment shortly before trial and defendant International Freight Logistics (IFL) tried the matter. A verdict of $12,000 was rendered in Plaintiff's favor. Thereafter, Plaintiff' moved for attorney fees in excess of $50,000. After post-trial briefing, the court denied the motion for attorney fees. Plaintiff claimed that IFL was liable for attorney fees under 49 USC §14708 which, arguably, applies only to household goods movers. However, Plaintiff, relying upon the *Trepel II* decision, maintained that §14708 applied to all carriers since the generic term "carrier" was used in the statute and there is nothing of any binding authority indicating it applied only to household goods carriers. The court looked at the section's title which mentioned household goods carriers, but noted this was not dispositive. IFL argued that *Trepel II* was distinguishable because the underlying definitions found in 49 USC §13102 had been amended since *Trepel II* and an explicit definition for household goods motor carrier is now found at USC §13102(12). The court observed that while §13102 was amended to add a definition of household goods carrier, that definition was not added to §14708. However, the court also observed that Congress included the following provision in 2005 legislation that added the specific definition of household goods motor carrier to 49 USC §13102:

> "Application of certain provisions of law.—The Provisions of title 49, United States Code, and this subtitle (including any amendments made by this subtitle), that relate to the transportation of household goods apply only to a household goods motor carrier (as defined in section 13102 of title 49, United States Code)."

The court noted this language was fully enacted by Congress and, therefore, is fully binding law despite the fact that it was not codified in the United States Code. Since §14708(d) only applies to disputes that concern the transportation of household goods, the "Application of Certain Provisions of Law" provision clearly indicates that §14708(d) only applies to household goods motor carriers as defined by U.S.C. §13102(12). Therefore, because IFL does not qualify as a household goods motor carrier under §13102(12), Plaintiff could not recover attorney fees under §14708(d).

Plaintiff filed a Notice of Appeal two days after issuance of the opinion. It is not yet known whether Plaintiff will appeal the summary judgment granted Towne Air or only the denial of attorney fees.

29. Symonds by Dayton and Packard Logistics, Inc. v. Trans America, Inc., Will County, Illinois, Circuit Court No. 08 AR 922

A shipment of concrete forms which were to be displayed at a trade show was delivered late. Plaintiff broker and its shipper-customer sued carrier for losses due to inability of the shipper to display the forms at the trade show. Damages requested included show planning, preassembly, travel (hotel and related charges), space charges, facility service charges, substitution of equipment, and detention charges. The court awarded only the cost of transporting the items that arrived late (a finding it later reversed); charges for unusable rental space; and unused by required spaces. All other claims were denied. The court awarded the plaintiff amounts which were proved to have been costs which were wasted as a result of the carrier's failure to deliver the shipment on time. The remainder of the amounts sought were speculative and/or not reasonably foreseeable to the defendant under the Carmack Amendment.

I. Miscellaneous

30. Cameron v. Swift Transportation, Inc., American Arbitration Association; AAA Case No. 72 125 Y 00360 09

Arbitration Decision and Award involving owner-operator's assertion of breach of contract and other allegations after Swift terminated operating agreement. Decision and award dismissing the owner-operator's arbitration.

Petitioner was an owner-operator for Swift under 2 agreements until he was terminated by Swift on 10 days notice in June 2005. Petitioner sued in the United States District Court for the Central District of California in August 2006. The case was dismissed in March 2007 due to an arbitration clause in the agreements with Swift. After attempting to file an arbitration with the AAA, petitioner finally was able to file a petition in arbitration 2 years later in April 2009. Swift asserted various defenses including the applicable period of limitations.

The Petition in arbitration alleged breach of contract, breach of the implied covenant of good faith and fair dealing, mismanagement of tractor, creative accounting to cause financial hardship, fraud, malice or oppression, conspiracy to cause financial hardship, intentional infliction of emotional distress, wrongful termination, violation of California Business and Professional Code Section 17200 and interference with contract. The AAA found the majority of the tort claims were barred by the statute of limitations.

The AAA Arbitrator enforced the agreement as written which stated Swift could terminate on 10 days notice. Because Swift terminated the petitioner on the required 10 days' notice, there was no breach of contract. Swift conceded there was no reason to terminate except Petitioner had become disabled in April 2004 and Swift hired drivers to replace him. Noting Swift's decision was "less than optimal," the arbitrator nevertheless ruled in favor of Swift.

As for the fraud and mismanagement claims, there was no proof by the Petition to support those claims and the Arbitrator dismissed them.

The Arbitrator also applied federal preemption citing *American Trucking Associations v. City of Los Angeles*, 559 F.3d 1046 (9th Cir.

2009) and dismissed the state created Business and Professional Code Section 17200 alleged violation.

31. Carolina Casualty Insurance Company v. Tymer Yeates and Shari Yeates, 584 F. 3d 868; 2009 U.S. App. Lexis 20216

Carolina Casualty issued a scheduled auto liability policy to an interstate for hire motor carrier with a MCS 90 attached. The policy limit and the MCS 90 limit were both $1 Million. An accident occurred involving a truck operated on behalf of the motor carrier. The truck was not a covered auto under the Carolina Casualty policy but was covered under a policy issued by State Farm. The limit of the State Farm policy was $750K. The accident involved serious injuries. State Farm paid its $750k limit. Carolina Casualty filed a declaratory judgment action seeking to establish that its policy and MCS 90 did not apply. The district court and a three judge panel of the 10th Circuit followed *Empire Fire & Marine Ins. Co. v. Guar. National Ins. Co.*, 868 F2nd 357 (10th Cir, 1989) to alter the terms of the Carolina Casualty policy to extend coverage much the way the 9th Circuit did in the dreaded Nueva decision. Carolina Casualty petitioned the 10th Circuit for an opportunity to revisit Empire Fire on the grounds that it was out of step with the majority of circuit courts on this point. The petition was granted and the court invited participation from FMCSA through the US Department of Justice.

Justice contended by brief and argued at oral argument that the MCS 90 should be treated as an absolute obligation to pay and not as a mere surety obligation. Justice claimed that the MCS 90 should respond to the full extent of its limit regardless of whether the minimum applicable financial responsibility limit was otherwise satisfied. In the attached resoundingly well reasoned opinion, the 10Th Circuit rejected the government's arguments, reversed Empire Fire and held that the MCS 90 is inapplicable once the minimum applicable limit ($750k here) has been satisfied on behalf of the motor carrier. The Justice lawyer was actually reprimanded during oral argument for lack of candor in citing cases. Despite repeated efforts to gain support for Carolina Casualty's position in discussions with Justice and contacts at FMCSA, the government steadfastly opposed the surety approach to the MCS 90. Its motivation in this regard remains a mystery.

As a consequence of this decision, the 10th Circuit is now in line with virtually every other Circuit in treating the MCS 90 as a mere surety obligation. It is also the first direct pronouncement that the MCS 90 need not respond above the applicable mandatory limit for the particular cargo on board. In most cases, this will mean that the $1 Million MCS 90 creates an obligation not to exceed $750K. Other circuit courts might disagree with this aspect of the decision, but, at present, this decision stands alone as the only authority on this issue. It is universally recognized that issues relating to MCS 90 are governed by federal law. Accordingly, insurance companies should be comfortable applying this en banc decision outside of the 10th Circuit.

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