IN TRANSIT

Transportation Loss Prevention & Security Association

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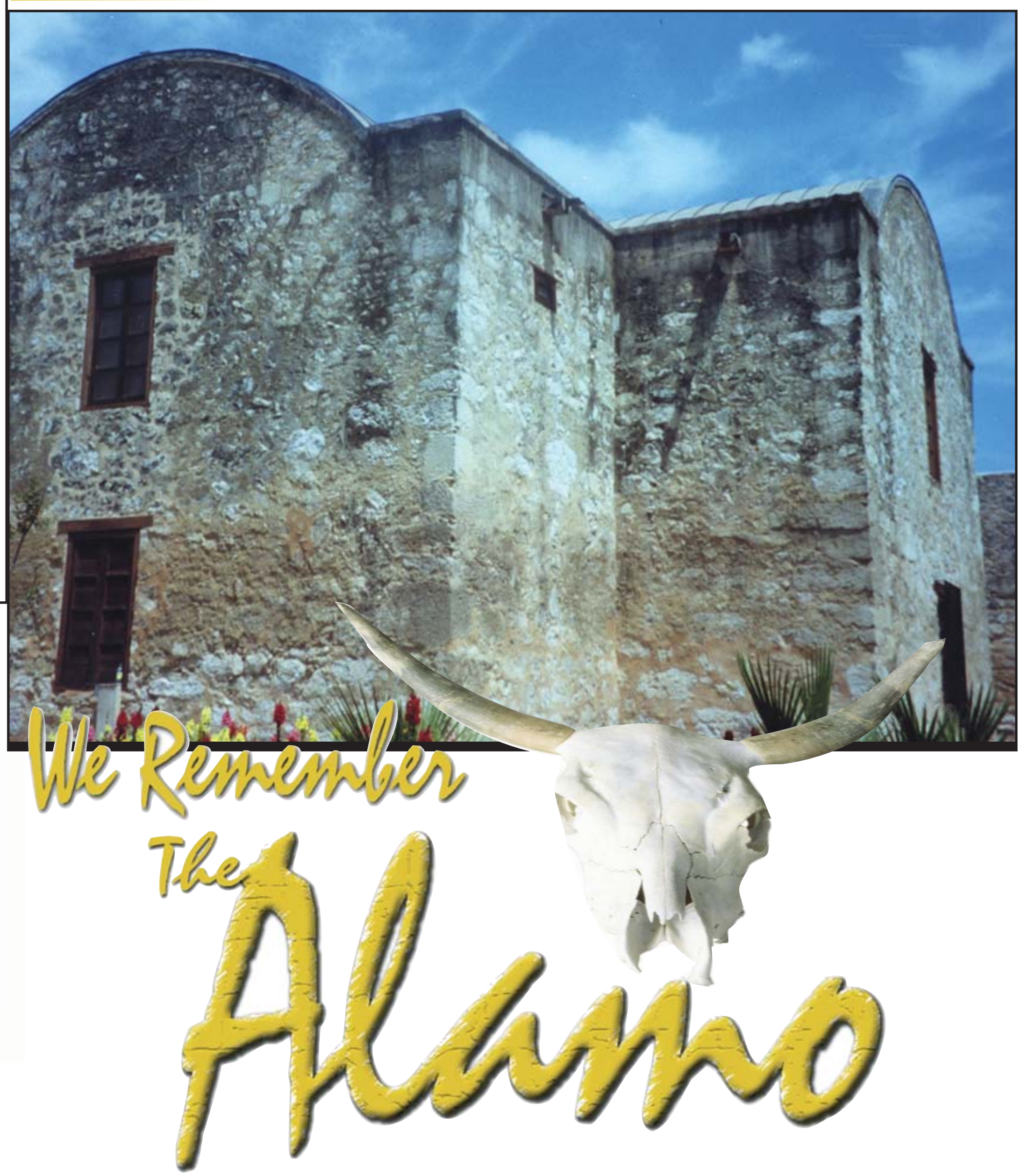
TLP&SA 6TH ANNUAL JOINT CONFERENCE



INSIDE

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FROM THE EXECUTIVE DIRECTOR...

REFLECTIONS ON A CONFERENCE

The room is silent. The lights are out. The Exhibits are gone. Most of the attendees are rushing off to make connections home. The Conference is over. **Was it worth it? You bet it was.**

Now is the time for some quiet reflection. It takes the better part of a year for th e combined forces of the Transportation Loss Prevention and Security Association (TLP&SA) and the newly named Transportation & Logistics Council (TLC) to put together an educational conference that will address the needs of the industry. I will not comment at this time on the logistical nightmare in choosing a proper venue and coordinating with the hotel so that the conference goes smoothly. I will concentrate only on the Conference itself.

Initially, many meetings are held and conference calls conducted to determine what issues and topics should be addressed. Have we done that before? Will shippers, carriers and other attendees be interested in the subject matter? Is the topic current? These are some of the questions that must be answered before a Program can take shape.

After the topics have been selected, we must start the exhausting task of finding the right speakers and presenters who will make the subjects clear and interesting. Once the right people are located, we must obtain a commitment and hope that nothing happens which will cause a speaker to cancel at the last minute.

Behind the scenes, Exhibitors must be lined up. Space must be segregated and arrangements must be made to have equipment received by the hotel and set up for the start of the Conference. I am sure we do not have to tell transportation and logistics professionals how many things can possibly go wrong.

But then the big day arrives, the start of the conference. Executives are coming in from everywhere asking questions ranging from where I register to how far away is the River Walk. People who have met before are greeting each other warmly and newcomers are welcomed like old hands. Pictures of the family are displayed and everyone is catching up on the year's events. Something good is happening. Those who have arranged this conference are beginning to feel better, everyone except George Pezold. George takes things so seriously he does not begin to feel better until several weeks after the event.

But like a successful opening night all went well and if there were some minor flaws, nobody noticed. A review of the Critique Sheets demonstrates that all the hard work paid off. The positive responses were off the charts. The presentations were meaningful, the speakers knew what they were talking about and some were even humorous. The food was good. The candy was better, and everyone filled their pockets with free stuff from the Exhibitors. We will all remember the Alamo city fondly. The Conference was an unqualified success.

So now what? Well meetings must be held, conference calls arranged, topics addressed and speakers obtained because we are already starting on next year's Conference in Orlando. **But is it worth it? You bet it is.**

William D. Bierman, Esq.
Executive Director

THE NEW BANKRUPTCY CODE'S ORDINARY COURSE OF BUSINESS DEFENSE TO A PREFERENCE PROCEEDING

By Rick A. Steinberg, Esq. - Nowell Amoroso Klein Bierman, P.A. - Hackensack, NJ

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA" or the "new bankruptcy code") took effect. While most of the changes in the BAPCPA from the prior bankruptcy code, which was enacted in 1978, relate to consumer bankruptcies, there are some significant changes in relation to business bankruptcies. One of the most important, especially as it relates to motor freight carriers, is the change in the ordinary course of business defense to a preference adversary proceeding. The changes in the bankruptcy laws as they relate to the ordinary course of business defense apply to preference adversary proceedings brought in the context of underlying bankruptcy cases filed on or after October 17, 2005. For all preference adversary proceedings brought in a bankruptcy case which was filed before October 17, 2005, the old bankruptcy code provisions apply, even if the preference adversary proceeding is filed on or after October 17, 2005.

WHAT IS A PREFERENCE PROCEEDING?

A preference adversary proceeding is a lawsuit brought by the trustee, debtor-in-possession or creditors' committee, usually, to seek to recover for the benefit of a debtor's estate payments made by the debtor to its creditors or vendors within 90 days of the bankruptcy filing for pro rata distribution to creditors. The theory behind the preference provisions in the bankruptcy laws is that one creditor should not be "preferred" over another when a debtor is insolvent and cannot make full payment to all its creditors. A preference proceeding is the mechanism whereby a debtor seeks to "avoid" the transfer of its property to the creditor and recover the transferred property for the benefit of its estate. Oftentimes, preference proceedings will be brought against motor freight carriers, who provide a debtor with the vital transportation and logistics services that it needs to try to keep its business afloat while it slides into bankruptcy. Under the bankruptcy laws, however, a motor freight carrier or other defendant in a preference adversary proceeding can defeat the lawsuit by proving that it provided the transportation or logistics services in the ordinary course of business.

WHAT IS A PREFERENCE?

Under the bankruptcy code, a trustee may avoid any transfer of an interest of a debtor in property: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the bankruptcy petition; (5) that enables such creditor to receive more than such creditor would receive if: (A) the case were a case under chapter 7 of the bankruptcy code; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of the bankruptcy code. 11 U.S.C. § 547(b).

THE ORDINARY COURSE OF BUSINESS DEFENSE

The ordinary course of business defense is the primary affirmative defense to a preference adversary proceeding. As an affirmative defense, the defendant bears the burden of proof on all elements of the defense by a preponderance of the evidence. The policy behind the ordinary course of business defense is that a creditor should not be discouraged from providing crucial goods or services to a struggling debtor because of fear that the payments may be recoverable by the debtor or its trustee if the debtor ends up in bankruptcy.

THE OLD BANKRUPTCY CODE

The ordinary course of business defense under the old bankruptcy code had three separate, distinct elements, all of which had to be separately proven by the defendant to prevail on the defense. The old bankruptcy code said that the trustee may not avoid a transfer under the preference section to the extent that such transfer was: (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms. The first element, that the debt was incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, is seldom disputed or litigated. The second and third elements, however, spawned endless litigation and countless reported decisions.

Under the old bankruptcy code, a defendant in a preference proceeding in every federal circuit except the Eleventh, which covers Georgia, Florida and Alabama, had to prove that the transfer was made by the debtor to the creditor in the ordinary course of business between the parties and that the transfer was made according to ordinary business terms in the industry. The Eleventh Circuit, in a case called Marathon Oil Co. v. Flatau (In re Craig Oil Co.), 785 F.2d 1563 (11th Cir. 1986), conflated the third element, that is, that the transfer was made according to ordinary business terms in the industry, into the second element, that is, that the transfer was made in the ordinary course of business between the parties. Every other federal circuit court that ruled on the issue, however, found that the second and third elements were separate and distinct elements that had to both be affirmatively proven by the defendant to prevail on the ordinary course of business defense. The second element, ordinary course of business between the parties, is called the "subjective" test, because courts look only to the dealings between the particular debtor and creditor. This element is susceptible to fact witness testimony. The third element, ordinary business terms in the industry, is called the "objective" test, because courts look at how other creditors in the same industry as the defendant handle similar transactions. This element often required the creditor to hire outside experts to testify about industry practice in general, despite the fact that

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TRANSPORTATION CASE SUMMARIES

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

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1. M. Fortunoff of Westbury Corp. v. Peerless Insurance Company, 432 F.3d 127 (2nd Cir. 2005). ***(BMC-32 cargo insurance endorsement)*** The U.S. Court of Appeals for the Second Circuit reversed a district court ruling that the mandatory minimum cargo insurance filing under the BMC-32 Endorsement Form applied to motor contract as well as common carriers. The Court of Appeals ruled that even though the ICC Termination Act of 1995 abolished the distinction between common and contract carriers, the Federal Motor Carrier Safety Administration, acting pursuant to the so-called "transition rule," nonetheless continues to register motor carriers as either "common" or "contract" carriers and its cargo liability insurance requirements at 49 C.F.R. §387.301(b) apply only to "common carriers." Although the legislative history of the ICCTA supports the conclusion that the distinction between common and contract motor carriers no longer exists, with respect to the topic of insurance, Congress left it to the Secretary of Transportation's discretion whether to require cargo liability insurance. Since the ICCTA gave the Secretary of Transportation (and the FMCSA as the Secretary's delegate) broad discretion to decide which motor carriers do and do not need to have cargo insurance, and since Congress' creation of one type of motor carrier did not necessarily create only one type of carriage, the FMCSA's regulations requiring cargo insurance only for common carriage but not contract carriage was not an arbitrary distinction. The FMCSA did not intend the BMC-32 Endorsement to apply to both types of carrier services, but "rather, [the FMCSA] went out of its way to retain the distinction between common and contract carriage in its cargo liability insurance requirements."

2. Spray-Tek, Inc. v. Robbins Motor Transportation, Inc., 2006 U.S. Dist. LEXIS 17879 (W.D. Wis. 2006). ***(Prima facie case; limited and special damages)*** A shipment consisting of a 25,000-pound drying chamber was damaged during transportation by the defendant from Wisconsin to Pennsylvania. The shipper and the defendant had not discussed the value of the drying chamber prior to shipment, and the motor carrier's witness admitted that "value really doesn't come into play" in preparing the defendant's transportation estimate. The bill of lading contained standard language stating "where the rate is dependent on value, shippers are required to state . . .the agreed or declared value of the property…," but the shipper failed to declare a value on the bill of lading. Plaintiff's cost of manufacturing a replacement-drying chamber was $233,100. On the parties' cross-motions for summary judgment, the court ruled that the plaintiff had established a prima facie case of liability, notwithstanding the defendant's contention that since the drying chamber never actually arrived at its final destination, the plaintiff could not prove "arrival" in damaged condition. The court also ruled that the terms of sale between the plaintiff and the manufacturer were sufficient to establish that it was the owner of the drying chamber when it was damaged, that the risk of loss had passed to plaintiff and that plaintiff was entitled to summary judgment on its Carmack Amendment claim. As to defendant's claim that its liability was limited to $2,500 per ton (or $32,500.00) the court recognized that although, today, there is no written tariff-filing requirement, and carriers need only provide a copy to the shipper upon request, because the contract was ambiguous as to whether the defendant gave the shipper a reasonable opportunity to choose between two or more levels of liability, it would not enter summary judgment for the defendant on its released rate defense. Of particular significance on this point is the Court's recognition of the defendant's testimony "that value does not come into play when rates are determined . . .Dimensions are what is important." Finally, the court ruled that the under the Carmack Amendment, special damages generally are not recoverable, and since the defendant was unaware when it undertook the transportation that damage to the shipment might result in additional costs and damages to plaintiff's Pennsylvania plant, defendant was entitled to summary judgment on the issue of special damages.

3. Accu-Spec Electronic Services, Inc. v. Central Transport International, et al., 2006 U.S. Dist. LEXIS 20346 *(W.D. Penn. 2006)*. ***(Damages; prejudgment interest)*** Plaintiff sued a freight forwarder (Logistics Plus) and a motor carrier (Central Transport) for damage to an x-ray machine transported in interstate commerce. Following a trial in which the jury, in answering special interrogatories, found the plaintiff entitled to recover $21,000 from both Central Transport and Logistics Plus, plaintiff moved for judgment as a matter of law that its damages were actually $45,371 and sought pre-judgment interest on that amount. The court, citing undisputed evidence that plaintiff's damages were $45,371 and certain concessions by Central Transport that the repair costs were reasonable and necessary, granted plaintiff's motion for judgment as a matter of law for the full amount of $45,371, plus pre-judgment interest on its damages from 120 days following plaintiff's filing of its amended claim with Central Transport. Also noteworthy is the court's denial of plaintiff's motion for reconsideration of its prior denial of summary judgment on plaintiff's claim under 49 U.S.C. §14704.

4. KPX, L.L.C. v. Transgroup Worldwide Logistics, Inc., 2006 U.S. Dist. LEXIS 6772 (D. Ariz. 2006). ***(Attorney's fees award)*** This decision takes cargo loss and damage litigation into a new area with potentially serious consequences for carriers. KPX contracted with a freight broker, Road-e-o, who contracted with Transgroup, a freight forwarder, to transport a shipment of 170 electric scooters from KPX in Arizona to its customer in Texas. Road-e-o furnished a uniform straight bill of lading to KPX, which contained language limiting Road-e-o's liability to $25 per pound. When the motor carrier hired by Transgroup, Value Truck, came to pick up the shipment, the truck driver signed Road-e-o's straight bill of lading and, at the truck driver's request, KPX also signed a Transgroup bill of lading, which contained a liability limitation of $0.50 per pound and included the language "Airbill No." KPX filed an action in state court against Transgroup to recover $7,946 in damages for the carrier's failure to deliver some of the scooters. KPX alleged three claims: one under the Carmack Amendment, one for breach of contract and a third claim alleging a private cause of action pursuant to 49 U.S.C. §14704, which permits a private cause of action for persons "injured" by carriers or brokers who violate the ICCTA and provides for an award of attorney's fees to a successful injured party. Transgroup removed the case to federal court and the parties cross-moved for summary judgment. Since KPX's actual damages were less than $10,000, the court dismissed its Carmack Amendment and breach of contract claims. However, the court ruled that federal question jurisdiction existed for KPX's claim under 49 U.S.C. §14704(a)(2) and (e). The court ruled that Transgroup was liable to KPX for damages and attorney's fees under 49 U.S.C. §14704(a)(2) and (e) by operating under the guise of an air freight forwarder, as evidenced by its issuance of an "Airbill" in lieu of a motor carrier or freight forwarder bill of lading. The court granted KPX's motion for summary judgment on its §14704 claim in the amount of $7,946.00, plus attorney's fees, rejecting Transgroup's argument that §14704(a)(2) pertains only to damages associated with violations of agency orders. The case is now pending on appeal in the Ninth Circuit.

5. Kaur v. All Nippon Airways Co. Ltd., 2006 U.S. Dist. LEXIS 22504 (N.D. Cal. 2006). ***(Warsaw preemption)*** Plaintiff sued defendant air carrier for the loss of two pieces of cargo from a five-piece shipment transported from India to California. The complaint, filed in state court, alleged several common law causes of action. Defendant removed the case to federal court and moved to dismiss all of plaintiff's claims as preempted by the Warsaw Convention. Plaintiff alleged that the loss occurred at defendant's warehouse, and defendant submitted evidence showing that its warehouse was located within the grounds of the San Francisco International Airport. In granting defendant's motion to dismiss, the court held that the Warsaw Convention preempts state and local claims "in the interest of achieving uniform application of liability rules with respect to claims arising from international air transportation." Article 18 of the Warsaw Convention addresses air carrier liability and governs a plaintiff's claim if the loss occurs "while the cargo was in the air or on the ground but within the confines of airport's boundaries." The court further ruled that plaintiff's allegations of intentional or gross negligence do not defeat the application of the Warsaw Convention.

6. Bowman v. Paul Arpin Van Lines, Inc., 2005 U.S. Dist. LEXIS 38437 (W.D. Virginia 2005). ***("Transportation"; preemption)*** Plaintiff hired the defendant household goods carrier to transport his household goods shipment from Massachusetts to Virginia, declaring a $100,000 value for the shipment. The truck arrived a day early, and while the tractor-trailer containing the plaintiff's household goods was in a storage facility, a flood caused severe damage. Plaintiff sued Arpin under the Carmack Amendment and for misrepresentation and gross negligence under Virginia law. Arpin moved to dismiss the state law claims on grounds of Carmack Amendment preemption. Plaintiff contended Carmack did not apply to his state law claims because Arpin's alleged fraudulent conduct occurred before the transportation of the property and because the property was in storage when it was damaged. The court granted Arpin's motion to dismiss the state law claims and rejected plaintiff's narrow reading of the term "transportation." It ruled that under the ICCTA "transportation" includes arrangements made for the movement of goods as well as the movement itself. "The Carmack Amendment preempts a claim when the interstate transportation of goods is the basis of the plaintiff's claim, and there is no cause of action divisible from that shipment."

7. Norfolk Southern Railway Company v. Consolidated Freightways Corporation, 2006 U.S. App. LEXIS 8698 (9th Cir. 2006). ***(Interline trust doctrine)*** Before filing a voluntary petition in bankruptcy in 2002, Consolidated Freightways had done extensive business with Norfolk Southern Railway. Consolidated Freightways had collected freight charges on shipments it interlined with Norfolk Southern between October 2001 and October 2002, and the portion due Norfolk Southern amounted to about $1.5 million in freight charges. Norfolk Southern contended that Consolidated Freightways held the money in trust for Norfolk Southern under the "interline trust doctrine," and, therefore, the money was not part of the bankruptcy estate. Norfolk Southern filed suit to collect its interline charges and the bankruptcy court granted Consolidated Freightways' motion to dismiss. On appeal, the U.S. Court of Appeals for the Ninth Circuit rejected the interline trust doctrine, affirmed the bankruptcy court's ruling and declined to adopt the interline trust doctrine as a matter of federal common law. The Court considered the two federal interests involved: federal bankruptcy law versus federal interstate transportation law, and determined that application of federal bankruptcy law does not justify the creation of a new federal common law rule. The Court pointed out that the ICC Termination Act ("Transportation Act") did not create a federally-guaranteed system of payment of interline balances and rejected Norfolk Southern's argument that the interline trust doctrine should be enforced on the basis of the general federal policy to "foster sound economic conditions in transportation and to ensure effective. . .coordination between real carriers and other modes." The Court added that the Transportation Act does not contain any provisions encouraging the development of federal common law by the courts.

8. The Goodyear Tire & Rubber Co. v. Great Southwest Express Co., Inc., 2006 U.S. Dist. LEXIS 12485 (N.D. Georgia 2006) ***(Damages and prejudgment interest)*** Plaintiff sought damages of $300,000 plus pre-judgment interest for the loss of five shipments of tires it tendered to the defendant motor carrier, which were stolen from defendant's terminal. In granting plaintiff's motion for summary judgment and denying defendant's cross-motion for summary judgment, the court, after first dispensing with defendant's objection to a late filed affidavit, ruled that plaintiff was entitled to its invoice (retail) value for the stolen tires ($300,000). Rejecting defendant's contention that plaintiff should be awarded only its replacement costs since it allegedly lost no sales, the court ruled that the defendant motor carrier had not shown why the court should deviate from the general rule of awarding market value. Plaintiff also was awarded pre-judgment interest at the post-judgment interest rate (3.49% per annum) from the date it filed its claim with defendant. The court rejected plaintiff's request for pre-judgment interest at the rate of 1.5% per month as "exorbitant."

9. Worldwide Moving & Storage, Inc. v. District of Columbia, 2006 U.S. App. LEXIS 9297 (D.C. Cir. 2006) ***(State enforcement action versus household goods motor carrier; preemption)***. Plaintiff Worldwide Moving & Storage sought an injunction to prohibit the defendant, District of Columbia, from imposing a surety bond requirement on plaintiff, an interstate motor carrier of household goods registered with the Federal Motor Carrier Safety Administration, and its officers, contending such a requirement was preempted by federal law. Plaintiff's principal, one Melvin Yates, had pled guilty in state court to five misdemeanors involving his failure to comply with District of Columbia regulations governing local household goods moves. The state court found Yates in civil contempt, imposed a fine of $100 per day upon him and entered an injunction ordering him to obtain a $100,000 surety bond. Subsequently, Yates filed for bankruptcy and began operating plaintiff Worldwide, which commenced the present action to prevent the District of Columbia from enforcing the surety bond requirement. The federal district court dismissed Worldwide's complaint for lack of constitutional standing and the Court of Appeals affirmed. In affirming, the Court observed that under the "abstention doctrine," a federal court may dismiss a federal claim when there are ongoing state proceedings that are judicial in nature, the state proceedings implicate important state interests, and the proceedings afford an adequate opportunity in which to raise the federal claims. The Court noted that Worldwide's complaints met all of those criteria and rejected Worldwide's contention that the Superior Court's enforcement proceeding was preempted by the Carmack Amendment and by 49 U.S.C. §14501(c)(1), which prohibits a state from enacting or enforcing laws or regulations governing certain aspects of interstate transportation. Curiously, the decision did not mention that 49 U.S.C. 14501(c) (2)(B) provides that the preceding preemption provisions do not apply to the transportation of “household goods”.

10. Specialty Products International, Ltd. v. Con-Way Transportation Services, Inc., 410 F. Supp. 2d 423 (M.D.N.C. 2006) ***(Evidence; improper packaging defense).*** This case presents an interesting study in evidentiary issues surrounding the carrier defense of improper packaging. Specialty Products sued Con-Way for damage to four 150-gallon stainless steel beer brewing tanks damaged during two cross-country shipments in May 2003. Discovery revealed that following the two shipments, Specialty Products had changed its method of packing the tanks for transportation by improving the wrapping and crating of the tanks. A third shipment subsequently arrived undamaged. Plaintiff filed a motion in limine to exclude from evidence its subsequent measures to improve the packaging for the third shipment. Con-Way argued that the subsequent change in packaging should be admissible under the Federal Rules of Evidence that would permit admission of the subsequent packaging under the umbrella of an ongoing "event" of measures taken by the shipper during all three shipments. The court rejected this argument and ruled that Con-Way could not use evidence of plaintiff's subsequent packaging to show that the first shipment was improperly packaged. However, the court also denied plaintiff's motion for summary judgment, ruling that Con-Way had produced sufficient evidence to create a genuine dispute of material fact as to the improper packaging of the first two shipments.

11. Zolo Technologies v. Roadway Express, Inc., 2006 U.S. Dist. LEXIS 19369 (D. Colo. 2006) ***(Damage inspection; spoliation of evidence)*** Roadway damaged a $90,000 piece of electronic equipment during the course of transportation and had its inspector inspect the damage, take photographs and prepare a report while the equipment was still in Roadway's possession. During discovery, in October 2005, Roadway then sought to examine the damaged equipment but learned that plaintiff, a year earlier, had disassembled the damaged equipment and reused what it could in an effort to mitigate its damages. On that basis, Roadway filed a motion for sanctions for spoliation of evidence, asking the court to (1) preclude plaintiff from introducing evidence that the equipment was adequately constructed and packaged for transportation, (2) instruct the jury that it may draw a negative inference from plaintiff's failure to produce the damaged equipment and (3) instruct the jury that it could infer that plaintiff had not properly prepared the equipment for transportation. The court denied Roadway's motion, ruling it had not proved bad faith on plaintiff's part. The court considered the fact that Roadway had hired an inspector to examine the equipment before it was delivered, that plaintiff needed the equipment to conduct its business and mitigate its loss, and that the equipment was salvaged prior to the lawsuit. The court reasoned that those facts did not support an inference that plaintiff had acted in bad faith. The court also denied Roadway's request that plaintiff be precluded from introducing evidence of proper packaging of the equipment at trial, finding that Roadway had immediate notice of the loss, that plaintiff had little or no culpability in salvaging the equipment, and that Roadway had not been prejudiced because its inspector had inspected the equipment early on.

12. Bowersmith v. United Parcel Service, Inc., 2006 Ohio App. LEXIS 1297 (Ohio 2006) ***(Attorney sanctions)*** Plaintiffs Lori and Scott Bowersmith filed suit in state court alleging common law and state causes of action against UPS for $2,500 in damages resulting from the transportation of three packages they shipped from Ohio to California. UPS, through its attorney, Aaron M. Shank, filed a motion to dismiss, which was granted the next day. Plaintiffs then filed a response to UPS's motion and the court then reinstated the case and ordered a scheduling conference. When Attorney Shank failed to appear at the scheduling conference, the court entered a default judgment against UPS. Plaintiffs then filed a motion for sanctions against Shank and UPS under Rule 11 contending that they should be sanctioned for continuing to argue Carmack Amendment preemption of their state and common law claims. Following a hearing on that motion, the trial court entered judgment for plaintiffs for damages of $2,583 and subsequently granted plaintiffs' motion for sanctions against Shank and UPS for $6,212, apparently under the belief that the Carmack Amendment or the preemption cases behind it had somehow been overruled and that he had therefore misled the court. On appeal, the Court of Appeals of Ohio reversed and ruled that the trial court had clearly abused its discretion by sanctioning Shank. The Court of Appeals held that the Carmack Amendment and its preemption case law had not been overruled but were still effective, that plaintiffs' state law claims were preempted by Carmack even when litigated in state court. The Court of Appeals observed, "We are aware of no rule of procedural or substantive law or of ethical considerations, which would require defense counsel to advise the plaintiff's counsel about how to properly plead the plaintiff's case."

13. St. Paul Fire and Marine Insurance Company v. Schneider National Carriers, Inc., 2006 U.S. Dist. LEXIS 8332 (S.D.N.Y. 2006) **(Limitation of liability)** Plaintiff St. Paul insured AIT Worldwide Logistics, Inc., a freight forwarder, and sought to recover $692,000 in payments it made on behalf of AIT to two of AIT's customers due to the destruction of four shipments of computer equipment that occurred during transportation by defendant Schneider National in March 2002. AIT had issued four Air Waybills to its two shippers, each of which recited that AIT's maximum liability for aggregate losses at any one time and place was limited to $100,000. The shippers, however, entered the actual values of the shipments on the Air Waybills, which totaled $774,000. In route to California, Schneider's truck was involved in an accident as a result of which the shipments were damaged. Following salvage, the net damage claimed by the two shippers was $692,000. St. Paul/AIT paid the four shippers and sought to recover payment from Schneider. Schneider claimed that it was entitled to the $100,000 per shipper limitation of liability in the AIT Air Waybills, for a total maximum of $200,000. However, the Transportation Contract between Schneider and AIT, entered into in 2001, provided that Schneider's liability would not exceed "$750,000 per truckload shipment." Schneider also claimed AIT's decision to reimburse the shippers was a voluntary payment for which Schneider could not be liable. The district court rejected Schneider's arguments and held it liable for the full damages claimed of $692,000. The court ruled that while the Carmack Amendment governed the subject claims, Schneider was not an intended beneficiary of the four AIT Air Waybills and it could not escape its own $750,000 limit of liability under its transportation contract with AIT. The court also ruled that Schneider had not shown the shippers had been given a "reasonable opportunity" to declare a higher level of carrier liability with Schneider, that the four Air Waybills clearly were intended to provide the shippers with reimbursement for the declared value of their shipments, and that Schneider's "volunteer" argument was without merit because AIT acted to preserve its business relationship with the shippers and could potentially have been liable to them for the full amount.

14. Atlantic Mutual Insurance Company v. Napa Transportation, Inc., 399 F. Supp. 2d 523 (S.D.N.Y. 2005) ***(Pre-judgment interest).*** This was a subrogation case in which the plaintiff, Atlantic Mutual, recovered a judgment against the defendant motor carrier for the loss of a shipment of pharmaceuticals shipped by Atlantic Mutual's insured, Johnson & Johnson, from Pennsylvania to Rhode Island that were destroyed in a fire. The expected date of delivery was December 13, 2001. The value of the shipment was $87,245, and on April 15, 2002 Atlantic Mutual paid that amount to Johnson & Johnson. Although the court ruled in July 2005 that the plaintiff was entitled to judgment for the full amount of its claim plus interest, the parties could not agree on the issue of pre-judgment interest. The court determined that an award of pre-judgment interest was appropriate because the defendant had the use of over $87,000 since December 2001. The next dispute was over the correct date on which pre-judgment interest should begin to accrue. Defendant argued that the date on which plaintiff paid Johnson & Johnson (April 15, 2002) should be used, otherwise there would be a windfall to plaintiff. However, the court ruled that the most appropriate date for the commencement of pre-judgment interest was the date of expected delivery, December 13, 2001. The court reasoned that as subrogee, the plaintiff stood in the shoes of Johnson & Johnson and had the same rights to the full amount of payment as Johnson & Johnson did. Otherwise, "defendant would reap the benefits of over four months of undeserved profits based on the mere fortuity that plaintiff decided to pay Johnson & Johnson's claim and undertake the prosecution of this cause of action." As to the amount of pre-judgment interest, the court rejected plaintiff's request for the application of the New York statutory interest rate of 9% and instead applied interest under the same formula prescribed by 28 U.S.C. §1961 for post-judgment interest (which averaged 2.10%).

15. Schoenmann Produce Co. v. Burlington Northern and Santa Fe Railway Co.¸ 2006 U.S. Dist. LEXIS 14663 (S.D. Tex. 2006) ***(Preemption)*** Plaintiff sued defendant railroad BNSF in Texas state court alleging numerous state law causes of action for damage to shipments of potatoes transported by the railroad. BNSF removed the case to federal court based on the Carmack Amendment, and plaintiffs moved to remand, contending that the shipments were not governed by the Carmack Amendment but by the Staggers Act, 49 U.S.C. §10709. The Court denied the motion to remand, analyzing rail carrier liability under Staggers. The Court recognized that rail carriers and shippers may agree to terms other than Carmack Amendment liability and that the plaintiffs had presented no evidence to support their argument that the potato shipments at issue were governed by 49 U.S.C. §10709. The Court also recognized the provisions in BNSF's Rules Book, which provided for limitations of its liability and that it offered alternative full liability under the Carmack Amendment, which plaintiff did not elect. The Court further observed that "the Staggers Act did not 'signal an end to the era of Carmack Amendment liability and a turn to liability premised only on breach of contract.'" Observing that "courts continue to apply the Carmack Act even when the carrier offers alternative terms" and that BNSF had a right to remove, the Court ruled that the claims were within federal question jurisdiction and denied the motion to remand.

16. Alicia McWhorter v. ATS Logistic Services, Inc., (Civil Action No. 05-0644-M, S.D. Ala., January 17, 2006) ***(Removal/remand)*** Plaintiff sued defendant ATS, whom she had hired to transport electrical equipment from North Carolina to Texas. ATS had a contract with defendant Mason & Dixon Lines ("MDL"), whom and ATS hired to transport the shipment, which was damaged in transit. Plaintiff filed suit against ATS in Alabama state court, and ATS filed a third-party complaint against MDL alleging breach of contract claims for indemnification and failure to procure insurance. Plaintiff subsequently amended her complaint to allege common law claims directly against MDL as a defendant. On August 24, 2005, MDL filed a motion to dismiss plaintiff's amended complaint arguing that the claims were preempted, and on October 7, 2005, plaintiff filed a third amended complaint, which included a Carmack Amendment claim against MDL. MDL then removed the action to federal court, following which plaintiff moved to remand. The court granted plaintiff's motion to remand because all defendants had not joined in the removal of the action. Even though ATS had settled with the plaintiff, the stipulation of dismissal had not been signed by all parties, and therefore ATS was still a defendant when MDL filed its removal papers. The Court also found that MDL was aware of plaintiff's Carmack Amendment claim as early as August 24,

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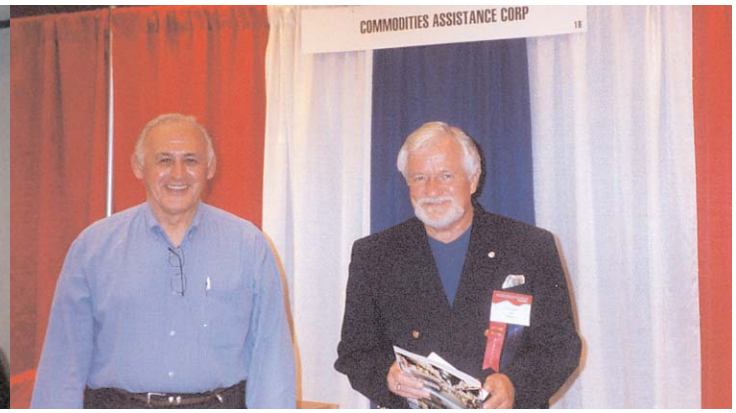
Centerload Shipping/mcaires@centerload.com
Mark Caires with an attendee



Commodities Assistance Corp/harry@commast.com
Harry Muscatello & Clark Van Orman

Consolidated Salvage/brandon@csisalvage.com
Brandon Mankin & Michelle Severance, Bree Foster & Matt Mankin

Electric Guard Dog/sentry@electricguarddog.com
Bill Bierman with Bill Mullis & Fritz Damm

Freight Hound/tommiller@freighthound.com
Martha Payne with Tom Miller & Rick Panning

International Paper/colleen.o'connell@ipaper.com
John Tate with Kent Wade & Colleen O'Connell

ITW Shippers/john.guidy@itwshippers.com
Ed Loughman with Sandra Rubio & John Guidy

Lock America/fminnella@laigroup.com
Hy Hillenbrand with Mike Tillberg and Frank Minnella

McGinnis Lumber/pbusbee@mcginnislumber.com
John Gibbs, Janet Skoglund, Richard Lang and Philip Busbee

Recovery Management/dpack@reccorp.com
Eric Zalud & George Pezold with Dave Myers, Doug Taylor & Dee Pack

Reverse Solutions/ihshweky@reversesolutions.com
Ron Simmons, Joe Pucci, Barbara Cafasso, Isaac Shweky & Rosie McCormack

Transport Security 'The Enforcer'/enforcer@transportsecurity.com
An attendee visits with Nick Erdmann & Brenda Baker

Trinity Transport/mike.curry@trinitytransport.com
Brian Kenney , Chris Reed, Peter Wyszynski & Mike Curry

Tri-Wall (A Weyerhaeuser Business/jane.jennings.weyerhaeuser.com
Ben Curtis with an attendee and Steve Broussard & Melissa Dixon

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George Pezold, Bill Bierman, Butch Day Danny Saviola

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ARIZONA COURT AWARDS ATTORNEY FEES TO EVERYONE FOR ANYTHING

By Gordon McAuley Partner, Hanson Bridgett Marcus Vlahos & Rudy, San Francisco

"Liberality consists less in giving a great deal than in gifts well timed." Jean de La Bruyere, Les Caracteres, Du Coeur [1688]

The Arizona Federal District Court held in February that shippers have a private cause of action to enforce the federal regulations that apply to interstate motor carriers, brokers, and perhaps water carriers and freight forwarders, and are entitled to recover attorney fees when plaintiffs bring <u>any</u> infraction to the attention of the Court. Read that again: it makes even less sense the second time you read it. Plaintiff attorneys everywhere, in anticipation of reaping this gift, are shopping for new

The Arizona Federal District Court held in February that shippers have a private cause of action to enforce the federal regulations that apply to interstate motor carriers, brokers, and perhaps water carriers and freight forwarders, and are entitled to recover attorney fees when plaintiffs bring <u>any</u> infraction to the attention of the Court.

motor boats and vacation homes. *KPX, L.L.C. v. Transgroup Worldwide Logistics, Inc.,* 2006 U.S. Dist. Lexis 6772, reports the case where plaintiff arranged with a "broker" to obtain motor carrier transportation of electric motor scooters from Arizona to Texas. The broker issued a straight form bill of lading to the shipper for transport of 9 pallets containing 170 scooters with a total weight of 9000 pounds. The bill of lading contained a limitation of liability of $25 per pound. The broker retained freight forwarder Transgroup to carry the goods to Texas. Transgroup hired Value Truck to actually haul the scooters from the fire-hot heat of Arizona to the Texas frying pan (well, across the panhandle to Sugar Land).

On arrival at the shipper's facility in Arizona the Value Truck driver signed the broker-prepared bill of lading, but also had the

The Transgroup bill was entitled "air bill" and contained several references to airports, next flight out, and other airy stuff that makes sense only if trucks could fly

shipper sign the bill of lading prepared by Transgroup. The Transgroup bill was entitled "air bill" and contained several references to airports, next flight out, and other airy stuff that makes sense only if trucks could fly. The air bill contained a $.50 per pound limitation of liability for loss or

The Carmack claim should be familiar to readers: it establishes that interstate motor carriers are almost strictly liable for loss or damage to goods that occurs while in the possession of the carrier.

damage to cargo. Eventually most of the scooters were delivered to Sugar Land (hey, isn't that where a prominent national politician resides? Hint to follow.) There

The state law breach of contract claim likewise is a garden variety (say like a squash or rutabaga)

was no DELAY claim, but 26 scooters were lost. These scooters apparently were quite inexpensive: the total claim was for $7,946: about $300 per scooter. That appears to be less than the $25 per pound limitation amount in the broker's bill of lading, but still more than the $.50 per pound in the Transgroup bill. The price of gasoline likely is increasing the demand for these little beauties.

The shipper eventually filed suit in Arizona state court to recover the loss of the scooters. It alleged a Carmack Amendment claim under 49 U.S.C. 14706, a breach of

In adding section 14704 Congress had expressed its concern that with deregulation ... The transportation industry might not obey the law

contract action, and a novel but bazaar claim under 49 U.S.C. 14704(a). The Carmack claim should be familiar to readers: it establishes that interstate motor carriers are almost strictly liable for loss or damage to goods that occurs while in the

By this section, Congress apparently deputized the public to watch over the transportation industry to ensure industry participants obey the orders of the Secretary or Board. Subsection (d) provides that the court "shall" award a reasonable attorney's fee under this "section".

possession of the carrier. The carrier is liable for the actual amount of loss, unless the carrier and shipper agree to limit the carrier's loss in exchange for a lower shipping rate. The state law breach of contract claim likewise is a garden variety (say like a squash or rutabaga) claim that the shipper did not get what it paid for. (Your author does not actually know what a rutabaga is, but he likes the word. He also likes the word "eleemosynary" but doubts that there is a convenient way to insert it in this report.)

The section 14704 claim requires some more explanation. When Congress was mucking about with deregulation in the mid '90s (no, 1990s; not 1890s) and passed the Interstate Commerce Commission Termination Act ("ICCTA"), it also added 49 U.S.C. section 14704 "Rights and Remedies of Persons Injured by Carriers or Brokers." Paragraph (a) (1) states that a person injured because a carrier or broker does not obey an order of the Secretary or Board (referring to the Federal Motor Carrier Safety Administration ("FMCSA") may bring a civil law suit to enforce that order. Subparagraph (2) states that the carrier or broker is liable for damages sustained by a person as a result of an act or omission in violation of "this part". In adding section 14704 Congress had expressed its concern that with deregulation and limited funding of the remaining governmental watch dogs to ensure carrier and broker compliance, that the transportation industry might not obey the law. By this section, Congress apparently deputized the public to watch over the transportation industry to ensure industry participants obey the orders of the Secretary or Board. Subsection (d) provides that the court "shall" award a reasonable attorney's fee under this "section".

The Court dismissed . . . . the breach of contract claim, ... But . . . It found federal question jurisdiction to hear the remaining section 14704 claim, despite the paltry amount in controversy. Here is where the explanation gets squishy, like a rutabaga, and the court granted *eleemosynary* gifts to plaintiff attorneys everywhere. (Hah!)

The mischief unleashed by the *KPX* case is that the court did not restrict the scope of section 14704 to violations of orders of the FMCSA. Rather, it gave a literal, but absurdly broad, interpretation to section 14704(b) as discussed later. (Note ominous foreshadowing to keep you reading.)

The defense did what it should: it transferred the case to federal court based on the complete federal preemption established by the Carmack Amendment claim, and sought dismissal of the breach of contract and section 14704 claims. The defense argued that the state law breach of contract claim is preempted by the Carmack Amendment, and that the section 14704 claim should be dismissed because plaintiff did not allege that the motor carrier violated any order of the FMCSA. The Court dismissed the Carmack Amendment claim because it was for less than $10,000: the minimum amount in controversy to get such claims heard in federal court. Title 28 U.S.C. §1337(a). It dismissed the breach of contract claim, as expected. But wait, there's more! It found federal question jurisdiction to hear the remaining section 14704 claim, despite the paltry amount in controversy. Here is where the explanation gets squishy, like a rutabaga, and the court granted *eleemosynary* gifts to plaintiff attorneys everywhere. (Hah!)

The document issued by Transgroup, although on a form labeled "air bill," could be regarded as a receipt or bill of lading as it contained the information required by the Code of Federal Regulations for complying transportation documents. See 49 CFR 373.101

The court took up the question whether Transgroup had violated the federal regulations by issuing a document labeled "air bill" for the transportation. It found that motor carriers are exempted from the Carmack Amendment requirements when they operate in connection with air carrier operations, or are transporting goods that should have been on an airplane, but were placed on trucks due to weather or aircraft mechanical problems. Title 49 U.S.C.

Continued from Page 13

§13506(a) (8). It held, correctly, that this cargo never was intended to experience the comfort of an aircraft cargo hold. The

the court found that Transgroup violated section 14706 by issuing an air bill when it was not operating in accordance with the air operations exemption of section 13506(8)?

court then took off into uncharted territory.

Title 49 U.S.C. §14706(a)(1) requires that a motor carrier or freight forwarder shall issue a "receipt or bill of lading" for property it receives for transportation. The document issued by Transgroup, although on a form labeled "air bill," could be regarded as a receipt or bill of lading as it contained the information required by the Code of Federal Regulations for complying transportation documents. See 49 CFR 373.101. A logical argument can be made that the original bill of lading prepared by the broker is the operative bill, and the "air bill" presented by Value Truck as agent for

The court next examined whether section14704 gave the shipper a private right of action against the carrier for "the improper use of an air bill."

Transgroup, was merely a receipt for the cargo. Nonetheless the court found that Transgroup violated section 14706 by issuing an air bill when it was not operating in accordance with the air operations exemption of section 13506(8). The remedy should have been to disallow the limitation of liability in the air bill, but the court did not stop there.

The court next examined whether section14704 gave the shipper a private right of action against the carrier for "the improper use of an air bill." It looked to the precedent established by Owner-Operator Indep. Drivers Assn. v. New Prime, Inc., 192 F.3d 778 (8th Cir. 1999) and found that the Eighth Circuit recognized a private right of action for the drivers association to bring an action for injunctive relief against carriers who violate truth in leasing regulations. The court awarded attorney fees to the driver's association under section 14704(d) when it granted the injunction, and found that the drivers had suffered monetary damages as a result of the violations.

"I discovered...that pursuit of truth did not permit violence being inflicted on one's opponent, but that he must be weaned

The KPX court, in the biggest error of the decision, then stated: "Here, the Plaintiff has standing to bring a private cause of action against Transgroup because KPX's damages result directly from the challenged bill of lading/air bill, which Plaintiff alleges violates 49 U.S.C. 14706..."

from error by patience and sympathy. For what appear truth to the one may appear to be error to the other." Mahatma Gandhi [1922]

The KPX court, in the biggest error of the decision, then stated: "Here, the Plaintiff has standing to bring a private cause of action against Transgroup because KPX's damages result directly from the challenged bill of lading/air bill, which Plaintiff alleges violates 49 U.S.C. 14706..." In fact, the issuance of the shipping document did not harm the shipper at all. The plaintiff's harm was the loss of the cargo, for which the Carmack Amendment provides the shipper's exclusive remedy. Moreover, the court already had dismissed the Carmack claim due to lack of jurisdiction over a claim for less than $10,000.

The most damaging aspect of the decision is the Court's order for attorney fees. Without addressing the legion of cases that confirm that shippers are not entitled to attorney fees under the Carmack Amendment for loss or damage to cargo, the court found that any violation of section 14704 entitles the shipper to attorney fees. And, what is a violation of section 14704? This court held that "...49 U.S.C. §14704(a) authorizes private actions for injunctive relief and damages to remedy

the court found that any violation of section 14704 entitles the shipper to attorney fees. And, what is a violation of section 14704?

violations of the Motor Carrier Act and its implementing regulations." *KPX*, at 19. *That is, that any violation of the Part B of Subtitle IV of Title 49 U.S.C. [49 U.S.C. §§ 13101-14914] will grant a private right of action for a member of the public to seek an injunction, damages, and attorney fees.*

CONCLUSION

The potential harm from this decision is

The potential harm from this decision is staggering. Any one can sue any carrier for an injunction to prevent even the most innocent and innocuous violation of the hundreds of requirements under sections 13101-14914,

staggering. Any one can sue any carrier for an injunction to prevent even the most innocent and innocuous violation of the hundreds of requirements under sections 13101-14914, despite many of those regulations already providing for hefty fines and penalties for their violation. If the plaintiff obtains an injunction directing the carrier not to violate the federal regulations, then the plaintiff gets **mandatory** attorney fees. Is there any wonder why plaintiffs' attorneys are licking their chops? The case is under appeal to the Ninth Circuit but for many that prospect offers little comfort. If upheld, this will result in dramatic increases in the operating costs for motor carriers. Their razor-thin operating margins will evaporate entirely.

Continued From Page 7

2005 when it moved to dismiss plaintiff's second amended complaint, and therefore the 30-day time period to remove had expired. Finally, the court was persuaded by plaintiff's argument that her filing of the third amended complaint in the state court was an involuntary action because she was up against the possibility that the two-year time period to bring suit under the Carmack Amendment would soon preclude her from any action against MDL. This involuntary action on plaintiff's part could not serve to penalize her.

17. Transport Factoring Associates, Inc. v. Textron Financial Corporation, 2005 U.S. Dist. LEXIS 28634 and 35346 (D. Ariz. 2005) ***(18 month limit to recover unpaid freight charges)*** Plaintiff Transport Factoring Associates brought an action for a declaratory relief and damages against defendant Textron to recover interstate freight charges on shipments of goods brokered by KC Express to various carriers. Some of the underlying motor carriers who had not been paid by KC Express assigned their accounts receivable to Transport Factoring. While KC Express was in business, it had entered into a factoring agreement with Textron under which Textron had recourse to KC Express for any factored receivable not ultimately paid by the shipper. After KC Express squandered the money paid by Textron and failed to pay the underlying carriers, Transport Factoring filed suit against Textron. Textron moved for summary judgment on the ground that under 49 U.S.C. §14705, which prescribes an 18-month time limit for suits by motor carriers to collect interstate freight charges, Transport Factoring's suit against Textron was time-barred. The court agreed and granted Textron's motion for summary judgment, ruling that even though plaintiff's only agreement was with the broker, KC Express, and there was no express agreement between the shippers and carriers, the plain language of the statute prescribed the 18-month suit limitation period and made no mention of who the defendant in a collection lawsuit may be. "[T]he provision applies to any action brought by a carrier to collect its charges."

18. Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co., 2006 U.S. Dist. LEXIS 14636 (W.D. Wa. 2006) ***(Freight charge recovery from shipper and broker)*** Defendant NLC performed brokerage services for defendant Sears in arranging for the plaintiff, Oak Harbor, to transport Sears' freight. Oak Harbor sued Sears and NLC to recover over $426,000 that all parties agreed was owed to Oak Harbor. Sears contended that under its contract with NLC, NLC was solely liable to Oak Harbor, while NLC argued that the bills of lading issued by Oak Harbor made Sears solely liable for Oak Harbor's freight charges. The original Sears/NLC relationship involved inbound shipments to Sears' "mixing" warehouses, and their relationship later expanded to include Sears' use of NLC's brokerage services on outbound shipments from its mixing warehouses. On outbound shipments, Sears-generated bills of lading were used and on inbound shipments Oak Harbor-generated bills of lading were used. There was a written contract between NLC and Oak Harbor that identified NLC as "broker/shipper" and stated, inter alia, "SHIPPER agrees to pay CARRIER within a predetermined time from date of receipt regardless whether or not BROKER/SHIPPER has been paid for movement. . . ." The flow of payment was that Oak Harbor would then bill NLC three days after delivery of a shipment and expected it to be paid by NLC within 30 days. NLC audited the freight bills and billed Sears on a weekly basis, and Sears paid NLC approximately five days after it received NLC's bills. In turn, NLC paid Oak Harbor with funds received from Sears approximately 25 days after NLC had received Oak Harbor's freight bills. The court, in granting Oak Harbor's motion for summary judgment against both Sears and NLC and holding NLC liable to Sears for $227,000 on Sears' cross-claim, relied on the fact that the NLC/Oak Harbor contract was ambiguous as to the definition of the term "shipper" but concluded that it must mean NLC. As to Oak Harbor's claim against Sears, the court relied on Southern Pacific v. Commercial Metals and observed that the bills of lading did not include a "no recourse" provision and that since Sears was the shipper on the Sears-generated bills of lading, Sears was liable to Oak Harbor for freight charges due on outbound shipments. As to inbound shipments, the court held that Oak Harbor's bills of lading complied with industry standard uniform straight bills of lading marked "collect," that Sears was "indisputably the consignee and that the NLC/Oak Harbor contract did not trump the default provisions of the bills of lading. The court rejected Sears' argument that under the NLC/Oak Harbor contract, bills of lading were mere receipts and it did not contain a waiver by Oak Harbor of any claim for payment from Sears. Finally, the court rejected Sears' "equitable estoppel" argument, ruling that this case was different from those involving "double payment cases" where consignees accepted pre-paid shipments and paid the consignors' invoices for the goods in reliance upon the "prepaid" designation on the bills of lading. As to outbound shipments, the court ruled that since Sears was the shipper, it should be liable because it chose to do business with NLC and directed Oak Harbor, via the Sears generated bills of lading, to send its freight bills to NLC.

Work Happy!

What every employee needs is to be appreciated. It is the worst thing in business for an employee to come in each and every day to do a job when they are not **HAPPY.** The company does not have to go ***'out of their way'*** to make their employees ***happy***, they need only to show their employees ***what to do***, and ***why it must be done that way***. The most horrific problem in business today is that employers (their managers, supervisors, lead-people) do not **TEACH** their employees how and why to do a job. When someone knows ***'how to'*** and ***'why to'*** do their job they will be pleased with their work and the company will benefit from their efforts because the job will be done correctly and the employee will be happy. Try to <u>use this theory</u>, give it a chance-***IT WORKS!*** My father used to tell me, and my five siblings, "I'd walk a mile for a '*pat on the back*' but I wouldn't budge an inch for a '*kick in the arse*'. I've been in trucking for over 50 years and it has always worked for me. I have been a 'boss' most of that time and everyone I worked with knew I was the 'boss', but most importantly they knew 'we worked together'. Make and keep your employees ***HAPPY!***

Ed Loughman, TLP & SA

Continued from Page 3

transportation professionals and other vendors are usually experts in their own field or industry. Although the word "industry" is not defined in the bankruptcy code, most courts interpret it to mean the creditor's industry, such as transportation, rather than the debtor's industry, if the parties are not in the same industry.

THE NEW BANKRUPTCY CODE

The new bankruptcy code's ordinary course of business defense provides that a trustee may not avoid a transfer under the preference section to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of a debtor and the transferee and such transfer was made in the ordinary course of business or financial affairs of the debtor and the transferee or was made according to ordinary business terms. 11 U.S.C. § 547(c). The first element of the affirmative defense, that the debt was incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the creditor, has not changed in any substantive way, and is not expected to spawn any major controversies, as before. The seemingly grammatical change in the second and third elements of the ordinary course of business defense, that is, the change of the conjunctive word "and" to the disjunctive word "or" between the second and third elements, however, is expected to work a vast change in preference litigation, to the benefit of creditors. Previously, creditors were forced to prove not only that the payments made to them by the debtor during the so-called preference period did not differ significantly from payments made to them by the debtor in the so-called pre-preference period, but that the preferential payments were made according to ordinary business terms, which sometimes required expert testimony. The need to retain expert witnesses substantially increased the costs of defending preference proceedings, sometimes leading to forced settlement, because the cost of litigation exceeded the cost of capitulation. Under the new bankruptcy code, such forced settlements should no longer be necessary, at least not due to the need to prove both that the preferential payments were made in the ordinary course of business between the debtor and the creditor and that the payments were made according to ordinary business terms in the transportation industry.

CONCLUSION

The new bankruptcy code makes a huge, substantive change in the ordinary course of business defense, basically by changing an "and" to an "or." Under the new bankruptcy code, the second and third elements are written in the disjunctive, "or", rather than the conjunctive, "and." Therefore, under the new bankruptcy code, a defendant need merely prove that the allegedly preferential payments were made either in the ordinary course of business between the parties or according to ordinary terms in the industry. Thus, a motor freight carrier that is named as a defendant in a preference adversary proceeding should have a smoother road to navigate in proving its ordinary course of business defense under the new bankruptcy code than under the old law.

Membership Additions

The TLP & SA wishes to welcome new members:

Jason Riha -Priority Services, Inc.—Villa Park, Il

Martha J. Payne, Esq., a Board member of the TLP&SA has joined the Cleveland law firm of Benesch, Friedlander, Coplan & Aronoff LLP in the Transportation and Logistics Group.

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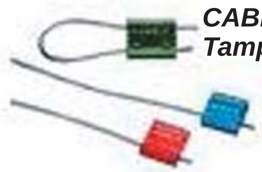

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