CONFERENCE OF FREIGHT COUNSEL

SUMMER 2013 MEETING

FAIRFAX HOTEL—WASHINGTON, D.C.

JUNE 15-17, 2013

AGENDA OF CASES

I. Carrier Liability:

1. BBC Chartering & Logistic GmbH & Co. KG v. Gulf Stream Marine, Inc., 2013 WL 1415106 (S.D.Tex. 2013). BBC entered into a Booking Note to provide ocean carriage of a Crane from Houston to Chile on BBC's vessel. The shipper, MariTrans, hired Anderson Trucking to deliver the Crane to Gulf Stream's Manchester Terminal for loading onto BBC's vessel. Because of an impending hurricane, BBC's vessel did not arrive at the Port of Houston when scheduled. The extreme flooding caused by Hurricane Ike damaged the Crane. The consignee and insurer of the Crane filed an arbitration proceeding in Chile against BBC and Maritrans. BBC settled the claim in Chile for $150,000.00. BBC then filed this lawsuit seeking indemnity from Gulf Stream. BBC did not assert a claim for damage to the Crane, only a claim for indemnity for the arbitration settlement. Gulf Stream sought summary judgment on its affirmative defense that the damage to the Crane was the result of an "Act of God" and summary judgment that the COGSA statute of limitations and per package limitation apply. BBC sought summary judgment on its indemnity claim.

Issues: Whether the act of God defense applied, whether COGSA applied and whether BBC provided sufficient notice of the arbitration proceeding to prevail on its indemnity claim.

Holding: To prevail on its act of God defense, Gulf Stream must show "that (1) the loss was due directly and exclusively to an act of nature and without human intervention, and (2) no amount of foresight or care which could have been reasonably required could have prevented the injury. The court held that a material

fact issue remained on the amount of Gulf Stream's foresight or care. Because BBC maintained, and the court accepted, that BBC was not asserting a cargo claim, but rather only an indemnity claim, the court denied Gulf Stream's motion on COGSA. The court also found a fact issue on BBC's claim that it provided adequate notice of the arbitration, and consequently denied BBC's motion.

Presenter: Jim Attridge

2. **Catlin Insurance v. China Southern Airlines,** 2013 US Dist Lexis 36544, 2013 WL 1112245 (N.D. Ill). The shipper hired the air carrier to transport 980 pigs from Illinois to China. In turn, the air carrier engaged another carrier to transport the porcine cargo. The pigs were transported pursuant to an air waybill that said the transport of the pigs was governed by the Montreal Convention. The carrier provided the subcontracting carrier with a "Declaration of Indemnity" relieving the subcontracting carrier from liability for death, injury or illness of the pigs in transit. The carrier further indemnified the subcontracting carrier for any expense incurred in connection with the transport of the pigs. The shipper did not know anything about the indemnity agreement. 180 pigs perished during the flight. The shipper's subrogating insurer sued the carrier. The shipper's claim was framed in part as breach of contract for providing the subcontracting carrier a blanket immunity without the shipper's knowledge or consent.

Issue: Can the shipper's breach of contract claim against the carrier proceed?

Holding: The carrier had no authorization to issue a "Declaration of Indemnity" on behalf of the shipper. The Montreal Convention does not preempt this breach of contract claim. However, the carrier can still raise the Montreal Convention as an affirmative defense to this lawsuit. The carrier's motion to dismiss the breach of contract claim is denied. The lawsuit will proceed.

Comment: The judge indicated that the Declaration of Indemnity would be invalid on the merits, because the treaty renders null and void any contract provision that relieves a carrier of liability. Thus, a likely outcome of this case could be that even if the carrier committed a breach of contract by issuing the Declaration of Indemnity, the Declaration of Indemnity is null and void anyway, and the carrier will have capped liability towards Shipper as per the air waybill. Another issue (not mentioned in this decision) is the question of who bears the expense associated with removing the pig carcasses and arranging for the disposal of pigs.

Presenter: Kurt Vragel

3. **Clevo v. Hecny Transportation,** 2013 US App. Lexis 8511, 2013 WL 1777030 (9th Cir.). Shipper sold computer parts to Consignee. Shipper engaged Carrier to transport the goods via ocean. Shipper wanted to be sure that Consignee paid for the goods. Shipper and Consignee agreed that Consignee must present the original bills of lading to Carrier before Carrier would release the goods to Consignee. Shipper took measures to protect its right to payment and to formalize Carrier's role in this process. Shipper sent Carrier a document called a "Guarantee Letter," which in essence said: "You will not release any shipment to Consignee until (i) you have received the original bills of lading from Consignee, and (2) you have received my written fax permission. You will compensate me for any damage if you break this rule." Carrier signed the Guarantee Letter. At destination, Carrier released the goods to Consignee even though Carrier did not receive the original bills of lading from Consignee, nor did Carrier receive Shipper's permission slip. Consignee never paid Shipper, and Consignee filed for bankruptcy. Thirteen months later, relying on the Guarantee, Shipper sued Carrier for the purchase price of the goods ($2 million).

Issue #1: Is Carrier bound by the Guarantee?

Held #1: Yes. This document was binding.

Issue #2: Is Shipper's lawsuit time-barred?

Held #2: Yes. This was a case of misdelivery. Carrier's error in releasing the goods to Consignee without first obtaining the original bills of lading and without obtaining Shipper's permission is a misdelivery. The ocean bill of lading had a one year statute of limitations for misdelivery. The bill of lading had a Himalaya clause and it flowed down to the carrier in question. Shipper did not file the lawsuit until 13 months had elapsed. Shipper's lawsuit was too late. Case dismissed.

Presenter: Kathleen Jeffries

4. **Great American Insurance Co. v. USF Holland, Inc**., 2013 WL 1313841 (S.D.N.Y., Mar. 27, 2013). Novartis entered into three contracts with Holland to ship animal vaccines. The first was a Pricing Agreement which limited the liability of Holland to $25 per pound with a cap of $100,000 per shipment. The Pricing

Agreement also contained terms and conditions with a limitation of liability of the lesser of $10 per pound or $100,000 per shipment. The Pricing Agreement referred to a Special Services Schedule ("SSS") for various services including Guaranteed Delivery and "Protect From Freeze". The SSS limited Holland's liability to cancellation and refundable shipment charges. The bill of lading contained a blank valuation provision. Although the shipments were labeled DO NOT FREEZE, there was no provision on the bill of lading reflecting that the cargo should not be frozen. The product allegedly froze. Great American paid Novartis approximately $135,000 and filed this subrogation claim against Holland under Carmack.

Issue: Can the subrogating insurer recover under the contracts?

Holding: The Court initially granted Great American's motion to exclude the expert witness report finding that his report "oversteps the basic role of an expert" by advancing a legal opinion rather than an expert opinion on transportation industry practices. The court found that Great American made out a prima facie case of liability against Holland, that the undisputed proof reflected that the animal vaccines were delivered to Holland in good condition and that they arrived in a damaged condition. The court disregarded Holland's argument that Novartis decided to ship freeze-prone vaccines in the aftermath of severe snow storms in Illinois and Iowa. Following a convoluted contractual analysis of the three written agreements, the court concludes with a determination that the $25 per pound limitation applied as found in the Pricing Agreement. As a result, Holland was found to be liable for the full $100,000 liability under the Pricing Agreement.

Presenter: William Bierman

5. <u>Great American Ins. Co. of New York, Inc. v. USF Holland, Inc</u>., 2013 WL 1832185 (S.D.N.Y. 2013) (on reconsideration).

Issue: USF Holland sought reconsideration of the above decision. Holland argued that that a "guaranteed delivery" sticker placed by the shipper merely constituted an offer to purchase guaranteed delivery services. In its first decision, the court found that defendant never agreed to provide these services (as evidenced by defendant's email to Novartis stating that such services were unavailable due to a winter storm and by defendant's failure to provide or charge for the service).

Holding: Without a manifestation of acceptance by Holland, well-established contract principles dictate that no contract to provide the guaranteed delivery

service was formed. As a result, the limitation on liability found in the guaranteed delivery portion of the Holland Special Services Schedule ("SSS") did not apply. Holland argued the Court's finding was manifest error because state law "concepts" such as offer and acceptance in the motor carrier liability context are preempted by the Carmack Amendment. The Court found that position to be without merit, holding that while plaintiff could not have brought a state-law breach of contract action against Holland regarding the interstate shipment by motor carrier, that fact does not limit the interpretive tools the Court may use to evaluate the Carmack claim. The operation of the Carmack statutory scheme depends on the use of principles of contract interpretation. Reconsideration denied.

Presenter: William Bierman

6. **Liberty Mutual v. The Boldt Co.**, 2013 U.S. Dist. LEXIS 22723, 2013 WL 632254 (N.D.Ga. 2013). The defendant was a rigger hired by a paper towel manufacturing company to block and brace a wrapper machine on trailers for transport from Wisconsin to Georgia. The machine was disassembled and loaded onto two trailers. The parts loaded into one trailer were chocked. The parts loaded in the second trailer were secured by pallets. The rigger was paid $2,100 for its efforts to "move and load and secure properly [the machine] in two trailers". Thirty miles from the final destination in Georgia, the driver slammed on his brakes to avoid an oncoming car, resulting in damage to the parts which had been chocked. The cargo in the second trailer arrived undamaged. Because the shipper intended to sell the paper towels to Wal-Mart, and the order was past due, the shipper elected to purchase a new wrapper machine rather than repair the damaged wrapper for approximately $300,000.

Issue: Was the rigger liable?

Holding: The trial court denied the rigger's motion for summary judgment on the grounds that a genuine issue of material fact existed as to whether the parts were properly secured on the trailer. The court found as reasonable the plaintiff's expert witness testimony that the superior method of securing the parts was with pallets rather than chocking. Furthermore, the court determined that it would deny the motion for summary judgment as to damages but reserved the issue of the foreseeability of damages with regard to the purchase of a new wrapper. Comment: Does Carmack apply to claims against a transportation rigger?

Presenter: Rob Spears

7. **Man Ferrostaal, Inc. v. M/V Akili et al.,** 704 F.3d 77 (2nd Cir. 2012). *M/V Akili*, its owner - Akela Naviation, and its manager - Almi Marine Management, appealed from a bench trial verdict holding the Akili liable in rem for damage to cargo consisting of 9,960 "thin-walled" steel pipes (but dismissing Akela and Almi). Plaintiff's business consisted of accepting orders of steel from customers in the U.S., finding international suppliers of the steel, and arranging the shipment of the steel to the customer in U.S. The subject pipes, manufactured in China, were purchased by the Plaintiff and then sold to a customer. The *Akili* was chartered to Seylang Shipping, Ltd., who subchartered it to S.M. China. S.M. China entered into a part-cargo charter with the Plaintiff to ship the pipes from China to Houston, and subsequently to New Orleans; the part-cargo charter contained a clause paramount specifying the application of Hague-Visby rules and specifying liability for cargo damage caused by negligent stowage upon the "owner" of the vessel, defined as S.M. China. When the pipes were delivered in New Orleans they were damaged as a result of being placed under heavier pipes.

Issues: 1. Whether an *in rem* proceeding rendering the Akili liable for damage to, or loss of cargo is unavailable in this matter because a vessel is not a "carrier" under the COGSA? 2. Whether the free-in-and-out provision of the charter (certifying that the cargo is to be stowed, latched, etc. free of risk and expense to the vessel) between the S.M. China and Plaintiff absolving the Akili from *in rem* liability is enforceable.

Holdings: The court held the free-in-and out provision unenforceable in so far as it may prevent in rem liability of the vessel. The court declined to decide whether the clause paramount incorporated Hague-Visby rules, prohibiting a carrier from contracting for a waiver of its obligations for damage under COGSA. Defendants argued that COGSA defines a "carrier" as the "owner, manager, charter, agent, or master of vessel." However, the Court focused on the pre-COGSA maritime law doctrine that the once the cargo is onboard a vessel, the vessel is deemed to have impliedly ratified the underlying contract of affreightment and is answerable for non-performance. Hence the *Akili*/vessel, "by setting sail with the cargo aboard, impliedly ratified the contract of affreightment between S.M. China and Ferrostaal." The court rejected the arguments of the Plaintiff that the ship owner and manager (Akela and Almi) should have been found liable *in personam* based on COGSA liability or bailment, as Plaintiff did not argue the former and there was no bailment relationship to constitute the later.

Presenter: George Wright

8. **Mayflower Transit, LLC et al., v. T.J. Campbell**, CA: 4:11-808 (E.D. Mo. 2012). This case involved an adverse claim of ownership regarding the shipment of household goods arranged by T J Campbell. After the shipment was loaded and was being moved, Campbell told Mayflower to deliver the shipment to storage in transit because he did not have the funds to pay for the move. While the goods were in SIT, Rita Case alleged that the goods that had been moved and were being stored belonged to her. In the first order, the U S District Court for the Eastern District of Missouri granted Mayflower's request for summary judgment against T. J. Campbell, but denied Mayflower's summary judgment request with regard to Rita Case. The court decided that because Rita Case was not identified on Mayflower's Bill of Lading, the court was unable to determine ownership of the goods included in the shipment as between T J Campbell and Rita Case.

In the second order, dated November 13, 2012, the court granted Mayflower's second Motion for summary judgment declaring that Rita Case was the owner of the household goods that had been in storage at the warehouse facility of Dodge Moving & Storage.

Presenter: Chad Stockel

9. **Union Pacific R.R. Co. v. Beemac Trucking, LLC, et al.,** 2013 U.S. Dist. LEXIS 32248, 2013 WL 886754 (D. Neb. 2013). UP and Beemac entered into a "Motor Carrier Transportation Agreement" (the "MCTA"), under which Beemac agreed to provide "motor carrier transportation services" for UP. The MCTA prescribed bill of lading contents and delivery requirements. In 2010, UP needed one of its grapple trucks moved from Kansas to Louisiana. Beemac submitted the winning bid, but did not have a truck available to carry the shipment. Beemac posted the job and received a response from a Landstar agent, and arranged to have Landstar handle the shipment. Pursuant to a carrier-broker agreement, Landstar agreed it would assume common carrier (i.e. Carmack) liability for actual loss, damage or injury to freight. Landstar picked up the grapple truck in Kansas. The truck was driven up ramps onto Landstar's trailer. Landstar's driver filled out a bill of lading that indicated the property was received in apparent good order. When Landstar's driver, Edling, arrived at the delivery site, someone showed up and helped him unload the grapple truck. After the man helped Edling unload the grapple truck, Edling left the truck's keys on its dipstick per prior dealings between the parties. At approximately 2:00 a.m., a UP train collided with the grapple truck, which was parked on the railroad tracks, and the truck was destroyed. UP contends the value of the truck was $268,689.33. UP sued Beemac and Landstar for

negligence, contractual indemnity against Beemac, common law indemnity, breach of contract against Beemac and a claim under the Carmack Amendment. The parties filed cross motions for summary judgment.

Issues: Did Defendants violate the delivery terms, and did UP waive the delivery requirements? Can UP recover consequential damages? Did UP fail to provide adequate notice of the loss? Can UP recover attorney's fees? Are UP's state law claims preempted?

Holdings: Material questions of fact precluded summary judgment on whether a valid delivery of the grapple truck was effected; and assuming a valid delivery was effected, the extent of the "actual loss or injury" caused to the grapple truck as well as whether UP may recover any amount of damages for train delays and its FELA liability resulting from the train colliding with the grapple truck. The uncontroverted evidence in the record showed that UP provided the Defendants with sufficient notice of it Carmack Claim. UP's state law claims were preempted by the Carmack Amendment.

There is an interesting subsequent decision on expert witness testimony and motions in limine in this case, reported at Union Pacific R. Co. v. Beemac Trucking, LLC, 2013 WL 1821020 (D.Neb. 2013).

Presenter: Barry Gutterman

II. Limitation Period and Notice

10. Crompton Greaves, Ltd. V. Shippers Stevedoring Company, 2013 WL 441453 (S.D. Tex., 2013). The parties disputed responsibility for damage to a large power transformer being manufactured and shipped from India to Arizona for Tuscan Electric Power, an electric utility. The purchaser contracted with the manufacturer to build and ship the transformer to the United States. The transformer was delivered in March 2007 from India to the port of Houston and was discharged. Shipper's Stevedoring provided internal services for the transportation of the transformer from the port to its final destination in Arizona. Upon delivery in Arizona, the manufacturer determined that the transformer was damaged and inoperable. After a seven-day trial, the court provided extensive and detailed findings of fact and determined that the majority of the plaintiff's claims were barred by COGSA's one-year limitations. Furthermore, the court found that

the manufacturer had failed to make out a prima facie showing that the stevedoring company was liable as a bailee and that it is not liable to the plaintiff on the theory of negligence. This case represents an extensive analysis of the applicability of COGSA and "delivery" for purposes of the running of the one-year statute of limitations.

Presenter: Kathy Garber

11. **Lexington Express Ins. Co. et al., v. Daybreak Express, Inc.**, 393 S.W.3d 242, 56 Tex. Sup. Ct. J. 233, 2013 Tex. LEXIS 68 (Tex. 2013). Shippers hired Daybreak Express to transport computer equipment from New Jersey to Texas. When the shipment arrived, the consignee claimed damage to the equipment. The consignee, Burr, contended that the damage totaled in excess of $166,000. Daybreak offered to pay less than $6,000. Burr then asserted a claim against the shipper, Supor, whose insurer, Lexington, paid Burr $87,500. As subrogee, Lexington sued Daybreak for breach of an alleged settlement agreement, not for damaging Burr's equipment. Specifically, Lexington alleged that Daybreak's adjuster had agreed to settle the claim in the amount of $166,655. Daybreak removed the case, alleging complete preemption under Carmack and the *Hoskins* decision. The court remanded the case, noting that Lexington brought no claims for damages to the goods. After remand, however, Lexington added a claim for damage to the goods. Daybreak raised the defense of limitations because more than four years had passed since Daybreak's rejection of Burr's claim. Lexington contended that all of the claims related back to the original filing under Texas law. The Court of Appeals, holding that the Texas relation-back statute applies to a Carmack claim, held that the cargo damage and breach of settlement claims were based on wholly different transactions, one centering on the transport of Burr's equipment and the other on the existence of a settlement agreement. Accordingly, there was no relation-back and the Carmack claim was barred.

Issue: The Texas Supreme Court withdrew its decision reported in our January 2013 agenda and addressed whether the cargo damage claim and the breach of settlement claim both arose out of the same occurrence.

Holding: The cargo-damage claim and the breach-of-settlement claim both arose out of the same occurrence: Daybreak's shipment of Burr's computer equipment. The settlement was an effort to reach agreement on the damages recoverable under the Carmack Amendment. Although Lexington might recover on the breach-of-settlement claim without proving the amount of damage to the equipment, that damage was the basis for the settlement agreement. However, the claims arose out

of the same occurrence and involved the same property damage. Accordingly, Lexington's cargo damage claim was not barred by limitations.

Presenter: Ken Bryant

12. United Arab Shipping Co. v. Transworld Logistics Group, Inc. , 2013 WL 845386 (N.J.Super.A.D.). The shipper engaged the carrier to transport autos and auto parts to Iraq in containers via ocean. (Actually, the Shipper was an NVOCC, because the NVOCC appeared as the shipper on the bill of lading.) The ocean carrier issued 23 bills of lading - one bill of lading for each container. The containers were unloaded in August 2008. The shipper determined that twelve containers were missing. Because of irregularities in the delivery process and in the paperwork, it was not clear where the missing containers were located. Some containers may have been detained by Iraqi Customs, and others may have wound up in the hands of an imposter consignee. In August 2010, the ocean carrier sued the shipper for $105,000 (the unpaid shipping charges). The carrier claimed that it delivered the goods and it deserved to be paid. The carrier responded that any irregularities in the shipping were beyond its control. The shipper counterclaimed for $1 million - the purported full value of the lost cargo and the lost containers. The counterclaim was styled as gross negligence, misrepresentation, breach of warranty, and indemnification.

Held: The shipper's counterclaim against the ocean carrier is governed by COGSA, which provides shipper's exclusive remedy. The statute of limitations is 1 year from the date of delivery. Thus, the limitations period expired, and the shipper's counterclaim against the ocean carrier for loss of cargo was filed after expiration of the limitations period. Regardless of the limitations issue, the ocean carrier's liability is capped at $500 per package or customary freight unit pursuant to COGSA. The court allowed the ocean carrier's suit seeking to recover shipping charges to proceed, commenting that if the carrier proves its entitlement to freight charges, then the shipper may be entitled to a defens of "recoupment," entitling the shipper to deduct from the shipping charges the amount of $500 per missing container. In other words, although limitations bars the shipper from asserting an affirmative claim for the cargo loss, under a "recoupment" defense, shipper might nonetheless deduct a capped amount from the transportation charges from the transportation charges that shipper may be required to pay carrier.

Presenter: Tom Martin

III. **Limitations of Liability**

13. **Danner v. International Freight Systems**, 2012 US Dist Lexis 1233, 2013 WL 78101, 90 Fed. R. Evid. Serv. 411 (D. Md). There were several shippers (a family) and multiple carriers, but for simplicity sake this summary will refer to shipper and carrier in the singular. Facts: Shipper had gone on a hunting trip to South Africa. Shipper killed several trophy quality male lions. The skins and skulls went by air from South Africa to Seattle, and then into Carrier's bonded warehouse. The skins were meant to be picked up for ground handling, but at some point in this process there was a mistake, and the items were lost. They were later found in a warehouse. The skins and skulls suffered irreparable damage due to moisture and bacteria. Shipper sued Carrier for $98,000, arguing that the trip and the trophies were unique, and requesting the Carrier to reimburse Shipper for the cost of the lion trophy fees assessed by the South African Government, airfare to South Africa, the amounts paid to guides and staff for 10 days, and the cost of dipping and packing of the skins and skulls. Carrier contended that its liability was capped by the Montreal Convention at 19 Special Drawing Rights per kilo, which worked out to $3,000 based on the weight of the skins and skulls. Shipper responded that the evidence indicated that the skins and skulls were lost in transit and languished in a warehouse for months, and the bacteria and moisture penetrated the skills and skull during time that the trophies were not being carried by air, and the treaty does not apply. The Carrier responded that the air waybill stated that the liability limits apply when the cargo is in the charge of the carrier or the carrier's agent. The warehouse was the Carrier's agent's warehouse. Thus, accepting for argument sake that the damage occurred during warehousing, the liability cap still applies. Article 18 of the Montreal Convention establishes a rebuttable presumption to this effect. The case was tried to the Court, without a jury.

Held: The court held that the Carrier's liability was capped under the Montreal Convention.

Presenter: Colin Bell

14. **Miller v. Air Van Lines, Inc.**, 2012 WL 6901155 (Conn. Super.). Steven Miller brought suit for damage to household goods transported from Connecticut to Hawaii, of alleged value of $113,711 (including a piano). When damage to certain items was discovered upon delivery, Miller was paid the declared value of the damaged items, totaling $17,854. Miller filed suit against the motor carrier, Sterling Moving and Storage, Inc. and the various intermediaries. A bench trial resulted in a verdict for the defendants. The Court found that it did not credit

Miller's testimony as to the value, that Miller admitted that he was aware that he had selected the limitation of liability value, as opposed to full declared value, to save costs, and that the limitations were reasonable. The court dismissed the bailment claims as they were not raised in the complaint or the Joint Trial Management Report. The Court also dismissed the claims under the Connecticut Unfair Trade Practice Act ("CUTPA") as both impliedly preempted under the Carmack Amendment and lacking any factual support.

Presenter: Leslie McMurray

15. OOO "Garant-S" v. Empire United Lines Co., Inc., 2013 US Dist Lexis 46329, 2013 WL 1338822 (E.D.N.Y., Mar. 29, 2013). The shipper tendered two BMW cars to the carrier (actually, an NVOCC) for transport to Finland. While the cars were in the carrier's storage facility, not yet loaded on a vessel, thieves broke in and stole the cars. The shipper suspected the carrier's employees of being complicit in the thefts. The shipper sued the carrier for breach of contract, conversion, wrongful taking, negligence and fraud. The carrier asserted that its liability was capped at $500 per vehicle under COGSA. The shipper responded that since the cars were not yet loaded onto the vessel, the bill of lading did not apply, and the carrier was liable for full value.

Issue: What was the carrier's liability?

Holding: The carrier's liability is capped at $500 per car, for a total of $1000. The court held that the bill of lading extended COGSA coverage beyond the time of loading and unloading. The bill of lading showed the place of receipt as the carrier's storage facility. The bill of lading incorporated COGSA and its $500 per package liability cap. The court also observed that the carrier and shipper had a long standing relationship, the standard bill of lading issued at the time of loading had a liability cap, and the shipper was aware of these terms. Thus, the standard terms applied, even though the actual bill of lading had not yet been issued. Finally, the court held that the allegation that Carrier's employees were complicit in the theft does not deprive the carrier of the COGSA liability cap.

Presenter: Richard Furman

16. Rohr, Inc. vs. UPS-Supply Chain Solutions, Inc., et al., 2013 U.S. Dist. LEXIS 50457, 2013 WL 1411898 (S.D. Cal. 2013). Rohr is a subsidiary of Goodrich. Rohr and UPS-SCS entered into two agreements, a Master Services

Agreement (MSA) and a Customs Brokerage Services Agreement (CBSA). The MSA had two limitations of liability in favor of UPS-SCS. The CBSA provided UPS-SCS had no liability for damage to goods while in another's custody. UPS-SCS hired carriers to transport two oversized shipments. Both carriers struck overpasses with the cargo. The carrier for one of the shipments defaulted when sued. The carrier for the other shipment, Knight Transportation, filed a motion to enforce the limitation of liability provided by COGSA and the ocean bill of lading—arguing that the bill was a through bill. UPS-SCS also moved to enforce the limitations contained in the MSA and the CBSA.

Issues: Whether UPS-SCS and/or Knight were entitled to rely on the limitations of liability? Whether Rohr was entitled to summary judgment against UPS-SCS and Knight on the limitation of liability issues?

Holdings: Since the services provided by UPS-SCS in relation to the shipments were not described in any portion of the MSA, the MSA's limitations do not apply. However, the court held that if UPS-SCS can prove that it acted purely as a customs broker for Rohr, then the limitation in the CBSA will apply to UPS-SCS. The court treated Knight's motion as a motion to reconsider a prior decision denying relief to Knight. The court found that the new evidence presented by Knight did not warrant reconsideration. Rohr's motion was denied because fact issues precluded the court's summary determination of whether UPS-SCS was acting as a broker, carrier or freight forwarder.

Presenter: Hillary Booth

17. <u>Saacke North America, LLC v. Landstar Carrier Services, Inc</u>., 2012 U.S. Dist. LEXIS 178739 (W.D.N.C., 2012). A trade show exhibiter/shipper hired a broker to move its trade show equipment from Chicago to North Carolina. The broker selected Landstar as the carrier to transport the shipper’s goods. The sponsor of the trade show (“GES”) required each exhibiter to agree to a bill of lading in order to move an exhibiter’s goods from the trade show floor to the trade show shipping area. The GES bill of lading contained a limitation of liability of fifty cents per pound or $100 per package. The bill of lading also contained a blank excess declared value provision. Landstar picked up the freight in Illinois and delivered it to North Carolina. Upon delivery of the freight to North Carolina, the Landstar driver submitted a Landstar bill of lading to the shipper which a representative of the shipper signed at destination. The freight was short one pallet at a value of approximately $184,000.

Issue: Was Landstar entitled to rely on the limitation of liability?

Holding: On cross-motions for partial summary judgment, the trial court held that Landstar was not entitled to rely upon the limitation of liability in the GES bill of lading because the shipper did not have a reasonable opportunity to select a higher release rate. Furthermore, the court held that the Landstar bill of lading was inapplicable because it was not tendered to the shipper prior to the movement of the freight. The court also held that there was no agency relationship between the shipper and GES, the sponsor of the tradeshow, such that the shipper would be bound by the provisions of the GES bill of lading. Finally, the trial court held that Landstar's rules tariff did not apply. As a result, the trial court granted the shipper's motion for partial summary judgment and denied Landstar's motion for partial summary judgment and held that Landstar's liability was not limited.

Presenter: Fred Marcinak

IV. **Preemption**

18. **Atlas Aerospace LLC v. Advanced Transportation, Inc.,** 2013 U.S. Dist. LEXIS 58378, 2013 WL 1767943 (D. Kan. 2013). Atlas alleged it contracted with Advanced Transportation to transport a machine from Canada to Kansas. Advanced hired DMG Canada to prepare the machine for shipping. Atlas hired Redmond to mount the machine on BRK's trailer. The machine was damaged upon arrival in Kansas. Atlas filed state law claims, and BRK filed a motion to dismiss which was previously granted dismissing non-Carmack claims against BRK. Advanced filed a motion to dismiss after Atlas amended its complaint. Advanced claimed that non-Carmack claims should be dismissed. Atlas argued that since Advanced was a broker in this transaction, claims against Advanced fall outside Carmack preemption.

Issue: Are Atlas' non-Carmack claims against Advanced preempted? Are Atlas' claims for lost profits too speculative?

Holding: The court denied Advanced's preemption arguments, both under Carmack and under Section 14501, holding that preemption does not apply to brokers under these facts and specifically rejecting the *Ameriswiss* decision. The court also held that Atlas had made sufficiently specific claims for lost profits to survive the minimal standard of pleading required at the motion to dismiss level.

Presenter: Beata Shapiro

19. **Benefield v. Hays City Police Dept and Greyhound**, 2013 US Dist Lexis 17732, 2013 WL 501412 (D. Kansas). A passenger was traveling on a Greyhound bus from Denver to St. Louis. The passenger became unruly. The bus driver called the police while the bus was in Hays, Kansas. The passenger was taken to jail. The passenger was found to have marijuana in his possession. The bus drove off with the passenger's luggage still in the bus. The passenger was eventually convicted of various crimes and spent 4 months in jail. Two years and 3 months after the arrest, the passenger (representing himself) sued the Hays City Police Depart and Carrier for false arrest, false imprisonment, and conspiracy, and sued Carrier for theft of his luggage.

Issue: Can the passenger sue the bus company for theft?

Holding: No. Carrier wins. The claim against the bus company is preempted by the Carmack Amendment, which provides the passenger's exclusive remedy. The bus company validly limited its liability. Further, the passenger never filed a claim, and the statute of limitations expired. The other claims for false arrest, false imprisonment and conspiracy were dismissed.

Presenter: Ken Hoffman

20. **California Tow Truck Assn. v. City of San Francisco**, 2013 WL 791265 (N.D.Cal.), Fed. Carr. Cas. P 84,751 (N.D. Cal. 2013). Nonprofit corporation representing towing companies filed a state court action alleging that San Francisco's permit system for towing companies and drivers was preempted by the FAAAA. In this, the fourth decision in this ongoing dispute, the parties filed cross-motions for summary judgment. Both parties appealed. The Court of Appeals, 693 F.3d 847, vacated and remanded. On remand, parties again filed cross-motions for summary judgment.

Issue: Whether the FAAAA preempts the city's permit system for tow trucks.

Holdings: The court held that: (1) the city's permit system fell within scope of motor vehicle safety exception to FAAAA's preemption provision; (2) the requirements that permit applicants provide identifying information, description of their business plans, system for handling complaints, evidence of minimum

insurance coverage, and record of all of applicant's criminal convictions fell within scope of FAAAA's motor vehicle safety exception; (3) the requirement that applicants pay filing and finger-printing fees fell within scope of FAAAA's motor vehicle safety exception; (4) the requirement that applicants provide evidence of insurance fell within scope of FAAAA's financial responsibility exception; (5) the requirement that tow drivers and firms display their permits at all times was not subject to preemption; (6) the requirement that firms maintain record of each vehicle towed fell within scope of FAAAA's motor vehicle safety exception; and (7) the provision prohibiting firms from imposed towing, storage, or other charges in excess of the maximum rate established by the city was preempted by FAAAA.

Presenter: Christina Nugent

21. **City of Girard v. Youngstown Belt Railway Co.**, 134 Ohio St.3d 79 (2012). The City filed an appropriation action against Youngstown in state court regarding a 41.5 acre parcel of land of the 55 acre parcel owned by Youngstown after Youngstown had entered into an agreement with Total Waste Logistics for the sale of the land for use as a construction-and-demolition landfill contingent on Total Waste obtaining the appropriate permits. Youngstown filed a motion for summary judgment arguing that the appropriation proceedings were preempted by Interstate Commerce Commission Termination Act of 1995 ("ICCTA") as it was using 13.5 acres of the parcel (a section which was not part of the planned appropriation) for storage space and had plans for the remaining lot to develop it for use for "industrial, transloading, and/or warehousing purposes to be serviced by rail" and the appropriation would result in a burden to or interference with railway transportation. The City argued that the sale of the parcel to a landfill company contradicted that argument and the 13.5 acres unaffected by the parcel needed for City use was admitted as sufficient for Youngstown's storage use. The trial court, exercising its discretionary jurisdiction, held that the appropriation action was preempted. The City appealed. The District Court of Appeals affirmed the trial court's ruling, although on a slightly different reasoning as to ICCTA preemption, focusing on Youngstown's unspecified future plans for the parcel to expand railway operations (despite the sale agreement to the landfill company.) The City appealed.

Issues: 1. Did the trial court correctly exercise jurisdiction? 2. Is there ICCTA preemption?

Holding: The Court of Appeals found that the trial court properly exercised its concurrent jurisdiction to decide whether ICCTA preemption applies. The Court of Appeals reversed as to preemption, finding that preemption did not apply where the present use of the parcel did not call for preemption of the future operations of the purchaser of the property (as a landfill). The present use did not constitute transportation by a railway carrier, and Youngstown's claims that it intends to use the parcel for future expansion were too hypothetical and contradicted by the sale of the property to Total Waste Logistics.

Presenter: John Alden

22. Clean Harbors Recycling Services Center of Chicago, LLC, et al., v. Harold Marcus Ltd., 2013 U.S. Dist. LEXIS 45703, 2013 WL 1329532 (D. Mass. 2013). Harold Marcus Ltd.agreed to provide interstate transportation of waste materials for Clean Harbors pursuant to a Waste Transportation Agreement. The parties also entered into a "Stand By Emergency Response Agreement" ("SERA") by which Clean Harbors agreed to provide remediation services. When a load of waste materials exploded in Michigan in route from Indiana to Ontario, Canada, Clean Harbors provided clean-up services for the waste material spill and submitted a bill to the carrier for over $688,000. Clean Harbors filed suit in state court to recover for breach of contract as to both the transportation agreement and the SERA. The carrier removed the case to federal court and moved to dismiss based on Carmack preemption.

Issue: Was the SERA preempted by Carmack?

Holding: The trial court determined that the SERA was not preempted by Carmack as Clean Harbors did not seek to recover for any breach of the carrier's duties as a common carrier. However, the court determined that the remaining contract claim for indemnity for failure to provide appropriate insurance coverage and for improperly selecting a tanker for the waste materials it transported were preempted by the Carmack Amendment. The court further held complete preemption of the state law claims and allowed the plaintiff to amend. In addition, the court provided advice to the defendant as to potential defenses under the bill of lading, including the failure to provide written notice of a claim under the provisions of the bill of lading and deadlines within which to file a lawsuit.

Presenter: Fritz Damm

23. **Dan's City Used Cars, Inc. v. Pelkey**, 133 S.Ct. 1769 (U.S. 2013). Vehicle owner brought action against towing company that towed his vehicle and later traded it to a third party without compensating owner, alleging violations of state laws governing enforcement of statutory liens for storage and towing fees, the New Hampshire Consumer Protection Act, and common law negligence. The Superior Court granted summary judgment to towing company on grounds that the Federal Aviation Administration Authorization Act (FAAAA) preempted owner's claims.

Issue: Whether Section 14501(c)(1) preempts state-law claims stemming from the storage and disposal of a towed vehicle.

Holding: The FAAAA did not preempt owner's claims, and the FAAAA does not preempt state-law claims for damages stemming from the storage and disposal of a towed vehicle.

Presenter: Mark Andrews

24. **DHL Express (USA), Inc. v. Falcon Express International, Inc.,** 2013 WL 561457 (Tex.App.-Houston [1st Dist.], 2013). At issue was an allegation by the reseller of DHL's packaging services that DHL failed to disclose that DHL intended to end its domestic package delivery service operations, which it did soon after it terminated the reseller agreement. The parties disputed the claim of rescission of the agreement based on fraudulent inducement. A trial court jury awarded the reseller compensatory damages of $1.7 million on the rescission theory and $3.2 million in punitive damages for a total award of $4.9 million.

Issue: Whether FAAAA preempts the claim of rescission.

Holding: The Texas Court of Appeals reversed the judgment of the trial court and ruled that the fraudulent inducement claim and the award of punitive damages were preempted by FAAAA because permitting the claims would allow Texas' state law to serve "as a means to guide and police the marketing practices of" an airline or motor carrier following the decisions of the United States Supreme Court in *Wolens* and *Morales*. The Court of Appeals analyzed the U.S. Supreme Court decisions as well as two Texas Supreme Court decisions which analyzed the preemptive effect of FAAAA over tort lawsuits against carriers.

Presenter: Stephen Dennis

25. **Dynamic Transit Co. et al. vs. Trans Pacific Ventures, Inc.,** 291 P.3d 114; 2012 Nev. LEXIS 118; 128 Nev. Adv. Rep. 69 (Nev. 2012). Shipper purchased a luxury sports car for approximately $67,000 and contracted with Nex-Day Auto Transport, Inc. to deliver the car from Nevada to Washington. Nex-Day attempted to arrange for the transportation of the car with Dynamic Transit Company/Knights Company ("Knights"). However, Nex-Day owed almost $10,000 to Knights on a prior movement. As a result, the Knights dispatcher altered the terms of the agreement to include a "pay-on-delivery" clause and to provide for transport in an unenclosed carrier. The Knights dispatcher then generated a bill of lading and arrangement of pick-up of the vehicle. However, Nex-Day never received a copy of the work order from Knights and faxed a "cancellation" to Knights. Undaunted, a Knights driver picked up the car and loaded it on an unenclosed trailer. Upon arriving in Washington, Knights demanded that Nex-Day tender payment for the unrelated past-due invoices before it would proceed with delivery to the shipper. After Nex-Day denied payment, the car was transported to a storage facility in Missouri. The shipper brought suit against Knights for conversion and fraud.

Issue: Whether Carmack preempts a claim of conversion for the benefit of the carrier.

Holding: The court denied the position of the carrier that the Carmack Amendment preempted the shipper's state law claims. Specifically, the court found that the carrier had converted the car for its own use, which constitutes a denial of the rights of the owner of the property. Thereafter, the trial court awarded judgment in favor of the shipper for $52,500 in compensatory damages and $300,000 in punitive damages. The Nevada Supreme Court affirmed the decision of the trial court.

Presenter: Wes Chused

26. **Hamilton v. United Airlines, Inc.**, 2012 WL 6642489 (N.D. Ill.). Hamilton, a former flight attendant for United Airlines, sued for violation of the Illinois Whistleblower Act and common law retaliatory discharge and sought declaratory relief ordering United to admit that it had no legitimate reason to terminate him. Hamilton claimed that United terminated him for bringing to the Federal Aviation Administration's attention United's departure from internal holding times regulation as to security checks prior to allowing additional passengers board a flight already occupied with commercial passengers, while

United argued he was terminated for inflating holding times to increase his pay. United removed and moved to dismiss the claims based on federal preemption of the state law claims pursuant to the Federal Airline Deregulation Act, 49 U.S.C. § 41713(b)(1)("FADA") and the Whistleblower Protection Program ("WPP") amendment to the FADA.

Issues: 1. Are whistleblower and retaliatory discharge claims under Illinois state law preempted by FADA's exclusive regulation of price, route, and services of an airline, or expressly preempted by WPP? 2. Is there federal subject matter jurisdiction?

Holdings: The Court held that Hamilton's claims were too tenuously related to any price, route, or services provided by United and therefore not expressly preempted by FADA; the claims stemmed purely from his employment relationship with United rather than as an airline competitor; and the claims were not related to United's safety obligations as to rates, routes or services. The Court also held that Congress did not intend the WPP to be the exclusive remedy for whistleblower claims. The Court denied the Defendant's motion to dismiss and ordered remand of the action for lack of subject matter jurisdiction

Presenter: Bruce Spitzer

27. **Lozman v. City of Riviera Beach, FL,** 568 U.S. ____ (2013) Plaintiff docked his floating home at the City of Riviera Beach Marina and used it as his primary residence. The city seized Plaintiff's home after he did not comply with new city regulations, and filed an admiralty claim in the U.S. District Court for the Southern District of Florida. The district court found that the residence was a "vessel" under 1 U.S.C. §3 for purposes of admiralty jurisdiction, and further found that the floating home had been trespassing on city property. The city put the floating home up for auction, bought it as the highest bigger, and destroyed it. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's holding. The Supreme Court granted certiorari on the question of whether the floating home was a "vessel" under the definition of 1 U.S.C. §3.

Issue: Whether the definition of "vessel" in 1 U.S.C. §3 includes, and thus grants federal maritime jurisdiction over, indefinitely-moored structures like Plaintiff's floating home.

Holding: In support of his case plaintiff relied heavily the definition of "transportation" in sources such as Webster's and Black's dictionaries, arguing that transportation was not the intended purpose of the structure. In opposition, the defendant city relied on a practical capability standard. In an opinion delivered by Justice Breyer, the Court held by a vote of 7-2 that such a floating structure does not constitute a "vessel," and thus does not fall within the scope of federal maritime law. The court reasoned that the definition of "transportation," the conveyance of persons or things from one place to another, must be applied in a practical way. As such, the Court found that a structure does not fall within the scope of the statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

Presenter: Richard Furman

28. <u>OHL North America Transp. v. Chris Crossley's Trucking Adventures</u>, 2013 WL 1684103 (D.Or.,2013). OHL was a freight forwarder and a transportation management company. OHL hired Crossley to transport chicken from Texas to Oregon. The shipment was damaged by improper temperature during shipment. OHL's subrogating insurer sued Crossley under Carmack, but also alleged breach of contract and negligence.

Issue: Should Crossely's motion to dismiss the breach of contract and negligence claims be granted based on Carmack preemption?

Holding: The court acknowledged that the breach of contract and negligence claims were preempted by Carmack, but nevertheless denied Crossely's motion to strike the non-Carmack claims because the breach of contract and negligence are not part of pre-empted state law claims, but simply alleged in support of the Carmack Amendment case. The court cited no authority for its ruling.

Presenter: Kevin Anderson

29. <u>Pipe Freezing Services v. FedEx Ground</u>, 2013 US Dist Lexis 9591, 2013 WL 276048, Fed. Carr. Cas. P 84,746 (S.D. Miss). Shipper Pipe Freezing Services engaged carrier FedEx Ground to transport specialized high-value cryogenic cold end pipes from Mississippi to Texas. The pipes were used in storage tanks to prevent freezing. Shipper alleged that one pipe was missing and filed a timely claim. The carrier denied the claim on the basis that the original shipping cartons,

packing materials and contents were not made available for inspection, as required by the carrier's terms and conditions. The shipper sued the carrier for $19,000, the value of the missing pipe, plus damages for the carrier's purported fraudulent representations in connection with its handling of the claim. The carrier argued that the lawsuit was preempted by Carmack and the carrier's maximum liability was capped under the bill of lading. The carrier also argued that regardless, it denied the claim for legitimate reasons, and the shipper cannot twist denial of the claim into an alleged act of fraud and then sue for fraud. Such a tactic would be a back-door way of getting around Carmack. The carrier moved to dismiss.

Holding: Carmack preemption encompasses alleged negligence and misrepresentation that occurs in the course of a carrier's handling a claim for damages arising from an interstate shipment.

Presenter: Clark Monroe

30. Rosen v. Continental Airlines, Inc., 2013 WL 656189 (N.J. Super.). Michael Rosen filed a class action against Continental for violation of the New Jersey Consumer Fraud Act, discrimination, emotional distress, and breach of contract for Continental's refused to allow him to purchase on-flight amenities (headset and a cocktail) using cash on a flight from Hawaii to NJ. Rosen argued that the cash-less cabin policy amounted to discrimination against low-income passengers, preventing him from enjoying in-flight amenities, resulting in severe emotional distress and mental anguish. The lower court denied Plaintiff's claim for class certification as baseless and dismissed all but the breach of contract claim as preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(1)(a) ("ADA"), which Rosen voluntarily dismissed in order to appeal the lower court's ruling. The Appellate Division affirmed, finding the sale of a headset and alcoholic beverages "relat[es] to price, routes, and service[.]" The Court held that the definition of "services" includes matters such as "boarding procedures" (seemingly contrary to the holding in Hamilton-Case 26), baggage handling, and food and drink-matters.

Presenter: John Lane

31. In re Sierra Club, Supreme Court—New York, Cause No. 2012-00810 (March 25, 2013). In this action brought in Steuben County, New York, the Sierra Club sought to stop the Wellsboro & Corning Railroad (a subsidiary of Rail America, now owned by Genesee and Wyoming) from shipping clean water which is being sold by the Village of Painted Post, New York and being shipped to SWEPI (Shell Oil's Natural Gas Subsidiary) for fracking in Pennsylvania. The

Railroad brought a motion to dismiss the matter claiming preemption. The Sierra Club contended that the railroad had to obtain a state permit to operate the transloading facility it had built so that the 47 car trains of water could be loaded and moved on a daily basis. The Sierra Club also contended that even if there was federal preemption for the facility that the railroad would have to obtain permits from the Surface Transportation Board before it began its operations and in that proceeding obtain a National Environmental Policy Act (NEPA) review. The Sierra club also contended that the Railroad had crossed two other railroads to get to the facility it built on another railroad with only a trackage rights agreement and permission from the other railroad and did not obtain permission to do so from the STB.

Issue: Is state regulation of the interstate movement of water used in fracking preempted.

Holding: The Court in its review found that the STB's jurisdiction over railroad facilities is exclusive and that no other regulatory body or court, state or federal, could opine on the issues. The Court added that NEPA review would not necessarily be required even if the STB had been asked its opinion on the new facility and that there was no law or regulation which required that the railroad go to the STB to invoke its jurisdiction to build the facility or to acquire trackage rights to cross other railroads. Finally when the Sierra club suggested that the Court remand the matter to the STB for its opinion, the Court refused saying that was a useless act since the Court had no right to change or modify the decision or the STB in the matter. The opinion includes some great cases from the brief in the matter supporting preemption regarding the building and operation of railroad facilities and railroad operations in general.

Unfortunately the Village of Painted Post did not fare as well as the railroad. The court found that it did not obtain certain required state permits to sell the water and this part of the decision is now on appeal. The Sierra Club also asked the New York State Judge opine on whether or not fracking should continue in Pennsylvania but the Judge declined to make a ruling.

Presenter: John Fiorilla

V. Jurisdiction, Venue, and Removal

32. **Accuity v. YRC, Inc.,** 2013 U.S. Dist. LEXIS 23073, 2013 WL 646218 (N.D. Ohio 2013). Plaintiff insured shipper, Carrier Services Group, Inc., which

had hired YRC to transfer a computer server terminal from Colorado to Ohio. Plaintiff paid the damages to the cargo and subrogated against carrier for negligence, breach of contract and under Carmack. YRC removed the action under 28 U.S.C. §1337(a). Plaintiff filed a motion for remand on the basis of state court concurrent jurisdiction under the Carmack Amendment, arguing that the case does not have to be removed if it meets the jurisdictional amount. Defendant filed a motion to dismiss the breach of contract and negligence claims based on preemption under the Carmack Amendment.

Issue: Whether concurrent jurisdiction of Plaintiff's claims precludes removal.

Holding: No. The Court denied the Plaintiff's motion for remand and granted YRC's motion to dismiss the breach of contract and negligence claims.

Presenter: Eric Zalud

33. Coutinho & Ferrostaal, Inc. v. STX Pan Ocean Co. Ltd., 2013 WL 1415107 (S.D.Tex. 2013). STX time-chartered the *M/V AGIA* to carry cargo from China to Houston. Ferrostaal alleges that its cargo was delivered in good condition, but was damaged when the *M/V AGIA* arrived in Houston. Ferrostaal sued STX alleging that a cargo of steel coils was damaged on the *M/V AGIA* during shipment. STX moved to dismiss based on the forum-selection clauses in bills of lading which provided for a South Korean forum. The analysis of the forum-selection clause was made more complicated because of a prior suit STX filed in the same court based on the same voyage of the *M/V AGIA*. The federal court dismissed the prior STX suit based on limitations and did not rule on venue. Ferrostaal argued in this case that STX was now judicially estopped from relying on the forum-selection clause.

Issues: Is the forum selection clause applicable, and is STX estopped from asserting it?

Holding: Even though STX is neither the owner nor the charterer of the vessel at issue, the Himalaya clause in the bill of lading makes the forum selection clause applicable to STX. Contractual privity is not required to extend a bill of lading's protections under a Himalaya clause. Thus, the forum selection clause applies and is enforceable. STX is not judicially estopped from asserting the venue provision.

Presenter: Mike Tauscher

34. **Geyer v. U.S. Van Lines**, 2013 WL 65458 (S.D.W.Va.,2013). Geyer engaged defendant All Coast Transporters to convey personal and professional effects from Ohio to Georgia. At an undetermined time, defendant United States Van Lines obtained possession of the cargo. The United States Van Lines truck containing the plaintiff's belongings caught fire while travelling in West Virginia. Plaintiff sued All Coast and United States Van Lines in the state court in West Virginia. All Coast removed. United States Van Lines never appeared. Plaintiff filed two motions to remand, alleging removal procedure defects and failure to obtain consent of all defendants to the removal.

Issue: Should the case be remanded?

Holding: Both motions to remand were denied. The procedural defect of failing to notify the state court of the removal was moot because the removing defendant eventually provided the notice. The failure to obtain consent from the other defendant was waived as a basis for remand because of the plaintiff's failure to raise his procedural objections within the 30–day period established by 28 U.S.C. § 1447(c).

Presenter: Marian Sauvey

35. **Great American Insurance Co. v. Nippon Yusen Kaisha,** 2013 US Dist Lexis 67175, 2013 WL 1962308 (N.D. Cal). Shipper hired Carrier to transport 6000 cartons of grapes from California to the Philippines by ocean at a specified temperature. The temperature varied widely during shipping, which caused the grapes to arrive moldy and rotting. Shipper collected $48,000 from its own insurer, and in turn, Shipper's Insurer sued the ocean carrier in a US court in a subrogation suit to collect the $48,000. The bill of lading required lawsuits arising from the shipment to be filed in Japan. The carrier accordingly argued that the US court had no jurisdiction, and any lawsuit should be brought in Japan.

Issue: Is the forum selection clause in the bill of lading valid?

Holding: The court held that the forum selection clause is valid and enforceable, and the court granted the motion to dismiss.

Presenter: Chris Merrick

36. Great American Lines, Inc. v. Sanovi-Aventis U.S., LLC, 2013 WL 596421 (W.D.Pa. 2013). Great American Lines (GAL) entered into a Transportation Agreement with Sanofi, a manufacturer of pharmaceuticals, for delivery of Sanofi's product to Amerisource. GAL contracted with Logistics and Distribution Services (LDS) for the transport of Sanofi's product to Amerisource. Upon delivery of the freight, Amerisource reported that the freight was damaged and refused delivery. Sanofi filed a claim with GAL seeking $2.1 million for damage to its freight. GAL declined the claim and filed suit seeking a declaration that GAL was not liable to Sanofi pursuant to the Transportation Agreement. LDS filed a motion to dismiss based on another agreement, the Master Agreement, which contains a forum selection clause indicating that any claims arising from that agreement shall be brought in the State of Michigan and be decided under Michigan law. Alternatively, LDS sought dismissal based on the arbitration clause in a Broker-Carrier Spot Contract between GAL and LDS.

Issues: Should the case be dismissed based on the forum selection clause or the arbitration agreement?

Holding: The court determined that it was unclear which contract governed the dispute between GAL and LDS, namely, that it was impossible to determine the intent of the parties as to which agreement would bind or supersede the other agreement(s). Because of these issues, the court determined that the motions were premature and denied them without prejudice.

Presenter: Dennis Kusturiss

37. Haratio Shipping Co., Ltd. v. Oceaneering Intern., Inc., 2013 WL 1816625 (S.D.Tex. 2013). Oceaneering sought to ship electrical cable and stainless steel tubing from Germany to Florida. Oceaneering entered into a Booking Note with Onego, a vessel charterer. Onego entered into a time charter with Haratio. Haratio owned, and Plaintiff Internship Navigation Co., Ltd. operated, the *M/V ONEGO MISTRAL*, the vessel used to ship Oceaneering's cargo. Onego issued bills of lading on behalf of the Master relating to the carriage. Oceaneering filed this suit after the cargo allegedly sustained damage during the voyage from Germany to Florida.

Issue: Whether venue is proper in Texas in light of the different forum selection clauses in the parties' documents.

Holding: The court addressed two forum selection clauses: a clause in the addendum to the Booking Note, which selects London for arbitration, or a clause in the Bills of Lading, which selects litigation in Cyprus. The court held that the prior agreement between the parties trumps the forum selection in the bill of lading, requiring arbitration in London.

Presenter: Tim Knight

38. Mahmoud Shaban & Sons Co. v. Mediterranean Shipping Co., S.A., et al. (S.D.N.Y., Jan. 28, 2013). A forum selection clause was placed in a bill of lading between a broker and a carrier. The shipper did not see the bill of lading. After a shipment of rice was delivered by the ocean carrier to Jordan, the parties determined that the rice was contaminated. The rice was sold as animal feed at a substantial loss. The consignee-purchaser of the rice filed suit against the international freight forwarder and the ocean carrier in the Southern District of New York.

Issue: Whether the forum selection was enforceable.

Holding: Although no party transacted business in the Southern District of New York, the court found that it had jurisdiction over all parties pursuant to the forum selection clause in the bill of lading between the freight forwarder and the ocean carrier. Reviewing the *Kirby* decision, as well as the decision of the Southern District of New York in *A.P. Moller-Maersk*, the court concluded that an intermediary serves as the upstream merchant's agent for the purposes of agreeing to litigate in a particular forum.

Presenter: Barry Gutterman

39. Pyramid Transportation, Inc. v. Greatwide Dallas Mavis, LLC, 2013 WL 840664 (N.D. Tex.). Pyramid, a freight broker, arranged for Greatwide, a motor carrier, to deliver a Caterpillar dump truck for its customer, Claudio Marcias, from Georgia to Texas. The truck was damaged en route when it was struck by a train. Pyramid paid a third party to transport the damaged truck to Texas, incurred storage costs, and was not paid by Marcias for services in the amount of approximately $80,000. Pyramid refused to pay Greatwide for services rendered on other jobs as a result of the truck damage. Pyramid filed suit, raising claims under Carmack, breach of contract and negligence, for damages to the truck (with power of attorney to act on Marcias' behalf), loss of use, lost business

opportunities, and storage costs. Greatwide counterclaimed for breach of contract for the outstanding accounts. Pyramid filed a motion for partial summary judgment for damage to the truck and for attorneys' fees. Greatwide argued that Pyramid lacked standing as it did not own the truck and also moved for summary judgment for lack of liability and limitation of damages.

Issue: Does Pyramid have standing (constitutional and prudential) to sue under Carmack?

Holding: While the Court found that Pyramid had constitutional standing to raise the Carmack claim for damage to the truck, as it held a power of attorney from Marcias and sustained damages itself, the Court dismissed the Carmack claim based on lack of prudential standing. The Court *sua sponte* raised the issue of prudential standing, finding that without an assignment of rights from Marcias either in the bill of lading or any other contract, a broker on its own does not have the right to sue under Carmack, which only permits suit "under a receipt or a bill of lading" 49 U.S.C. § 14706(a)(1).

Presenter: Hank Seaton

40. <u>Samsung Austin Semiconductor v. Integrated Airline Services</u>, 2013 US Dist Lexis 3497, 2013 WL 105380 (N.D. Texas). Shipper hired Carrier #1 to transport an expensive machine and components from Singapore to Austin, Texas. The machine arrived at DFW Airport safe and sound. The plan was for the machine to be picked up by a ground carrier – Carrier #2. At pickup, Carrier #2 issued a delivery ticket indicating that carriage by air had ceased. While the machine was in a warehouse being prepared for ground transport, a forklift operator hired by Carrier #2 dropped the machine, causing irreparable damage. Shipper sued Carrier #2 and the forklift operator under state law for breach of bailment for $2.7 million. Carrier #2 and the forklift operator argued the damage to the machine occurred within airport boundaries, and thus, the lawsuit is governed by the Montreal Convention and should be adjudicated in federal court. In addition, they argued they were agents of Carrier #1, and thus, the Montreal Convention extended to their acts and omissions. The Shipper argued that the carriage by air ended when the machine arrived at DFW Airport and, consequently, the Montreal Convention does not apply.

Issue: Should the lawsuit be adjudicated in federal court or state court?

Holding: The lawsuit should be adjudicated in state court. The Montreal Convention generally extends to the entire move and extends to the agents of the air carrier. However, in this case, the paper trail and the shipping documents establish that the air move ended when the machine arrived in DFW Airport. Plus, Shipper had arranged for Carrier #2 and the forklift operator to handle the last part of the move, and thus, they were not the agents of Carrier #1 under this analysis. The Shipper's motion to remand the lawsuit to state court was granted.

Presenter: Kevin Fanning

41. **Solent Freight Services, Ltd., Inc. v. Alberty**, 2012 WL 6626009, 2012-2 Trade Cases P 78,190 (E.D.N.Y., 2012). This antitrust case involved a freight forwarder of hatching eggs and a claim against a competing freight forwarder. The plaintiff freight forwarder alleged violations of federal anti-trust law, defamation, tortious interference with business relations and civil conspiracy.

Issue: Did the plaintiff have standing to complain about an alleged agreement between the freight forwarder and a hatching eggs producer?

Holding: The court granted the defendant forwarder's motion to dismiss the federal anti-trust claims on the grounds that the plaintiff did not have standing to complain about an alleged agreement between the freight forwarder and a hatching eggs producer. As to the federal anti-trust claims, the court also held that the actions of the defendant competitor were not violations of the per se rule since the allegations of the amended complaint alleged a "vertical restraint" based upon the agreement between the competing freight forwarder and the hatching eggs producer. Further, the court held that the plaintiff's rule of reason claims should be dismissed because the restraint of trade in the hatching eggs market did not affect the freight forwarding industry in the particular market involving hatching eggs. The court pointed out that anti-trust laws "were enacted for the protection of competition, not competitors". The court also found that the plaintiff had not alleged a monopoly claim for the same reasons it found with regard to the rule of reason and the per se rule. The court refused to retain jurisdiction over the plaintiff's state law claims.

Presenter: John Anderson

VI. Carrier-Broker-Third Party Issues

42. National Interstate Insurance Co. v. Champion Truck Lines, Inc., et al., 2013 WL 1952198 (D.N.J., Mar. 21, 2013). Davis was injured when he was struck by a chassis driven by Champion's employee. Champion was hired as a carrier by broker Northstar to transport a container. After Davis sued for damages arising from his injuries, National Interstate filed this case to determine coverage for Davis' claims.

Issue: Whether Northstar's insurer or Champion's insurer was primary insurer for Davis' claim.

Holding: The court ruled that Northstar did not "hire" the container that injured Davis because the driver of the tractor trailer was under the control of the entity which had paid the driver, Champion. The tractor was serviced by Champion, and the driver was never hired by broker Northstar. Accordingly, Champion's insurer was primary for purposes of Davis' claim.

Presenter: Robert Rothstein

43. Royal & Sun Alliance Ins., PLC v. Int'l Management Services Co., Inc., 703 F.3d 604, Fed. Carr. Cas. P 84,745 (2nd Cir. 2013). Royal & Sun Alliance sued UPS (the logistics contractor), WDS (a motor carrier which was a UPS subsidiary), and Int'l Management Services ("IMS") (which provided the drivers) for damages resulting to its insured's (Ethicon) shipment of pharmaceuticals when the WDS truck, operated by an IMS driver, collided with a concrete barrier and caught fire. The resulting damages were stipulated at $750,000. On a motion for summary judgment, the United States District Court for the Southern District of New York found UPS liable in the amount of $250,000 pursuant to Ethicon's contract with UPS. The lower court also held that WDS was entitled to the limitation of liability protection under Ethicon's contract with UPS, as WDS was a wholly owned subsidiary of UPS, and the contract specified that the protections would extend to "designated affiliates". The lower court found that IMS was not entitled to the protection of a limitation of liability. After a bench trial, the court held in favor of RSA and entered verdict against IMS for $500,000 plus interest. IMS appealed.

Holding: The Second Circuit found that the limitation of liability in the contract between UPS and Ethicon's did not extend to a third party in the absence of a provision to that effect (e.g. "Himalaya Clause"), and in fact, Ethicon's contract with UPS stated that the liability of third-party carriers would be "governed by the applicable agreement with such carriers," while WDS's agreement with IMS did not contain any limitation of liability provisions. The Second Circuit also found

that the limitation of liability did not apply under the federal common law of bailment, absent evidence that the parties agreed to such a limitation. Finally, the Second Circuit held that the District Court did not misapply a burden shifting scheme applicable to negligence actions under federal common law when it held that IMS had failed to present sufficient evidence to overcome the inference of liability resulting from RSA meeting its prima facie burden of proof per the two prong test for negligence of a bailee under federal common law.

Presenter: George Wright

44. **Titan Transportation, Inc. v.O.K. Foods, Inc**, 2013 Ark. App. 33, 2013 WL 245253 (Ark.App.). The shipper O.K. Foods hired broker Titan Transportation to handle a shipment of frozen chicken from Arkansas to Colorado. Unbeknownst to O.K. Foods, Titan hired carrier Southwind to handle the actual transportation. At destination, the consignee rejected the shipment because records showed that the shipment was outside of the prescribed temperature range. OK sued Titan and Southwind for $30,000. Southwind ignored the lawsuit. OK asserted that Titan was responsible for the chicken. OK alleged that Titan never told OK that Titan selected Southwind to transport the chicken. The records showed that Southwind's corporate charter was revoked 8 months previously and Southwind was not in good standing. Because Titan selected an insolvent carrier, OK argued that Titan was responsible to OK just as if Titan was the actual carrier. Titan asserted that it was merely the broker and never touched the shipment; thus, OK's only remedy was with Southwind.

Issue: Can shipper sue the broker?

Holding: The appellate court did not characterize the broker Titan as a carrier, but instead concluded that Titan was an agent acting on behalf of an undisclosed principal (carrier Southwind), and accordingly, Titan was liable for the loss The court stated that the following facts supported this conclusion: The documents issued by Titan did not state that Titan was a broker; Titan did not hold itself out as a broker, or at least it was ambiguous about Titan's status; Titan's brochures showed images of carriers, and indicated that Titan itself performed hauling services; Titan advertised that it offered "carrier services"; and Titan never disclosed the name of the motor carrier to OK Foods.

Presenter: Vin Merrill

45. **United Van Lines, LLC v. Lohr Printing, Inc**., 2013 WL 353313 (D.N.J.,2013). Lohr Printing was in the business of making text-book covers. Lohr leased a printer valued at $261,000. Lohr contracted with UVL's agent, McCollister's, to ship the printer from Kentucky to New Jersey. A United driver picked up the printer and presented a United bill of lading. Lohr signed the bill of lading at origin. The printer was allegedly damaged in transit. United and McCollister's filed for a declaratory judgment of limited liability, and Lohr counterclaimed for damages in the full value of the printer. United had non-Carmack claims dismissed in a previous decision. Lohr filed third-party claims against the manufacturer of the printer and individual employees of McCollister's under various theories, including an alleged principal-agency relationship between United/McCollister's and the manufacturer.

Issue: Was the manufacturer of the printer and the motor carrier principal and agent for purposes of liability for the damaged shipment?

Holding: The court dismissed the agency allegations against United, McCollister's and the manufacturer. Neither the shipping contract nor the behavior of the parties suggested the requisite exercise of control between the manufacturer and United/McCollister's.

Presenter: John Husk

46. **Viasystems v. Landstar**, 2012 US Dist Lexis 171133, 2012 WL 6020015 (E.D. Wisconsin). Shipper hired Middleman #1 to arrange the transport of a Finnpower turret punch press from Wisconsin to El Paso, and from there it would be transloaded and placed on a flatbed for the cross-border move, and delivered to Ciudad Juarez, Mexico. Shipper provided Middleman #1 specific instructions for the move, including that the press be transloaded on a flatbed in El Paso for the cross-border move**.** Middleman #1 contacted Middleman #2, who in turn hired Carrier. The press arrived in El Paso, but there was uncertainty over where it was supposed to go. Carrier did not deliver the press to the address on the bill of lading, but instead delivered it to a different address. Carrier claimed that Middleman #2 advised Carrier by phone to do this. Carrier hired Sub-Carrier to handle the cross-border move. Sub-Carrier in turn hired Sub-Sub Carrier. The press was never placed on a flatbed. The press fell off the Sub-Sub's truck and was destroyed. The evidence suggested that the press was not properly rigged. Shipper sued Middleman #1, Middleman #2 and Carrier for $600,000.

Issues: The parties disputed just about everything, including what Shipper had instructed about the flatbed, whether and to whom those instructions were conveyed, what the bill of lading said, whether the bill of lading was modified, whether there were irregularities concerning the bill of lading, whether Middleman #2 told Carrier to deliver the press to a different El Paso address, whether Middleman #2 was a carrier or a broker, and whether Carrier was authorized to use a subcarrier. The parties disputed who was responsible for loading the press in El Paso. The parties disputed whether Carrier knew Sub-Carrier hired Sub-Sub.

Carrier argued it did exactly what Middleman #2 told it to do. Middleman #2 was the agent of Shipper, and by obeying Middleman #2 it is just as if it obeyed Shipper. Middleman #2 told Carrier to deliver the press to an address other than the address on the bill of lading. Carrier safely delivered the press to that alternative El Paso location, and the damage occurred after the press left Carrier's hands. Middleman #2 never told Carrier that Shipper required a flatbed for the cross-border move."

Holding: Carrier was liable under Carmack. Carrier issued a through bill. Carrier was liable for damages caused by intermediate carriers selected by the Carrier. Carrier cannot shield itself from liability by claiming that Middleman #2 was Shipper's agent. Carrier was involved in loading at the alternative address, and the press was not securely loaded, therefore Carrier was responsible (at least in part) for the press falling off the truck. The judge did not rule on the amount of damages. Carrier may be entitled to contribution and indemnity from some of the other defendants. Middleman #1 and Middleman #2 may have some culpability. The case will proceed to determine the amount and the allocation of damages.

Presenter: Dirk Beckwith

47. **Wise Recycling, LLC v. M2 Logistics**, 2013 WL 1870424 (N.D.Tex.). Wise Recycling (Wise) used broker M2 Logistics (M2) to arrange for over 500 shipments of scrap metal over two years. Wise and M2 did not have a broker-shipper contract. Wise prepared a Bill of Lading naming itself as the shipper and incorrectly naming M2 as the "carrier." M2 hired a carrier to transport the cargo. Before completing the interstate delivery, the driver stopped his vehicle in a fenced and locked yard. Thieves broke into the yard and stole the tractor and trailer by driving it through the fence. The cargo was not recovered, and the motor carrier's insurance company denied the claim because the vehicle, which was recently purchased by the driver, was not scheduled on the motor carrier's policy. Wise

sued the motor carrier under Carmack and negligent misrepresentation. Wise sued M2, as both a motor carrier and a broker, seeking damages and attorney's fees under Carmack, negligent retention, negligent misrepresentation regarding insurance, and breach of a contract. M2 removed the case and filed a Motion to Dismiss. M2 argued that although Carmack preempts state law claims against motor carriers, a broader interpretation of ICCTA shows that state law claims against transportation brokers should also be preempted.

Issue: Whether the state law claims of negligence, breach of contract, and a request for attorney's fees should be dismissed as to M2 as a broker and/or as a carrier due to federal preemption under FAAAA and ICCTA.

Holding: The Court held that Wise's allegation that M2 was a carrier was a "pure" Carmack claim and refused to dismiss Wise's Carmack claims. The Court held that Wise's claims of negligence and breach of contract against M2 as a carrier were preempted by Carmack. The Court also addressed preemption under FAAAA, holding that Wise's negligence claims against M2 as a "broker" were preempted by 49 U.S.C. § 14501. However, the Court did not dismiss Wise's breach of contract claim against M2 as a broker. Finally, the Court withheld ruling on the issue of attorney's fees until a dispositive resolution is obtained.

Presenter: Dennis Minichello

VII. **Freight Charges**

48. **Estes Express Lines, Inc. v. Carpenter Decorating Co., Inc.**, 2012 WL 2501117 (W.D. N.C.). Estes filed suit against Carpenter for unpaid freight charges pursuant to a pricing agreement. Carpenter failed to appear and the Court entered default. Plaintiff requested entry of default judgment. The Court concluded that the mere allegation that the defendant violated a federal law was insufficient to confer federal jurisdiction as the default only constitutes an admission as to the facts alleged in the complaint, not as to allegations regarding conclusion of law. The Court focused upon the elimination of the requirement to file tariffs (in most cases) with the enactment of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") to conclude that ICCTA eliminated federal-question jurisdiction over freight charge disputes where the freight charge disputes are no longer based upon filed tariffs. The Court gave the Plaintiff eleven days to submit

a memorandum establishing the Court's jurisdictional basis to avoid dismissal of the case for want of jurisdiction.

Presenter: Kyle Young

VIII. **Damages & Costs**

49. <u>Orient Overseas Container v. Crystal Cove Seafood</u>, 2012 US Dist. Lexis 182821, 2012 WL 6720615 (S.D.N.Y.). Shipper Crystal Cove hired carrier Oriental Overseas to transport 3,400 cartons of frozen tilapia fish from China to Tennessee. The fish had to be maintained at a specified temperature. After the fish was unloaded from the vessel, the fish was loaded onto a rail car. The refrigeration unit in the rail car failed. The carrier learned about the malfunction but did not tell Crystal Cove until two days later. Crystal Cove then told the carrier to break the seal on the containers and transfer the fish into a different container, but for reasons not clear, the carrier refused to do so. When the fish arrived at destination, it was clearly spoiled, and the shipper rejected the shipment. The carrier stored the fish in a different container, with a working refrigerator, while it hired a surveyor and attempted to sort out the dispute. Acting against Crystal Cove's orders, the carrier sold the fish to a salvage company for $30,000. Crystal Cove sued for $60,000 in damages under COGSA. The carrier counterclaimed for demurrage charges and surveying expenses. The parties disputed the salvage value of the fish and whether Crystal Cove had mitigated its damages.

Holding: After a bench trial, the court found that the carrier acted in bad faith and for purposes of delay and vexation and had to pay Crystal Cove damages, plus $50,000 for Shipper's attorney's fees.

Presenter: Jeff Cox

50. <u>W.W. Rowland Trucking Co., Inc. v. CRC Insurance Services, Inc. et al.</u>, CA: 4:12-91 (S.D. Tex. 2013). Trucking company sued its insurer for wrongfully failing to cover theft of a truck. Insurer argued that it had no obligation to pay since the insured warranted that its terminal would be one-hundred-percent fenced. The insured contended that the breached warranty did not cause the loss, and therefore nullifies the exclusion.

Issue: Did the trucking company's failure to fence its lot preclude coverage?

Holding: The court held that, pursuant to Texas law, an insurance contract on personal property is not voided by a warranty violation unless it causes or contributes to the loss. Since the insurer could not demonstrate that the gaps in the insured's fence caused the loss, the court found in favor of coverage.

Personal: David Sauvey

51. Rush Industries, Inc. v. MWP Contractors, LLC, 2012 US Dist. Lexis 170758, 2012 WL 6010059 (M.D.N.C. Nov. 2012). Rush purchased a saw for $13,000. The saw was beyond its expected useful life at the time Rush purchased it. Rush hired MWP to move the saw to Georgia. Unbeknownst to Rush, MWP contracted with Brann's Transport Service to move the saw. During transit, connectors and cables on the saw's computer were damaged. When the saw arrived and was set up, the saw did not operate. Rush sued MWP and Brann's for the damages. At trial, Rush met its burden of proving delivery to the carrier in good condition. However, Rush was not able to meet its prima facie burden of proof on damage to the computer components of the saw, other than the patent damage to the connectors and cables. Latent damage to the computer components was not proven, and Rush was only able to recover $118 for the cost of replacing cables and connectors. MWP counterclaimed for unpaid freight charges and recovered $6,388.59 from Rush.

Presenter: Wes Chused