Conference of Freight Counsel
Winter 2013 Meeting – Dallas, Texas

AGENDA

January 13-14, 2013
W Hotel Dallas, Texas

Topics:

A. Carrier Liability	**Cases 1-8**
B. Limitation Period and Notice	**Cases 9-15**
C. Limitation of Liability	**Cases 16-18**
D. Preemption	**Cases 19-28**
E. Jurisdiction, Venue and Removal	**Cases 29-41**
F. Carrier-Broker-Third Party Issues	**Cases 42-44**
G. Freight Charges	**Cases 45-49**
H. Damages and Costs	**Cases 50-54**

January 13:

Breakfast **8:30 a.m. – 9:30 a.m. W Hotel, Industry I**

First Session **9:30 a.m. – 12:00 noon W Hotel, Great Room-Ballroom**

Opening remarks, business meeting and introductions – 9:30

A. Carrier Liability

1. <u>Chem One, Ltd., et al. v. M/V Rickmers Genoa, et al.,</u> 2012 U.S. App Lexis 23241, 2012 WL 5458854 (2nd Cir.)

FACTS: The shipper tendered the ocean carrier 600 tons of a chemical for transport from China to the United States via ocean vessel. The ocean vessel collided with another ship, breaching the vessel's hull. Sea water flooded the cargo hold where the chemical had been stowed and reacted with magnesium in the chemical, producing flammable hydrogen gas. The hydrogen gas ignited, resulting in an explosion damaging the ship, the cargo, and killing a crew member. Over 65 parties were involved in the lawsuit. In this appellate decision, the court noted that the case was governed by COGSA, a finding which was challenged in this appeal. It was not disputed that the shipper provided the ocean carrier with an HTS code identifying the cargo as a magnesium based chemical. The summary judgment evidence established that the ocean carrier knew that magnesium emitted highly flammable hydrogen when exposed to water.

ISSUE: Under COGSA, a shipper of explosive or dangerous goods is strictly liable for all damages arising from the shipment, unless the carrier consented to, and had knowledge of, the nature and character of the goods. The carrier argued that it did not know the nature and character of the goods, and argued the shipper did not advise the carrier how dangerous the goods were. The carrier further

argued that the shipper should have advised of the heightened dangers of the subject chemical when exposed to sea water through a plain warning. Thus, the appellate court addressed whether the shipper was strictly liable.

DECISION: The appellate court held that the carrier was on notice of the nature of the goods, that the goods contained magnesium, and that flammable hydrogen would be released if the chemical came into contact with sea water. Further, the court found that the carrier stowed the cargo in a hold of the ship that was susceptible to flooding. The court further held that the shipper provided the required information to the ocean carrier and had no duty to get any additional warnings, and accordingly, shipper was not strictly liable.

Presenter: Bill Taylor

2. <u>Guru Kripa Foods, Inc. v. Inter, Inc.,</u> 2012 U.S. Dist. Lexis 113187, 2012 WL 3306520 (E.D.N.Y. 2012)

FACTS: A thief posing as a buyer for food retailers Trader Joe's and Whole Foods conned the plaintiff-shipper into releasing numerous truckloads of rice over a two month period. The thief told plaintiff each shipment would be picked up from plaintiff in New York by the retailers' truckers and delivered to the retailers. Plaintiff issued its own shipper Bills of Lading to the truckers calling for deliveries to the retailers and listing their corporate office addresses in California and Texas. Plaintiff relied on the thief to handle all transportation arrangements with the truckers and retailers. Plaintiff had no dealings with the retailers, no contract with the freight broker or truckers and plaintiff did not pay for any of their transportation services.

Of course, the thief had no relationship with the food retailers. Instead, the thief hired and paid the freight broker to arrange the pick-ups from plaintiff and deliveries to a Chicago warehouse designated by the thief. Not knowing its customer was a thief, the broker complied with his instructions and directed the truckers to make the New York-Chicago hauls. The drivers signed plaintiff's shipper Bills of Lading at the time of the pick-ups. Most of the rice was never recovered and the thief absconded.

ISSUE: Did the freight broker or trucker have any liability to plaintiff?

DECISION: The Court held plaintiff failed to establish a contractual relationship with the freight broker and dismissed the suit against it. The Court did not reach the broker's FAAAA preemption arguments. With respect to the trucker, the Court dismissed the action because plaintiff failed to plead a Carmack cause of action against it. Despite plaintiff's shipper Bills of Lading issued to the trucker, the Court accepted the trucker's arguments, based on New York contract law, that it had no privity with plaintiff.

<u>Note</u>:

Plaintiff failed to argue, and the Court did not raise, the issue whether the trucker was liable to plaintiff under the Pomerene Bill of Lading Act for non-delivery of the shipments to the designated consignee-retailers in California and Texas based on the drivers' signing and acceptance of plaintiff's shipper Bills of Lading that listed California and Texas consignees, notwithstanding the freight broker's instructions to the trucker to deliver the goods to Chicago. The Court accepted the freight broker's and trucker's argument that, because the shipments were "blind," defendants had no

obligation to disclose the true destinations to plaintiff. Thus, the Court did not consider whether the trucker had a controlling statutory duty under the Bill of Lading Act to deliver the shipments to the Bill of Lading-designated consignees (contrary to the broker's delivery instructions) or return them to plaintiff if delivery to the Bill of Lading consignees could not be made.

Presenter: George Wright

3. <u>Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co.,</u> 696 F.3d 647(7th Circuit 2012)

FACTS: Plano Molding Co. makes plastic storage boxes and molds. World, an NVOCC, coordinated the transportation of the molds from China to the U.S. The molds were FOB Shanghai, but this designation was changed subsequently to DDP or delivered duty paid, whereby the buyer does not take ownership until the goods arrive at its door. World contracted to ship the molds from China to Illinois, and K-Line subcontracted the movement within the United States from California to Illinois to Union Pacific Railway. The train transporting the cargo derailed, causing $2,000,000 in damage to K-Line customers' cargo and separately costing Union Pacific approximately $2,000,000. The World bill of lading issued to Plano Molding the day the molds were placed on the shipping vessel in Shanghai contained a Himalaya clause granting World's subcontractors' the benefit of all provisions contained in the bill of lading. K-Line issued its own bill of lading which contained a similar provision stating that the shipper or merchant warrants the suitability of the cargo for carriage and indemnifying the carrier. The district court granted Plano's motion for summary judgment dismissing the claims by Kawasaki and K-Line against Plano.

ISSUE: Whether the district court properly dismissed all negligence and breach of contract claims against Plano based on the terms and conditions of the shipping documents.

DECISION: The court affirmed summary judgment dismissing negligence claims and contract claims arising from K-Line's bill of lading. The court reversed the summary judgment as to the contract claim based on World's bill of lading. With respect to the K-Line bill of lading, the court held Plano did not sue on the K-Line bill of lading, and Plano did not have any agency relationship with K-Line or the railroad. Consequently, Plano could not be held to the terms of the K-Line bill of lading. With respect to the World bill of lading, Plano did not hire World, and a broker retained World; thus, Plano was not a party to the World bill of lading. However, the district court also concluded the evidence surrounding the Plano-broker-World transaction were "murky at best," and the court concluded material fact issues precluded summary judgment, remanding the case.

Presenter: Dennis Minichello

4. <u>Omega Apparel Inc. v. AB Freight System, Inc.,</u> 2012 WL 2814300, 2012 WL 2814300 (M.D. Tenn.)

FACTS: Omega Apparel hired ABF to deliver a shipment of army green fabric with a total value in excess of $200,000. The fabric was loaded in Michigan on an ABF trailer in good condition. The trailer containing the fabric arrived at ABF's Nashville facility, and due to severe rain and flooding, the fabric became partially submerged and was ruined. ABF attempted to relocate trailers when it realized that flooding could potentially affect cargo contained in trailers parked on the ABF facility. However, these efforts were unsuccessful with respect to the Omega shipment of cloth. ABF

contended that fabric was lost due to action of a public authority or an act of God. ABF sought summary judgment on these two defenses.

ISSUE: Whether act of public authority or act of God entitled ABF to judgment denying Plaintiff's claims.

DECISION: The court noted the May 2010 Tennessee floods were 1,000-year floods in middle Tennessee that resulted in 31% of the state being designated as a major disaster area. The court also pointed out that ABF would not be absolved of liability unless it could show its negligence played no role in the loss. While ABF's motion characterized its agent as being "heroic," Omega identified sufficient facts from which a reasonable jury could conclude ABF did not exercise reasonable care under the circumstances, and consequently, a reasonable jury could find ABF was negligent with respect to the loss of the fabric. The court, accordingly, denied summary judgment.

Presenter: Ken Bryant

5. <u>Sompo Japan Ins. Co. v. Norfolk Southern,</u> 2012 U.S. Dist. Lexis 125398, 2012 WL 3838162 (S.D.N.Y.)

FACTS: This is at least the fifth installment decision arising from a train derailment in 2006. Sompo, as subrogating insurer, asserts claims for several shippers against several rail carriers for different types of goods being shipped from Japan and China to various locations in Georgia. The cargo was transported by ship to California where it was discharged in Long Beach and placed upon rail lines operated by BNSF. After the cargo was transported to Dallas, it was transferred to Norfolk Southern for the final leg of inland carriage, and the train subsequently derailed. The carriers argued that under the bills of lading, only the initial ocean carrier, Yang Ming, could be held liable for damages to the goods during transit, based upon a specific provision in the bill of lading. A separate bill of lading issued by Nippon, was less specific as to which carrier would be liable for damage occurring in transit.

ISSUE: Can the carriers rely on the covenants not to sue in the two ocean bills of lading to avoid liability?

DECISION: Each of the bills of lading contains a valid Himalaya clause extending the bill's liability limitations to downstream carriers. The court held the Yang Ming bill of lading to be unambiguous and require all claims to be made against Yang Ming, rather than any of the downstream carriers. The court stated it was up to Yang Ming then to seek indemnification from the parties with whom it contracted to complete carriage of the goods. The court further held that Nippon bill of lading was ambiguous, and required additional evidence of the parties' intent, thus precluding summary judgment on that portion of the shipment.

Presenter: Bruce Rider

6. <u>Norfolk Southern Railway Co. v. Sun Chemical Corp.,</u> 2012 GA App. Lexis 1019, 2012 WL 5951501 (Ct. App. Ga)

FACTS: Sun Chemical entered into a contract with CSAV, an ocean carrier, to transport ink under a through bill of lading. CSAV assumed responsibility for the entire intermodal transportation of the

ink from origin to final delivery, and it retained the right to use the services of contractors and other carriers to accomplish transit. In the through bill of lading, CSAV provided that carriage of the goods during intermodal transportation would be subject to the tariffs and terms of relevant bills of lading, contracts of carriage and other transportation documents. CSAV specifically stated in the through bill of lading that liability for other carriers used in the shipment may be less than the liability of CSAV. Further, Sun Chemical authorized CSAV to subcontract on any terms.

CSAV subcontracted with Riss Intermodal, freight forwarder, to arrange for inland transportation. Riss hired Norfolk Southern to transport the ink to Savannah. The intermodal transportation agreement between Riss and Norfolk incorporated Norfolk's rules circular. Norfolk's rules circular gave the shipper the option to select Carmack liability or "standard" liability.

During shipment, the Norfolk Southern cars derailed, destroying the ink. Sun Chemical filed a claim with its insurer, which paid in excess of $60,000. Sun and the insurer sued Norfolk Southern for that amount plus interest and litigation costs. Cross-motions for summary judgment were filed, and the trial court granted relief to Sun Chemical and denied relief to Norfolk Southern, holding that Norfolk Southern was strictly liable under Carmack.

ISSUE: Whether the limitations of liability and protection of downstream agents contained in the shipping documents may be enforced by Norfolk Southern?

DECISION: The court, based on *Kirby*, rejected most of the shipper's claims, holding some chemicals should be bound by the Riss and Norfolk Southern's downstream agreements as to liability terms. Noting that *Kirby* does not address the question whether Carmack liability preempts Sun Chemical Express' intent to allow downstream carriers to make their own liability arrangements, the court examined the *Kawasaki* decision by the U.S. Supreme Court. The court determined *Kawasaki* held that a downstream rail carrier not in privity with the owner of the goods would not be subject to Carmack liability in cases involving a through bill of lading. The court reversed the judgment and remanded the case with directions for the district court to enter judgment in favor of Norfolk Southern.

Presenter: Bruce Rider

7. Royal and Sun Alliance v. STI, 2012 U.S. Dist. Lexis 172307, 2012 WL 6028991 (S.D.N.Y.)

FACTS: Shipper hired an ocean carrier to move frozen human plasma from Kentucky to Austria. The ocean carrier hired a motor carrier to move the ground portion of the move in the United States. The shipment moved under a sea bill of lading between the shipper and the ocean carrier. The driver for the motor carrier fell asleep and drove his vehicle off the road, destroying the plasma shipment. The shipper collected from its insurer, and the shipper's insurer sued the motor carrier for unspecified damages.

ISSUE: Are the subrogating insurer's claims governed by COGSA or Carmack?

DECISION: The shipper argued Carmack applied because the motor carrier was not a party to the ocean bill of lading and, therefore, was not covered by COGSA. However, the court ruled because the shipper signed a single through bill of lading, incorporating COGSA, and the shipper paid the ocean carrier a single all-in-one through rate to move the plasma from Kentucky to Austria, COGSA

was applicable. Further supporting the court's decision was the bill of lading's Himalaya clause, which provided that liability limitations covered the ocean carrier's subcontractors.

Presenter: George Wright

8. Starke v. UPS, 2012 U.S. Dist. Lexis 126512, 2012 WL 4370114 (E.D.N.Y.)

FACTS: Starke paid UPS $27 to transport a package from Brooklyn to Albany via next day air delivery. The package contained time-sensitive information. On the date the shipment was tendered, New York was experiencing the effects of a recent snow storm that had closed airports and blocked roads. The package arrived 23 hours late. When the shipper asked for a refund pursuant to the UPS service guarantee, UPS declined, and the shipper sued UPS in a class action on behalf of all shippers who purchased next day air service within a specific time frame surrounding the snow storm. UPS contended that its service guarantee contained an exclusion for delays caused by acts of God. Starke argued that a snow storm was not an exclusion of this service guarantee, and UPS had accepted the package after the snow storm had already taken place.

ISSUE: Was the delay caused by the snow storm a breach of UPS' service guarantee?

DECISION: The court held that a snow storm is an exclusion to the money-back guarantee and the UPS service guarantee, which the court found to be clear and unambiguous. The court further held the exclusions listed in the UPS service guarantee did not have to be unforeseeable events, and the motion to dismiss was granted.

Presenter: Stephen Dennis

B. Limitation Period and Notice

9. Bowman v. Mayflower Transit, LLC, 2012 U.S. Dist. Lexis 144961, 2012 WL 4787354 (D. Mass)

FACTS: Bowman sued Mayflower for loss and damage to her shipment of household goods, and for restitution in the form of Mayflower's charges for the move. Bowman's claim stated she had not yet determined the cost of replacement of the goods, and promised to forward that information when it became available. Bowman sued Mayflower for state and common law claims, which were dismissed based on Carmack preemption. Mayflower moved for summary judgment on Bowman's Carmack claim because she failed to provide proper notice under federal law.

ISSUE: Whether Bowman's letter to Mayflower regarding her lost and damaged goods qualifies as a "claim" under the Carmack Amendment's implementing regulations.

DECISION: Bowman's letter failed to make a claim for a "specified or determinable amount" for the loss and damage to her goods. Bowman's claims for "restitution" are not related to the actual value of the damages to her goods, and as such, do not constitute a claim. To the extent that Bowman's lawsuit seeks a refund of her shipping charges, her claim is time-barred by 49 U.S.C. § 1705(a).

Presenter: Tim Baer

10. Lexington Insurance Co. v. Daybreak Express, Inc., 2012 WL 3800881 (Tex. 2012)

FACTS: 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 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 for $166,655. Daybreak removed the case alleging complete preemption under Carmack and the *Hoskins* decision. The court remanded the case, noting 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 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 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 issue before the Texas Supreme Court was whether 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.

DECISION: Reasoning that the settlement was an effort to reach agreement on the damages recoverable under the Carmack Amendment, nevertheless, the Carmack claim centers on damage to property and the breach of the settlement agreement on another alleged agreement to pay for the damage. In each case, the requirements for proof of the two claims were somewhat different, but the claims in each case arose out of the same occurrence and involved the same injury to property. The court held that the cargo damage claim was not barred by limitations.

Presenter: Edward Valdespino

11. Norfolk Southern Railway Co. v. Jefferson Iron & Metal Brokerage, Inc., 2012 U.S. App. Lexis 19876, 2012 WL 4328383 (11th Cir. 2012)

FACTS: Jefferson accrued $126,000 in demurrage charges, but contended Norfolk was not entitled to charge demurrage without first providing Jefferson notice as required by law. Jefferson appealed the district court's summary judgment in favor of Norfolk on the demurrage charges. Norfolk contended it provided notice to Jefferson regarding the location of its rail cars electronically. Norfolk's tariff provided that notification of the constructed placement of cars would be provided by telephone or electronic means, including e-mail, telephone or facsimile. The tariff provided if electronic communication was utilized, notification was effective as of the date and time of transmission. The district court analyzed the electronic method of notice. Jefferson contended on appeal it did not have notice of the location of its cars because Norfolk's notification only stated the cars were in "north Birmingham," and this was insufficient to satisfy Norfolk's notice obligation.

ISSUE: Whether Norfolk's notice satisfied its obligations under the tariff.

DECISION: The appellate court upheld the district court's summary judgment. The appellate court noted Jefferson failed to provide Norfolk with any instructions regarding where Jefferson wanted the cars to be returned. Because Jefferson had received the electronic information, and because Jefferson is presumed to know the tariffs applicable to shipments, it was presumed to know its cars were being held awaiting instructions.

Presenter: Leslie McMurray

12. <u>Siaci Saint Honore v. Ironbound and Danmar Lines,</u> 2012 U.S. Dist. Lexis 112496, 2012 WL 3229179 (S.D.N.Y.)

FACTS: The shipper hired Danmar to transport 1320 packages of perfume and cosmetics in an ocean container between France and New York, and thereafter via motor carrier between New York and New Jersey. Danmar hired a subcontracted carrier to complete the motor carrier transportation. At the origin, the carrier issued an ocean bill of lading. The bill of lading was an intermodal through bill of lading which incorporated the ocean and inland portions of the transportation into a single document. It also included a clause extending the bill of lading to the carrier's subcontractors. The cargo was stolen during the motor carrier movement between New York and New Jersey. The shipper collected its claim from its insurer. The subrogating insurance carrier sued the ocean carrier and its subcontracted motor carrier seeking $122,000 in damages. The lawsuit was filed one year and two weeks after delivery was to be completed. The carrier raised the affirmative defense of COGSA's one year statute of limitations. The subrogating insurer asserted that the lawsuit was governed by the Carmack Amendment, because the theft of the goods occurred during motor carrier transit.

ISSUE: Whether the one year COGSA limitations period applies.

DECISION: The court determined that COGSA applies based upon the terms of the bill of lading. Because the bill of lading contained a valid clause extending COGSA to the inland move, the COGSA limitations period applied to the surface transportation between New York and New Jersey, and the claim was dismissed.

Presenter: Jim Wescoe

13. <u>Siemens Water Technology v. Trans-United,</u> 2012 U.S. Dist. Lexis 163935, 2012 WL 5832373 (S.D. Tex.)

FACTS: Siemens retained a broker to arrange transportation of a large quench separator tower from Wisconsin to the Port of Houston via motor carrier. The broker retained a motor carrier, who subcontracted the load to defendant Trans-United. The shipment moved under a bill of lading selected by the shipper from an internet website of an unrelated carrier. The shipper filled out the bill of lading and presented it to the motor carrier. The back of the bill of lading was blank. During transit, the cargo struck a highway overpass. Upon inspection, Siemens determined that only the carrying lugs for the frame of the quench separator were damaged, and the cargo should continue its journey. The cargo was delivered without further incident to the Port of Houston, loaded onto an

ocean vessel and transported to India. Many months later, the shipper claimed that the tower was damaged internally after it was powered up for use. Eleven months after the overpass incident, Siemens sent the broker a letter purportedly holding the carrier liable and submitted a claim form to the carrier seeking $361,000 in damages. The shipper sued carrier, and carrier filed a motion for summary judgment asserting the shipper did not file a claim within nine months, and also asserting the limitation of liability contained in the generic bill of lading's incorporated terms and conditions. The shipper argued the nine-month claim requirement did not appear in the bill of lading and was inapplicable. The shipper also argued because the damage to the quench separator was internal, and did not manifest itself until it was installed in India, the nine-month claim filing deadline was inapplicable. The shipper further argued it was not bound by the liability limitation in the terms and conditions, as the terms and conditions were not set forth in the bill of lading, and they were never provided to the shipper.

ISSUE: Whether the nine-month claim filing requirement should be enforced, and if not, whether the carrier's liability should be limited.

DECISION: The court determined it needed more evidence regarding the bill of lading, specifically whether the shipper agreed to the terms of the bill of lading (even though the shipper selected it). The court also said it needed more information regarding whether the nine-month claim filing period applied, and whether the failure to timely file the claim was excusable.

Presenter: Katherine Knight

14. <u>Williams v. North American Van Lines, Inc.,</u> 1:11-cv-409 (W.D. Tex. 2012)

FACTS: Williams hired North American to transport her household goods and personal property from New York to Austin, Texas. The shipment was delayed, items were damaged and lost and Williams sued North American. Williams claimed that she told North American her goods were worth more than $200,000, but North American claims it offered her three levels of coverage up to $100,000. North American also contended Williams failed to file a proper claim.

ISSUE: Whether Williams filed a valid claim within nine months of delivery of the shipment, and whether North American's limitation of liability would be enforced.

DECISION: The court held Williams' demand for an estimated amount did not comply with federal regulations requiring a claim for a specific and determinable amount. The court further found Williams was not entitled to extend the nine-month claim period based on estoppel. Regarding the limitation of liability, the court determined each item of objective, documentary evidence demonstrated Williams declared a total value of $100,000.

Presenter: Jeanette Green

15. <u>Wells Fargo Equipment Finance Co v MLT-3 (The),</u> 2012 FC 738

FACTS: A truck sank while being loaded into a barge. Plaintiff alleged negligence. Defendant contended the one year limitations period applied.

ISSUE: Who was negligent, and did the limitations period apply?

DECISION: The court found the defendant responsible for the loss of the truck, as it was negligent in securing the mooring lines on shore to the barge. However, the plaintiff was found to have contributed to the loss since the driver backing up the truck onto the barge applied the brakes instead of accelerating upon seeing the barge move. The court considered the applicability of the *Hague-Visby* rules, which preclude an action against a carrier and the ship if such action is brought more than one year from delivery. The *Hague-Visby* rules require that there be some form of a written document evidencing a contract between the parties. The court decided these rules did not apply as there was no contract between the parties, and the defendant did not issue, and did not intend to issue, a bill of lading for the shipment of the truck.

Presenter: Heather Devine

16. Raineri v. North American Van Lines, Inc., 2012 U.S. Dist. Lexis 121678, 2012 WL 3757071 (D. N.J.)

FACTS: Raineri contracted with North American to move her belongings from her two New Jersey properties to California. The order for service provided NAVL would pack Raineri on June 21 and 22, load her goods on June 23 and deliver them in California in early July. The NAVL movers were late in beginning and completing the loading. Raineri sued NAVL for damages arising from loss and damage to her belongings and financial concessions that she made as a result of the movers' conduct. Raineri signed a bill of lading providing for a nine-month deadline to file a claim against the carrier. Further, the bill of lading incorporated NAVL's tariff, which contained an incorporation of the nine-month claim filing deadline. Raineri eventually signed the bill of lading when the goods were delivered in mid-July. NAVL moved for judgment, asserting Raineri's state and common law claims were barred by Carmack, and contending Raineri failed to satisfy the provisions of the bill of lading and federal regulations regarding notice and sufficiency of claims.

ISSUE: Whether Raineri's claims are preempted, and whether Raineri made a claim sufficient under federal law.

DECISION: The court held Raineri's claims that NAVL damaged her home while loading the goods at origin falls within Carmack preemption because such services fall within the definition of duties held by household goods motor carriers. The court further held that while written claim requirements are construed liberally and require substantial performance rather than strict compliance, Raineri's e-mails did not satisfy either federal regulations or the bill of lading.

Presenter: John Husk

C. Limitation of Liability

17. Imperial Towing, Inc., 2012 U.S. Dist. Lexis 158731, 2012 WL 5409831 (W.D. Pa.)

FACTS: U.S. Steel had an agreement with American Commercial for the shipment by barge of large rolls of steel. American Commercial subcontracted with Campbell, who subcontracted with Imperial Towing to move the steel. While an Imperial Towing tugboat was pulling barges containing the U.S. Steel cargo, the rolls of steel sank. They were eventually salvaged. The original agreement between U.S. Steel and American Commercial contained a limitation of liability of $700 per ton for the steel, as well as a Himalaya clause. Imperial Towing filed a complaint in federal court seeking a

declaration from the court that it was not liable in excess of the limitation amount. All parties to the transaction were joined in the case.

ISSUE: Whether the valuation and limitation provisions in the contract between U.S. Steel and American Commercial extend down to Imperial, and whether U.S. Steel could recover salvage proceeds in addition to the limitation of liability amount.

DECISION: The court determined that under the Himalaya clause, the Imperial Towing tugboat qualified as a "vessel" employed by American Commercial. The court also found the Himalaya clause included Imperial as a subcontractor under the agreement. With respect to U.S. Steel's claim to the salvage for the steel, the court focused on the contract's valuation provision which stated that "in no case shall carrier's liability exceed the actual value of the articles shipped." Based on this language, the court determined that the parties agreed the valuation of the steel coils was $700 per ton, and accordingly, U.S. Steel could not recover more than that amount.

Presenter: Steve Block

18. Mitsubishi Heavy Industries Ltd v Canadian National Railway Company, 2012 BCSC 1415

FACTS: The plaintiff's aircraft parts were severely damaged when the train carrying them derailed. The train was owned and operated by the defendant, which claimed the benefit of a $50,000 limitation of liability. This provision was contained in a contract between CN and Casco, the company that arranged for the carriage.

ISSUE: Who was the "shipper" of the goods in relation to the defendant, as both parties referred to a statutory provision in the *Canada Transportation Act*, SC 1996, c 10, whereby a railway company cannot limit or restrict its liability *to a shipper* except by means of a written agreement signed *by the shipper* or by any entity representing the shipper.

DECISION: The court found the plaintiff cannot be described as the "shipper" in this case, as it clearly intended others (i.e. subcontractors) would be responsible for transporting the goods, and there was no evidence any person representing the plaintiff was involved in the specifics of arranging the transportation with CN. Furthermore, there was no contractual relationship between the plaintiff and the defendant.

After further analysis regarding the relationship between CN and the various intermediaries, the court concluded Casco was the "shipper" within the meaning of the Canada Transportation Act. Casco arranged for the loading of the railcars for shipment of the goods and had significant dealings with CN regarding the negotiation and payment of freight rates. The defendant had also successfully proven that Casco had sufficiently agreed to and acknowledged the written agreement. Moreover, the court was satisfied that the plaintiff had express knowledge of the contract between CN and Casco, including knowledge about the limitation of liability.

Presenter: Gordon Hearn

19. **Akins v. Laboratory Corp., 6:10-cv-868 (N.D. Ala. 2012)**

FACTS: DHL picked up a shipment of tissue samples from a doctor's office for delivery to Lab Corp. The tissue samples belonged to Mr. Akins, who had undergone a biopsy. The shipment was a

domestic move by DHL. Shipping charges were billed to Lab Corp. On the day the samples were to be delivered, DHL told Lab Corp. it was not possible to make the delivery due to a severe snowstorm. DHL was unable to produce a manifest for the individual shipment, but Lab Corp. signed for a bulk delivery. The shipment containing Mr. Akins' tissue samples was lost. DHL's airway bill limited liability to $100 and barred recovery of consequential damages. In addition, Lab Corp. and DHL were parties to a contract containing DHL's terms and conditions, which limited DHL's liability at $100 for domestic shipments. Mr. Akins had to undergo subsequent biopsies. He claimed these procedures caused him to suffer distress and worry. He was ultimately found to have cancer. Akins sued DHL and Lab Corp. for breach of contract, negligence and wanton conduct. He claimed the defendants' actions caused him to suffer depression, anxiety, insomnia, exacerbation of post-traumatic stress disorder, panic attacks and diminished earning capacity.

ISSUE: Whether plaintiff could maintain his state law claims against DHL for losing the shipment of biopsy materials.

DECISION: The court ruled that state law claims against DHL were superseded by the Airline Deregulation Act. The court held that the limitations of liability in the air waybill were binding upon Mr. Akins, as he had an interest in the shipment and was a third party beneficiary of the agreement. The court further ruled that the contract between Lab Corp. and DHL limited DHL's liability to $100, and Mr. Akins was bound by that liability limit. The court made an additional finding that Akins could not prove DHL failed to deliver the package since Lab Corp. signed a bulk receipt for the shipment.

Presenter: Dennis Kusturiss

Lunch 12:00 – 1:15 W Hotel, Industry I

Second Session 1:15 – 4:30 W Hotel, Great Room- Ballroom

D. Preemption

20. <u>Continental Casualty v. Quick Enterprises,</u> 2012 WL 2522970 (D.N.J. 2012)

FACTS: Continental brought this subrogation action against Quick Enterprises, the motor carrier, and England Logistics, the broker, for damage to an interstate shipment. Both defendants moved to dismiss plaintiff's claims based on Carmack preemption.

ISSUE: Whether both the motor carrier and the broker are entitled to dismissal of state claims based on federal preemption.

DECISION: Plaintiff did not oppose the motor carrier's motion to dismiss, and the court granted the motor carrier's motion to dismiss based on Carmack preemption. The court noted the Third Circuit has not addressed whether Carmack preempts state law claims against freight brokers. After reviewing a number of district court decisions, the court determined that claims against the broker were not preempted. Because the claims against the motor carrier were dismissed, and because the claims against the broker were based solely on state law issues, the court remanded the case to state court.

Presenter: Jim Wescoe

21. Exel, Inc. v. Southern Refrigerated Transport, Inc., 2012 WL 3064106 (S.D. Ohio 2012)

FACTS: Plaintiff Exel brokered a motor carrier shipment of pharmaceuticals from Pennsylvania to Tennessee to Southern Refrigerated. One of the two shipments was stolen and never recovered. Exel paid the shipper, Sandoz, for the loss and asserted claims against Southern Refrigerated as subrogor. Exel also asserted claims for breach of the broker-carrier agreement between Exel and Southern Refrigerated.

ISSUE: Were all of Exel's claims against Southern Refrigerated preempted?

DECISION: The court held all of Exel's subrogation claims for shipper Sandoz were preempted. However, to the extent that Exel was making claims solely arising from the broker-carrier agreement between Exel and Southern Refrigerated, Exel could proceed with its claims. The court analyzed a number of district court decisions that address preemption of claims between brokers and carriers.

Presenter: Eric Zalud

22. Ginsberg v. Northwest, Inc., 695 F.3d 873 (9th Cir. 2012)

FACTS: Rabbi Ginsberg had his platinum elite status as a World Perks member with Northwest Airlines revoked in 2008. Northwest advised Ginsberg of its decision detailing events that led to the revocation, and determining that Ginsberg had abused the program. Ginsberg sued Northwest, purporting to state a class action, arguing Northwest violated its agreement and made negligent and intentional misrepresentations. Northwest moved to dismiss the complaint arguing the ADA preempted Ginsberg's claims. The district court dismissed all of Ginsberg's claims against Northwest, and Ginsberg appealed the district court's decision that the ADA preempted Ginsberg's claim for breach of the implied covenant of good faith and fair dealing.

ISSUE: Whether the ADA preempts common law contract claims, such as the implied covenant of good faith and fair dealing.

DECISION: The court determined a claim for breach of the implied covenant of good faith and fair dealing does not interfere with the ADA's deregulatory mandate. The court further held Ginsberg's claims do not relate to prices, routes or services, and accordingly, are not preempted. The case was remanded to the district court for reconsideration of the merits of Ginsberg's claims for breach of the duty of good faith and fair dealing.

Presenter: Miles Kavaller

23. S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc., 697 F.3d 544 (7th Cir. 2012)

FACTS: The shipper sued motor carriers for allegedly bribing an employee to accept defendants' services at inflated rates. The shipper alleged counts for fraudulent misrepresentation, conspiracy to commit fraud and violations of Wisconsin's state RICO and bribery laws.

ISSUE: Were the shipper's state law claims preempted by the FAAAA?

DECISION: The Seventh Circuit held plaintiff's claims for fraudulent misrepresentation and conspiracy to commit fraud were FAAAA-preempted. The Court of Appeals reasoned the fraud claims were analogous to the state consumer fraud claims held by the U.S. Supreme Court in *Morales* and *Wolens* to be preempted by the ADA. As to plaintiff's claims for violations of state RICO and bribery laws, however, the Court held they were not FAAAA-preempted. The Court reasoned that plaintiff's claims under the state criminal laws were not "simply efforts to change the bargain that the parties had reached." The Court further reasoned the state RICO and bribery laws were too tenuously related to the carriers' prices or services because those laws broadly prohibit certain conduct and generally relate to carriers "only in their capacity as members of the public."

Presenter: Tom Kuzmanovic

24. <u>Omnitech Robotics v. Sterling Moving and Storage,</u> 2012 U.S. Dist. Lexis 89728, 2012 WL 2522225 (D. Md.)

FACTS: The shipper hired the carrier to move goods from Maryland to Idaho by motor carrier. The goods consisted of robotic components used in machinery. The goods were supposed to be kept on racks and kept in a locked trailer. The goods were eventually damaged in transit. They were not kept on racks, and as a result, they were destroyed. The shipper also alleged the carrier stole a set of loading ramps. The shipper sued the motor carrier for unspecified damages based on breach of contract, breach of bailment, negligence, conversion, violation of the Maryland State Consumer Protection Act and violation of the Carmack Amendment. The carrier filed a motion to dismiss the state and common law claims.

ISSUE: Whether the state and common law claims were preempted by Carmack.

DECISION: The court granted the motion to dismiss ruling that all state and common law claims were preempted by Carmack. The court specifically dismissed the motor carrier's negligent misrepresentation claim.

Presenter: Colin Bell

25. <u>Pelletron Corp. v. C.H. Robinson Worldwide,</u> 2012 U.S. Dist. Lexis 106579, 2012 WL 3104845 (E.D. Pa.)

FACTS: Pelletron entered into a contract with Carbonlite for design and manufacture of equipment. Pelletron requested from C.H. Robinson a shipping quote for the equipment system for the Carbonlite plan. The e-mail requesting a quote stated that the "value for Ins = 100k." C.H. Robinson responded with a shipping quote, but the quote did not include any indication C.H. Robinson was a transportation broker or that a third party would be transporting Pelletron's goods. When Pelletron asked if there would be coverage for loss of $100,000, C.H. Robinson responded that all of its carriers had a minimum amount of insurance in that amount. Pelletron issued a bill of lading that identified C.H. Robinson as the carrier. The shipment was transported without incident. Less than two weeks later, Pelletron contacted C.H. Robinson for another shipment that was part of the same system sold to Carbonlite. Based on its prior exchange, Pelletron believed the minimum insurance coverage would be $100,000. The shipment was eventually stolen, but the cargo was not damaged

and was still located in the trailer when it was recovered. However, because the shipment was time-sensitive, Pelletron was unable to deliver its product as promised, and Pelletron made a claim against C.H. Robinson and the carrier for in excess of $300,000 for the loss, and consequential damages. Pelletron eventually filed a complaint bringing claims for violation of Carmack, breach of contract, breach of bailment and negligence.

ISSUE: Whether claims against C.H. Robinson were preempted.

DECISION: The court decided the Carmack Amendment does not apply to brokers, and it does not preempt state law claims against brokers. The court analyzed the facts alleged and determined there were fact issues regarding whether or not C.H. Robinson was a broker or whether C.H. Robinson held itself out as a carrier for purposes of this shipment. The court denied summary judgment to the motor carrier, finding a fact issue arising from the communications between Pelletron, Robinson and the motor carrier. The court did grant summary judgment on consequential damages claims, finding there were no communications from which the motor carrier could have determined that consequential damages were reasonably foreseeable.

Presenter: Gordon McAuley

26. <u>UTI, United States, Inc. v. Bernuth Agencies, Inc.,</u> 2012 U.S. Dist. Lexis 141520, 2012 WL 4511304 (S.D. Fla.)

FACTS: UTI sought to ship goods from Miami to the Dominican Republic. Upon arrival at destination, the goods were damaged. UTI sued Bernuth for liability under COGSA, negligence and bailment. Bernuth filed a motion to dismiss the negligence and bailment causes of action because of COGSA preemption.

ISSUE: Whether COGSA preempted the shipper's claims for negligence and bailment.

DECISION: The court rejected the Plaintiff's claims that the negligence and bailment causes of action were colorable to address pre-loading and post-discharge activities. The court recognized that COGSA leaves no state remedy in its wake and is, therefore, completely preemptive of the negligence and bailment causes of action.

Presenter: Chris Merrick

27. <u>Vaughn v. UPS,</u> 2012 Tex. App. Lexis 4654, 2012 WL 2133594 (Tex. App. – Tyler)

FACTS: Vaughn sent a package by UPS ground delivery from Tyler, Texas to California. The package contained various garments and art work Vaughn created, including some jewelry. Vaughn did not declare the value of the package. When the package was lost during shipment, Vaughn sued UPS. UPS filed a motion for summary judgment which was granted by the trial court. On appeal, Vaughn argued the summary judgment was improper.

ISSUE: Whether Carmack preempts Vaughn's state law claims for breach of duty and trust, contribution and negligence.

DECISION: The court determined the Carmack Amendment is the shipper's exclusive remedy for damage against a carrier for goods lost or damaged during a shipment, and affirmed the summary judgment.

Presenter: Kathy Garber

28. **Ocean Beauty Seafoods, LLC v. Landstar Ranger, Inc.**, 2012 WL 426706 (N.D. Ill.)

FACTS: Ocean Beauty filed a state court action against Landstar and Attarian Trucking Co. for a damaged shipment of pickled herring from Chicago to Boston, which arrived in a reefer that did not maintain the required temperature. The suit was filed in the State Circuit Court of Cook County as a common law breach of contract and negligence claim. Defendants removed to Federal Court and moved to dismiss under Rule 12(b)(6), contending the Plaintiff failed to state a claim because there could be no state law claims for breach of contract and negligence and the complaint failed to articulate a Carmack claim.

ISSUE: Was the suit preempted by Carmack?

DECISION: The court observed that if Ocean Beauty, had a claim it had to be under the Carmack Amendment. The Plaintiff was warned that it would "have to reframe the language of the Complaint" to state a claim under Carmack.

Presenter: Jason Orleans

29. Ameriswiss Technology, LLC v. C.H. Robinson, 2012 U.S. Dist. Lexis 138880 (D.N.H. 2012), 2012 WL 4483744 (D.N.H. 2012)

FACTS: Ameriswiss purchased 11 used machines located in Illinois and subsequently contracted with C.H. Robinson to arrange shipment of its machines from Illinois to New Hampshire. C.H. Robinson hired Midway to transport the machines. The machines were destroyed the day after loading when the Midway vehicle was involved in an accident in New York. Ameriswiss sued Robinson and Midway, alleging Robinson was liable and negligent for failing to select a competent carrier and liable for breach of contract because it failed to safely transport the machines. The case was consolidated with a suit by Ameriswiss' subrogating insurance carrier, M.B. Insurance, who asserted claims against Robinson for negligence, breach of a common carrier's duty, and breach of bailment. Robinson moved for summary judgment alleging all negligence claims and bailment claims were preempted by federal law and asserting a limitation of liability.

ISSUE: Whether claims against CH Robinson for negligence and breach of contract were preempted.

DECISION: The court ruled all claims for negligence were preempted by Carmack to the extent, if any, Robinson was acting as a carrier, and by ICCTA, to the extent Robinson was acting as a broker. The court further found for C.H. Robinson on the breach of contract claims.

Presenter: Wes Chused

E. Jurisdiction, Venue and Removal

30. BINL, Inc. v. United States, 106 Fed.Cl. 26 (Fed. Cl. 2012)

FACTS: Seven small surface transportation providers bid in response to a Department of Defense ("DOD") rate solicitation for transportation of the household goods of military service members and civilian DOD employees. The transportation service providers/carriers filed a pre-award bid protest, challenging the provision in the rate solicitations providing a carrier could not collect or require payment for any freight charges in which personal property was totally lost or destroyed in transit. As to shipments lost or destroyed in part, the rate solicitations required the carrier to refund the portion of its freight charges corresponding to the lost or destroyed property. The carriers argued these freight refund terms were contrary to law in light of the full replacement value liability scheme mandated by Congress under DOD statutes and regulations.

ISSUE: Whether the motor carriers have standing to bring a bid protest, and if so, whether the DOD violated the Carmack Amendment's liability provisions by including freight refund terms in its rate solicitations.

DECISION: The court held the carriers had standing to challenge the rate solicitations and overruled the government's motion to dismiss for lack of jurisdiction. The court further held that the inclusion of the freight refund terms in the solicitations was contrary to law and granted the carrier's motion for judgment blocking the enforcement of the freight refund provisions.

Presenter: Mark Andrews

31. Certain Institute Companies and Lloyds Syndicates, et al. v. J&J Truckin LLC, 2012 U.S. Dist. Lexis 112367, 2012 WL 3265098 (E.D. Va.)

FACTS: Subrogating insurance company plaintiffs sued both the motor carrier and a Commonwealth of Virginia employee for $1.3 million in damages to cargo that struck a bridge. Plaintiffs claim the Virginia employee was negligent and grossly negligent in approving the route, which clearly showed the bridge was too low for the cargo. Specifically, plaintiffs argued the Virginia employee who chose the route for the shipment failed to comply with state procedures requiring him to verify that a route would meet the dimensions of the vehicle and cargo. The state employee filed a motion to dismiss claims against him individually based on sovereign immunity, as he was a state employee acting in his official capacity. In response to these contentions, plaintiffs argued they had sufficiently pled a claim for gross negligence, effectively by-passing the doctrine of sovereign immunity.

ISSUE: Whether the Virginia employee is entitled to sovereign immunity as a defense against claims of negligence and gross negligence.

DECISION: The decision applied Virginia law regarding whether or not a state employee's act is ministerial or discretionary. The court determined that the defendant's actions were discretionary, and he was entitled to sovereign immunity. Regarding the claim for gross negligence, the court, applying the *Twombly* decision, determined that the plaintiffs failed to allege anything other than a simple negligence case, and as such, dismissed the gross negligence claims.

Presenter: Matthew Grimm

32. Frey v. Bekins Van Lines, 2:09-cv-5430, 2012 WL 2701642 (E.D.N.Y. 2012)

FACTS: This is a purported class action commenced by three plaintiffs against several moving companies and other individuals arising from an alleged pattern and practice of quoting lower shipping prices than those ultimately charged. Plaintiffs complain price quotes are based upon estimated weights as opposed to actual weights that are ultimately billed. They allege that the defendants charge fees based upon false weights arbitrarily assigned to shipments so as to increase shipping costs. In a 2010 order from a previous agenda, the court rejected Bekins' preemption arguments, but in a 2011 memorandum and order, the court granted Bekins' motion to dismiss holding that state law claims for fraud, negligence, unjust enrichment and consumer protection were preempted by 49 U.S.C. § 14501(c)(1). In April 2012, the court denied plaintiffs' motion to certify a class action. Plaintiff requested reconsideration of the class action decision.

ISSUE: Whether the claims of the purported class are sufficiently common to justify proceeding as a class action.

DECISION: The court determined each member of the proposed class would be subject to a variety of different defenses and issues making proceeding as a class action unmanageable. The court accordingly denied the motion for reconsideration.

Presenter: Todd Suter

33. Atlas Aerospace LLC v. Advanced Transportation, Inc., et al., 2012 U.S. Dist. Lexis 157416, 2012 WL 5398027 (D. Kansas)

FACTS: Shipper hired carrier to transport machine from Canada to Kansas via motor carrier. The machine was damaged while in transit in the U.S. The shipper sued the carrier for breach of contract and negligence, seeking unspecified damages, including lost profits. The carrier contended Carmack preempted state law claims and damages were limited per the terms of the tariff and the bill of lading. The shipper contended the shipment originated in Canada, and therefore the Carmack Amendment was inapplicable. The shipper specifically argued the re-codification of Carmack did not substantively change the law, and the old language used the phrase "from the U.S. to an adjacent foreign country."

ISSUE: Whether the Carmack Amendment applies to motor carrier shipments from Canada to the United States.

DECISION: The court held that the Carmack Amendment applies to shipments originating in Canada and traveling to the United States. The word "between" means that Carmack applies to shipments between the United States and Canada, regardless of the origin.

Presenter: Beata Shapiro

34. Siemens Transformadores v. Soo Line Railroad Co., 2012 U.S. Dist. Lexis, 2012 WL 1938848 (N.D. III.)

FACTS: Siemens shipped a transformer via rail from Mexico to the U.S. border and from Eagle Pass, Texas to Ontario. The transformer was shipped under two separate bills of lading. The transformer was damaged during several impacts outside of Chicago. The bill of lading had a limitation of liability.

ISSUE: Whether Carmack applies to the shipment, and whether the railroad may rely upon the limitation of liability.

DECISION: The court determined that because the shipment was moved on two separate bills of lading, and because the damage occurred during the U.S. to Canada segment of the transportation, the Carmack Amendment applied to the shipment. With respect to the limitation of liability, the court determined that the agreements between the parties did not provide the shipper with a reasonable opportunity to choose full Carmack liability protection.

Presenter: Peter Lee

35. <u>Siemens Transformadores v. Soo Line,</u> 2012 U.S. Dist. Lexis 30165, 2012 WL 774937 (N.D. Ill.)

FACTS: After the court denied the rail carrier's motion for summary judgment on limitation of liability, the railroad moved for reconsideration, arguing that the court committed error in concluding that the shipping contract was governed by the Carmack Amendment rather than 49 U.S.C. § 10709 which, unlike the Carmack Amendment, does not require a carrier to give a shipper a reasonable opportunity to choose full liability protection.

ISSUE: Whether the agreement between the rail carrier and the shipper is a § 10709 agreement rather than an agreement governed by Carmack.

DECISION: The court determined that the record was not sufficiently clear to justify reconsideration or to justify designation of the shipment as a non-exempt shipment. The court relied heavily on the parties' failure to raise this issue in prior briefing on the shipper's motion for summary judgment.

Presenter: Peter Lee

36. <u>Thompson v. Zurich American Ins. Co.,</u> 2012 U.S. Dist. Lexis 161110, 2012 WL 5472957 (E.D. La.)

FACTS: The Thompsons sued the motor carrier's insurer arising from a motor vehicle collision between the motor carrier and the Thompsons' vehicle. Zurich removed the case to federal court under the concept of supplemental federal jurisdiction, which allows federal courts to hear and decide state claims along with federal claims when they are so related to the claims in the action they form a part of the same case or controversy. Zurich argued federal jurisdiction existed as a basis for removal because the MCS-90 in the insurance policy raised a question of federal law.

ISSUE: Whether the MCS-90 in the insurance policy qualifies as a basis for federal jurisdiction.

DECISION: The court determined that the MCS-90 was not a basis for original jurisdiction, which is required in order to justify supplemental federal jurisdiction under 28 U.S.C. § 1367. The case was remanded.

Presenter: Rob Moseley

37. **Cowan Systems LLC, v. Ocean Dreams Transport, Inc., 2012 U.S. Dist. LEXIS 140254 (D. Md.)**

Facts: Cowan entered into a Broker-Motor Carrier Agreement with Ocean Dreams for the transport of copper cathodes from Panama City, Florida, to East Alton, Illinois. The load was stolen in transit. Cowan paid its shipper customer approximately $150,000, sued Ocean Dreams, and after no answer was filed, moved for default judgment on its claims for breach of contract and for carrier liability under Carmack.

Issue: Was the subrogating broker entitled to judgment on both claims?

Decision: The court granted the motion for default judgment on the breach of contract claim, but not the Carmack claim, finding that the subrogating broker did not have standing to recover on the Carmack claim because it was named as the carrier on the bill of lading.

Presenter: Ian Culver

Dinner
Dallas World Aquarium 6:30 Cocktails, 7:15– 9:30 Dinner.

January 14

Breakfast 7:30 – 8:30 a.m. W Hotel, Industry I

Third Session 8:30 a.m. – 11:30 Noon W Hotel, Great Room - Ballroom

38. Underwriters at Interest v. Seatruck, Inc., et al., 858 F.Supp.2d 1334 (S.D. Fla. 2012)

FACTS: Circuit Zone shipped cargo from the United States to Trinidad, using FEI Logistics as a freight forwarder. FEI hired Seatruck to transport the cargo. Seatruck picked up the container loaded with the cargo, but before the container was transported to Trinidad, the cargo was stolen. Circuit Zone filed a claim against its insurer, Underwriters, which paid $243,000 and instituted this subrogation action against Seatruck. Defendants removed the case to federal court based on COGSA. The insurer moved to remand, arguing that because the bill of lading had not yet been issued, and because COGSA applies only from the time cargo is loaded onto a carrier's vessel, COGSA cannot serve as a basis for removal.

ISSUE: Whether the carrier's removal based on COGSA was proper.

DECISION: The court found that Seatruck's standard bill of lading did not effectively extend COGSA's application to the pre-loading and pre-custody period of ocean transport. The motion for remand was granted.

Presenter: Mike Tauscher

39. Vertex Transport v. Shawn Gainers, 3:12-cv-156 (M.D. Fla.)

FACTS: The Plaintiff, Vertex, claimed it was the assignee of Anheuser Busch with respect to a shipment of beer. Plaintiff claimed it was hired by Busch to arrange for the shipment. The defendant trucking company picked up the shipment at origin, and delivered the truck load of beer to an address other than the delivery address listed on the bill of lading. However, defendants asserted plaintiff lacked standing to sue because it is neither a registered broker nor a motor carrier, and plaintiff's name does not appear on the bill of lading.

ISSUE: Whether plaintiff had standing to sue defendant motor carriers for loss of the shipment.

DECISION: The court determined that the plaintiff failed to demonstrate that it was a proper party to the action, and plaintiff failed to demonstrate that it was damaged. Summary judgment was entered for the defendants.

Presenter: Rob Rothstein

40. AGCS Marine Ins. Co. v. Krieger American Transp. Co., LLC, 2012 WL 3238278 (C.D. Cal.)

FACTS: In this subrogation action, the shipper, Buttercup Rugs, tendered a load for shipment from California to New York to Krieger American Transportation. While in route, the cargo was involved in an accident. A broker for the load filed a declaratory judgment action in U.S. District Court in Arizona, the district in which the accident occurred. Subsequently, a suit was filed in California by Buttercup's insurer. The defendants in the California action moved to dismiss for improper venue, or in the alternative, transfer of venue for the convenience of the parties and in the interest of justice pursuant to 28 USC §1404(a).

ISSUE: Whether the court should dismiss the case for improper venue, or transfer the case to Arizona.

DECISION: The court found the issues in the California case were identical to the issues in the pending Arizona action. Because the Arizona case was filed first, controlling law required the California court to transfer the case to Arizona. Once the case has been moved to Arizona, and consolidated with the Arizona action, the federal court in Arizona can determine the parties' 1404(a) motions.

Presenter: Jeff Simmons

41. **Leblanc v United States Service du Canada Inc**, **2012 QCCS 4619**.

FACTS: Petitioners were Quebec residents who purchased articles online from vendors in the United States, and had them shipped to their door via UPS or FedEx. The petitioners were charged a fee for customs brokerage services in connection with the importation of the goods into Canada. Petitioners sought to recover this fee, as well as punitive damages, because the defendants charged for services that neither the Petitioners nor the vendors had ordered.

ISSUE: What law governs, and what damages are available?

DECISION: The court drew a distinction between the contract of sale, the mandate to contract for transport and the contract of transport. The contract for sale is a distance contract concluded in Quebec and thus governed by the Quebec Consumer Protection Act. The mandate to contract for transport is also governed by the law of Quebec, since that is where the consumer resides. The contracts for transport however, were concluded at the service counter of the courier, or at the shipper's place of business or residence, when the goods were consigned for transport to Quebec. The contracts for transport are therefore governed by the laws of the American states in which they were made. The court also held that the Consumer Protection Act does not permit a Quebec consumer to seek punitive damages in the absence of a contract between the consumer and a merchant. Here, there was no contract between the petitioners and the carriers, therefore the petitioners could not recover any punitive damages from the carriers. The class action certifications were ultimately dismissed because the petitioners were found to lack the necessary interest to represent the proposed classes.

Presenter: Heather Devine

F. Carrier-Broker-Third Party Issues

42. Active Media Services, Inc. v. CAC American Cargo Corp., 2012 U.S. Dist. Lexis 139785, 2012 WL 4462031 (S.D.N.Y. 2012)

FACTS: Shipper hired broker to arrange for transportation of televisions from New York to Florida via motor carrier. Broker hired motor carrier to transport the televisions, which were stolen en route. Shipper sued broker and carrier for value of televisions ($250,000) under Carmack and negligence. Motor carrier defaulted. Broker contended it was not liable for the televisions, it did not transport the shipments and claims against it were preempted.

ISSUE: Whether broker is liable under the Carmack Amendment and/or state negligence claims for the theft of the televisions.

DECISION: Because the broker did not hold itself out as a carrier, and because it did not possess or transport the shipment, it is a broker. The court dismissed the Carmack Amendment count against the broker. However, the court found sufficient facts were alleged to justify the shipper's proceeding with its state law negligence claim against the broker.

Presenter: William Bierman

43. Intransit v. Travelers Property & Casualty., 2012 U.S. Dist. Lexis 151428, 2012 WL 5208170 (D. Oregon)

FACTS: The shipper hired a broker to arrange for transportation of a load of monitors between two cities within California. The broker posted an ad on various motor carrier solicitation sites. An individual responded to the posting, claiming to be a skilled and capable driver and requesting to transport the load. This individual also attached an insurance certificate to verify the legitimacy of his company. The broker approved this request for the load. When a driver appeared at the shipper's loading dock, he loaded the monitors onto a truck and drove away, never to be seen again. In the criminal investigation, it was established that the driver stole the monitors, that the insurance certificate was forged, that the insurance company which supposedly issued the certificate did not exist, and the name of the carrier used by the thief had nothing whatsoever to do with this transaction. It appears the broker paid the shipper $300,000 for the stolen monitors. The broker filed a proof of loss with its own insurance company for the $300,000 paid to the shipper. The insurance company denied coverage in that amount, claiming the policy was not intended to provide coverage for an imposter carrier to whom a shipper voluntarily tendered a shipment.

ISSUE: Does the insurance policy cover theft by an imposter carrier? If so, is the broker covered, and can he recover under the policy?

DECISION: The court determined that the policy covered theft by an imposter carrier. The ambiguities in the policy were construed in favor of the broker, who was covered by the policy and prevailed in the action. There is an extensive section-by-section analysis of the Travelers policy in question contained in the decision.

Presenter: Steve Block

44. <u>Thompson v. UFP Eastern,</u> 2012 U.S. Dist. Lexis 120129, 2012 WL 3686064 (D.S.C.)

FACTS: The shipper manufactures wooden pallets. The shipper hired a broker to arrange for transportation of the pallets. The shipper and the broker signed a written contract which stated the broker would use diligence to hire licensed carriers who would comply with applicable law. The agreement also said any carrier retained by the broker would be responsible for inspecting and testing to confirm that loading was performed safely. In the agreement, the broker indemnified the shipper from any claim for damages arising from the broker's failure to fulfill its duties. When the broker hired a motor carrier to transport a shipment of wooden pallets, the carrier did not inspect and test the load to confirm that the loading was done safely. At destination, when the trailer door was opened, the pallets fell on the carrier's driver and injured him. The driver sued the shipper for negligence arising from improper loading. The shipper filed a cross-claim against the motor carrier seeking indemnity and contribution based on the carrier's duty to inspect and test the load prior to shipment. The shipper also cross-claimed against the broker, seeking indemnity from the broker arising from the agreement, and contribution from the broker based on the broker's failure to exercise due diligence in selecting a carrier.

ISSUE: Can the shipper recover in contribution and indemnity from the carrier and the broker for the liability arising from the driver's injuries?

DECISION: The court determined it did not have sufficient evidence for apportioning fault between shipper and motor carrier. However, the court held that the shipper can recover contribution from the broker, but not indemnity.

Presenter: Hillary Booth

G. Freight Charges

45. Grocery Haulers, Inc. v. C&S Wholesale Grocers, Inc., 2012 U.S. Dist. Lexis 131598, 2012 WL 4049955 (S.D.N.Y.)

FACTS: Grocery Haulers is a motor carrier for food retailers. Defendant C&S provides trucking, warehousing and supply services for food retailers. The parties entered into an agreement to provide motor carrier services. Grocery Haulers moved approximately 100 disputed shipments under the agreement and delivered these shipments to parties other than C&S. The parties presented a number of arguments arising from the terms of the transportation agreement justifying their positions. C&S contended there were three types of factual inaccuracies in the delivery invoices, as well as delays in delivery. C&S also contended Grocery Haulers' false reports resulted in inflated charges to C&S. Grocery Haulers contended the practice of diverting deliveries to locations other than the store that placed the order is widespread in the grocery industry. C&S refused to pay the disputed invoices, and Grocery Haulers filed a complaint against C&S seeking declaratory and injunctive relief, as well as damages for tortious interference and conspiracy to interfere with Grocery Haulers' agreements with other entities. C&S filed counterclaims for breach of contract, damages for unfair trade practices and attorneys' fees. The parties eventually filed cross-motions for summary judgment.

ISSUE: Whether Grocery Haulers committed several different violations of 49 U.S.C. §13708, and whether C&S was damaged as a result of Grocery Haulers' alleged acts or omissions in violation of §13708. Also before the court were Grocery Haulers' claims for declaratory judgment, injunctive relief and its motion for judgment dismissing C&S's counterclaims.

DECISION: The court determined that while Section 14704 creates a private right of action against the carrier when the person sustains damages as a result of a Section 13708 violation, and attorneys' fees are available, Grocery Haulers' conduct did not violate Section 13708. After a very detailed analysis of the documents, contracts and evidence, the court granted summary judgment to Grocery Haulers on C&S's unfair trade practices claims, but denied all other arguments in the motions for summary judgment because of genuine issues of material fact.

Presenter: Ken Hoffman

46. Mediterranean Shipping v. Worldwide Freight Services, 2012 U.S. Dist. Lexis 123114, 2012 WL 3740683 (S.D.N.Y.)

FACTS: The carrier transported a 40 foot container from New York to Jordan via ocean transit. A notice of arrival was provided to the consignee. The container was not cleared, even though the carrier attempted to contact the consignee. The carrier then contacted the shipper on several occasions, without success. Approximately one year after the container was discharged, the local authorities emptied the container and disposed of the contents. The carrier had a tariff allowing for 15 days of free time, followed by demurrage at the daily rate of $10 initially, then $20 thereafter. The total bill for demurrage came to $14,000. The carrier's bill of lading provided the carrier was entitled to collect demurrage from the shipper after the expiration of the free time. The carrier sued the shipper for $14,000 in demurrage, and the shipper declined to pay.

ISSUE: Whether the carrier was entitled to collect demurrage on the ocean container.

DECISION: The court held demurrage is a standard industry practice, it was disclosed in the bill of lading, and the bill of lading is binding on the shipper. Demurrage is an accepted form of liquidated damages in shipping contracts, and it does not matter whether or not the shipper was the owner of the goods. Similarly, it does not matter whether the carrier had other containers available to it. A carrier does not have to prove it sustained damages due to its inability to use the container, nor prove it was free from fault in the transaction. Summary judgment was granted to the carrier.

Presenter: Richard Furman

47. <u>MSC Mediterranean Shipping Co. v. Metal Worldwide,</u> 2012 U.S. Dist. Lexis 110370, 2012 WL 3241980 (S.D. Fla.)

FACTS: The shipper hired the carrier to transport shredded steel scrap from Florida to India via ocean transit. The shipping containers were prepared and sealed by a third party, apparently selected by the shipper. The shipper did not have a representative present when the containers were loaded and sealed. The containers were tendered to the carrier and loaded onto a vessel, accompanied by bills of lading. Upon delivery in India, the sealed containers were opened. Much to the surprise of the consignees, the containers were loaded with dirt. India customs seized the containers and fined the carrier. The carrier sued the shipper for the unpaid transportation charges of $138,000, and for demurrage charges that accrued while the containers were detained in India. The carrier also demanded the shipper indemnify carrier for the fine that the carrier had to pay to the Indian authorities. The shipper refused to acknowledge it owed anything to the carrier and claimed the carrier should have realized the containers were too light, there was something wrong with the cargo, and detected the containers did not contain scrap metal. In the midst of this dispute, the shipper dissolved its operations, although it continued to defend itself against the carrier's lawsuit.

ISSUE: Whether the shipper had to pay the demurrage and the shipping costs.

DECISION: The carrier prevailed on the freight charge and demurrage issues. The bill of lading stated that the shipper was responsible for verifying the contents of the containers. The shipper was obligated for payment of all shipping charges. With respect to the fine paid by the carrier in India, the shipper was held not necessarily obliged to reimburse the carrier for the fine. Under the wording of the bill of lading, the carrier may only prevail on an indemnity action against the shipper if the carrier is entirely free from negligence. The court found there was some evidence to show the carrier was at least partially negligent, and refused to grant summary judgment on this claim.

Presenter: Fritz Damm

48. <u>Radiant Global Logistics, Inc. v. Cooper Wiring Devices, Inc.,</u> 1:11-cv-4254 (N.D. Ga. 2012)

FACTS: Cooper Wiring Devices, the shipper, needed to deliver approximately 2400 merchandise displays to Lowe's Home Improvement stores throughout the United States. The displays had to be delivered during a short period of time and according to a rigid schedule. The shipper contacted Plaintiff Radiant Global Logistics ("broker") to arrange for the transportation. The broker used asset-

based carriers and owner operators for the shipments. The broker completed the project with few, if any, service failures.

Shipper and broker had no written price contract. The broker sent freight bills to the shipper on a weekly basis including a per pound freight rate and a total sum owed for delivery. The shipper paid approximately 575 of the freight bills until, after all the displays had been delivered, the shipper informed broker it would not pay any more freight bills. The broker sued to collect in excess of $921,000 of unpaid freight charges.

The shipper counterclaimed, alleging in part that the freight rates were unreasonable and deviated from the broker's freight rates for other types of shipments; the broker commited fraud when it misrepresented the freight rates it would charge; the broker violated the Georgia Fair Business Practices Act; and the shipper sought attorneys' fees based on a Georgia statute. The broker moved to dismiss all four claims based on 49 U.S.C. § 14501.

ISSUE: Whether claims against the broker were preempted under § 14501.

DECISION: The court granted the motion to dismiss, holding state law remedies were preempted by § 14501.

Presenter: Hank Seaton

49. <u>NY Bike Gear v. Fedex Corp.,</u> 2012 U.S. Dist. Lexis 138810, 2012 WL 4459377 (S.D.N.Y.)

FACTS: Shipper is an internet retailer that sells motorcycle gear such as helmets, boots, goggles and jackets. The shipper ships hundreds of packages weekly via Fedex ground. Shipper used Fedex's automatic software system and information technology. Shipper used a scale provided by an authorized Fedex vendor for weighing shipments.

The shipper sued Fedex, alleging Fedex engaged in upweighing, meaning the packages were billed at a higher weight than they should have been, which resulted in rates higher than provided in Fedex's documents and tariffs. Shipper identified 150 examples of upweighing occurring at different facilities.

On shipments to Canada, the shipper designated on each package that the recipient would pay the Canada customs duties and taxes. However, Fedex made no effort to collect these charges from the recipients, and instead, billed shipper for these charges. The shipper further alleged that Fedex conspired with UPS to engage in lock step pricing increases and a scheme to conceal a mutual policy of upweighing. The shipper alleged claims of racketeering based on mail and wire fraud, conspiracy, violation of the Negotiated Rates Act and violation of New York consumer protection law. Fedex filed a motion to dismiss.

ISSUE: Whether the shipper alleged sufficient facts to proceed on its racketeering, price fixing and other claims.

DECISION: The court determined the shipper plausibly alleged the existence of a scheme to defraud, providing numerous specific shipments that were improperly billed and continued to be improperly billed. The shipper also alleged the carrier was in control of the billing technology that permitted this alleged situation. The court dismissed the conspiracy count because of an absence of factual allegations that UPS and Fedex conspired. The court dismissed the claim of false billing by motor carrier, ruling the provisions of the federal law did not apply. The court also dismissed the count alleging violation of New York consumer protection law because the alleged practices at issue

purportedly would only affect high volume commercial customers, and not individual consumers who are protected by the Act.

Presenter: Tom Martin

H. Damages and Costs

50. Ameriswiss Technology, LLC v. Midway Line of Illinois, Inc., 2012 U.S. Dist. Lexis 163401, 2012 WL 4483744 (D.N.H.)

FACTS: Following dismissal of claims against the broker, C.H. Robinson, Ameriswiss continued with its action against the motor carrier Midway for destruction of 14 machines in an intrastate shipment. The carrier ignored the lawsuit, and default was entered in favor of Ameriswiss. Ameriswiss paid $44,800 for thirteen machines a month before the cargo loss. These machines were between 20 and 30 years old when purchased. Ameriswiss presented a report in support of its motion for default judgment stating the fair market value of the machines was $545,000.

ISSUE: What are the shipper's damages under Carmack's actual loss standard for damages?

DECISION: Shipper's claim for $545,000 in damages included anticipated profits on sale of these used machines. The court held the shipper failed to provide evidence of sales of comparable equipment, and the shipper failed to explicitly prove anticipated profits. The court also rejected the appraiser's affidavit, which apparently contained more speculation than hard evidence to support the damages sought. The court held the shipper was entitled to $45,000, the amount it paid for the machines, less salvage value.

Presenter: Wes Chused

51. Gourmet Boutique v. Global Express, 2012 U.S. Dist. Lexis 72144, 2012 WL 1890252 (E.D.N.Y.)

FACTS: The shipper hired the motor carrier to transport frozen food from New York to Arizona. A temperature monitoring device was placed inside the trailer transporting the load. Upon arrival of the trailer, the shipper removed the device and learned the temperature in the trailer had been over prescribed levels for 50 hours during the trip. The shipper tested the food and ascertained it was not fit for consumption. The shipper accordingly arranged for the food to be destroyed. The shipper sued the motor carrier for $72,000 under Carmack. The majority of the claim for damages represented the value of the shipment, but costs of disposing of the spoiled food was also asserted. The motor carrier did not defend the lawsuit, and a default judgment was entered.

ISSUE: Can a shipper recover the cost of salvaging its damaged goods under Carmack?

DECISION: The cost of salvaging goods is a foreseeable element of the shipper's damages. The shipper was awarded the full amount of damages claimed for the value of the goods, together with salvage costs.

Presenter: Colin Bell

52. Hartford Fire Insurance v. Expeditors International, 1:10-cv-5643, 2012 WL 6200958 (S.D.N.Y. 2012)

FACTS: Expeditors hired Intransit Container, Inc. to transport an empty ocean container to Evergreen Solar in Massachusetts. Under the terms of the transaction, Intransit was supposed to transport the container to New Jersey after Evergreen had loaded the container. A receipt was issued by Intransit identifying the "client" as Expeditors and the entity delivering the container as Evergreen. The container was sealed, and the delivery receipt states the container was received in good condition and the seal was intact. No exceptions were noted on the delivery receipt. Expeditors issued a bill of lading listing Evergreen as the shipper and Soleil Energie as the consignee. The bill of lading contains a choice of law provision stating it was subject to COGSA. The bill of lading also contained a limitation of liability, a presumption any loss or damage occurred during sea carriage, and an indemnity provision whereby the shipper indemnified the carrier against claims made by the carrier's servants, agents or subcontractors. The cargo arrived damaged. The parties disputed when and how the damage occurred.

ISSUE: Whether the Carmack Amendment or COGSA applies to damage claims.

DECISION: The court determined that Carmack did not apply to the damage claim because Expeditors is bound by the terms of the bill of lading it issued, which clearly states COGSA applies to Expeditors and its subcontractors. In addition, where a bill of lading requires substantial carriage of goods by sea, it is a maritime contract, and COGSA is applicable. The court further held because the goods were sealed such that the carrier was prevented from observing the condition of the goods when they were tendered for shipment, the clean bill of lading was insufficient to establish delivery of the goods in good condition. Accordingly, plaintiff must bear its burden of providing by undisputed, admissible evidence the cargo was packaged and tendered to the carrier in good condition, and plaintiff failed to meet that burden.

Presenter: Bill Bierman

53. Mafcote v. Averitt Express, Inc., 2012 U.S. Dist. Lexis 162001, 2012 WL 5497936 (W.D. Kentucky)

FACTS: Shipper hired carrier to transport goods by ground within the United States. The shipper had contractual obligations toward its own customers with respect to the goods. Specifically, if the goods were delivered late or were not compliant, the shipper had to pay penalties to its customers. During contract negotiations, the shipper advised the carrier regarding the penalties that the shipper would have to pay in the event of late or non-compliant delivery. The carrier's tariff provided it was not liable for consequential damages. The shipper requested this exclusion not apply to its shipments. The shipper requested the carrier to be liable for any penalties the shipper paid to its customers for late or non-compliant delivery. After much discussion, the carrier e-mailed the shipper a "proposed contract" already signed by the carrier. The document incorporated the carrier's tariffs, including the exclusion for consequential damages. The carrier's e-mail stated "if you are in agreement, please sign this and return it to me." The shipper subsequently typed additional words on the contract, stating: "Carrier's tariffs apply only to the rates and not to the services." Shipper claimed it intended to nullify the consequential damage exclusion in the tariff. The additional typewritten words were clearly marked and plainly visible on the face of the contract. The shipper then signed the contract.

The shipper returned the altered contract to the carrier and requested the carrier countersign the altered contract. The carrier did not sign again, nor did the carrier initial the additional words. The carrier transported the shipper's goods for approximately six months. Eventually some shipments were late or non-compliant, and the shipper paid penalties to its customers. The shipper sued the carrier for damage to the goods, asserting claims for delay including penalties that the shipper paid to its customers.

ISSUE: Does the altered language in the contract nullify the consequential damages exclusion in the carrier's tariff?

DECISION: The court held that by adding the additional wording on the contract, the shipper rejected the carrier's offer and made a counter-offer. Since the carrier did not repudiate this additional wording, it accepted it by performing under the terms of the contract for six months. The additional wording was clear and apparent on the face of the contract, and the shipper did not commit any fraud by adding these words. The court declined to apply the consequential damage exclusion and refused to give the carrier equitable relief in the nature of reforming the contract.

Presenter: Ken Bryant

54. **Universal Sales, Ltd v Edinburgh Assurance Co Ltd, 2012 FC 418**

FACTS: In September 1970, the Irving Whale, under tow of the tug Irving Maple, sank in the Gulf of St. Lawrence while carrying a cargo of 4,270 metric tons of Bunker C fuel oil. In 1996, the Canadian government raised the sunken ship to the surface. The Canadian government settled with the Irving Group in 2000 for $5 million. The Irving Group then sought indemnity for sue and labour expenses of $3,602,458, damages of $4,508,501, and approximately $1,800,000 in defense costs.

ISSUE: Whether the indemnity for costs was enforceable.

DECISION: The insertion of a sue and labour clause in the marine policy was found to be of benefit to the underwriters and thus dismissed in its entirety. The Irving Group's sue and labour expenses began in 1995 and the report estimated the cost of preventative measures and cargo extraction as being in excess of $21,000,000. Accordingly, the sue and labour expenses could not have benefited the underwriters, as the limit of their liability, if any, was $5,000,000.

The court found the settlement between the Canadian government and Irving Group to be reasonable and made in contemplation of the likelihood that one or more of the underwriters would have been found liable in excess of that amount if the case went to trial. Justice Harrington held that the defendant underwriters were thus liable for $4,508,501. The underwriter's liability for the cost of defense was fixed at 25% of the $1,750,000 allowed.

Presenter: Heather Devine

55. Status report on the pending challenge to CSA in ASECTT v. FMCSA before the DC Circuit from Mark Andrews: Below is a link to the briefs filed by ASECTT and its two supporting amici with the DC Circuit. Addendum 1 is a "standing supplement" containing declarations by 20 trade associations, shippers, carriers and brokers detailing the harm being caused by FMCSA's publication and endorsement of flawed CSA data. The amici are the Airforwarders Association and the National Confectioners' Logistics Council. The government's brief is due January 14 and

the reply brief is due January 28 (contrary to dates recently published in other sources). Oral argument has not yet been scheduled. http://asectt.blogspot.com/p/asectt-et-al-v-fmcsa.html