CONFERENCE OF FREIGHT COUNSEL

WINTER 2014 MEETING

WESTIN HOTEL—SAN FRANCISCO, CA

January 25-27, 2014

AGENDA OF CASES

I. CARRIER LIABILITY

1. ABB, Inc. v. CSX Transportation, Inc., 721 F.3d 135 (4th Cir. 2013). An electronic transformer worth $550,000 was damaged in transit from Missouri to Pennsylvania. The parties did not dispute liability but contested the amount of damages. CSX had a limitation of liability. Two documents controlled the analysis: ABB's BOL and CSX's Price List. The ABB BOL, prepared by ABB's traffic manager, stated that the product value was $1,384,000, although the declared value section was left blank, apparently due to a feature of the computer program used to prepare the BOL. The BOL stated that where the rate is dependent on value, shipper must state it specifically in writing in the declared value section. It also stated the services are to be subject to the terms and conditions of the Uniform Domestic Straight Bill of Lading as specified in the Uniform Freight Classifications, and that it is subject to the "Classifications and Lawfully filed tariffs in effect on the date" of the BOL. CSX's Price List stated liability is limited to $25,000, and full liability coverage is only available by calling the sales representative for a specific quote. ABB's traffic manager testified that he could never obtain CSX's Price List in advance and could not find it on their website.

The District Court held that the parties limited liability to $25,000 in the bill of lading. The parties entered into a consent judgment, reserving ABB's right to appeal.

The Fourth Circuit concluded CSX is liable for the full value of the shipment under 49 U.S.C. § 11706, and the parties did not modify the level of liability by a written agreement permitted under Carmack. The Court applied the four part test for limitation of liability in examining the two controlling documents in this case: the ABB bill of lading and the CSX Price List 4605. The Court disagreed that ABB is not entitled to the protections of Carmack because it was the drafter of the BOL under the "written declaration of the shipper" exception in 49 U.S.C. § 11706(c)(3)(A), but pointed out that "ABB's problem in this case is partly of its own making … [the traffic manager] did not perform a key aspect of his job, namely, negotiating and obtaining rate information and liability for shipment of a very expensive equipment. … ABB could have prevented many of the problems that occurred in this case not only by revising its standardized bill of lading to exclude outdated references to 'tariffs' and 'classifications' that were part of the pre-1995 regulatory language." The Court determined the obligation to limit liability rests with the carrier, and "a carrier cannot limit liability by implication. There must be an absolute, deliberate and well-informed choice by the shipper." citing <u>Acro Automation Sys. v. N. Am. Van Lines</u>, 706 F. Supp. 413, 416 (D. Md. 1989). The Court also disregarded the argument that the BOL incorporates the Price List by reference, reasoning that this would charge the shipper with knowledge of private price lists created by the carrier simply by use of the "outdated word 'tariff'", allowing the carrier to daily unilaterally change its level of liability unbeknownst to the shipper. The Court distinguished cases such as <u>Siren, Inc. v. Estes Express Lines</u>, 249 F.3d 1268 (11th Cir. 2001), because those BOLs included a specific classification designation, e.g. Class 85, and distinguished <u>Werner Enters. v. Westwind Mar. Int'l, Inc.</u>, 554 F.3d 1319 (11th Cir. 2009), which relied on the notice of liability limitation in the invoice.

Presenter: Dirk Beckwith

<u>2. Aurora Organic Dairy Corp. v. Western Dairy Transport, LLC</u>, 2013 WL 5636671, 2013 U.S. Dist. LEXIS 148094 (W.D. Mo.). Shipper contracted with carrier to transport raw milk from its various farms to its processing facility in Colorado. 28 tankards of milk transported by the carrier were deemed contaminated, rejected, and destroyed. Shipper moved for summary judgment on liability, and carrier moved to strike opinion testimony by undisclosed expert witnesses under Rule 37(c)(1). Shipper argued the testimony came from fact, not expert, witnesses, that one witness was disclosed as a fact witness while another was inadvertently not disclosed, and that there was no prejudice because carrier received the expert reports previously. Carrier also moved for summary judgment on liability.

The court, relying on FRE 702, 703, and 705, found that because these individuals relied upon scientific, technical, and specialized expertise for their opinions, they should have been designated as expert witnesses and sanctioned the Plaintiff for failing to disclose them by excluding affidavits, reports and testimony at trial. Because one of the witnesses participated in the investigation of the contaminated milk and was disclosed as a fact witness, the Court allowed his statements regarding his observations to come in as fact witness statements but excluded any opinions based upon scientific, technical, or specialized expertise.

The court denied the cross motions for summary judgment as to liability, finding that there was an issue of fact as to whether the milk was contaminated during transport due to unclean tankards rather than filters at the silo, the filters having been destroyed by the Plaintiff prior to testing, for which spoliation the Court instructed that the jury be given an adverse inference instruction.

Presenter: Fritz Damm

3. Century Pulp & Paper v. MSC Damlia, 213 WL 5220947 (S.D. N.Y.). Seller Centifibre sold 500 tons of pulp to buyer in India. The 500 tons of pulp were to be packed in 20 ocean containers. Instead of loading the containers with 500 tons of pulp, the seller loaded only 5% of that amount into the containers. Ocean carrier issued a bill of lading reflecting that the entire 500 tons were contained loaded into the containers. Upon arrival and delivery, the seller drew on buyer's line of credit as if it had tendered the full shipment to the ocean carrier. Seller disappeared. The buyer sued the ocean carrier contending the Ocean Carrier's Bill of Lading falsely listed the weight of the shipment. The ocean carrier contended that buyer could not meet its burden of proving that all of the pulp was tendered to the ocean carrier. While the signed bill of lading with no exceptions met the buyer's burden of proof, the burden then shifted to the ocean carrier, who was able to prove that it had received less than the full amount listed on the ocean bill. The court held that the buyer was unable to prevail on summary judgment on the requirement of proof of tender of goods to the carrier in good condition. The court also rejected the buyer's claims that the ocean carrier should be estopped from denying receipt of the entire load of pulp. The court reasoned that the buyer could not have relied upon the ocean carrier's statements contained in the bill of lading when the bank made payment on the letter of credit. The court further held that the ocean carrier had proven that it was entitled to assert the statutory defense under COGSA Section

1304(2)(q) at trial by attempting to prove that the damages arose without actual fault or neglect of the carrier and its agents.

Presenter: Colin Bell

4. Distribuidora Mari Jose, S.A. de C.V. v. TransMaritime, Inc., -- F.3d ----, 2013 WL 6857997, (5th Cir.). Defendant TransMaritime appealed a summary judgment against it under Carmack. The loss involved 2,000 boxes of Christmas lights in transit from China to Mexico. Plaintiff was a Mexican corporation engaged in import/export, and TransMaritime was a logistics provider. Plaintiff bought Christmas lights from a Chinese manufacturer and shipped them to Mexico. The cargo was held in a warehouse until arrangements were made to transport the cargo by sea from the warehouse to Long Beach, California, and then by motor carrier to Laredo, Texas, where the lights would be imported into Mexico. Plaintiff hired TransMaritime to receive the cargo in Long Beach and transport them "in bond" to Laredo, and subsequently into Mexico. The ocean carrier issued bills of lading for 15 ocean containers to Long Beach, naming TransMaritime as the Consignee. The cargo arrived at Long Beach and was held by U.S. Customs. In order to secure release of the cargo from Customs, TransMaritime submitted various forms, but did not issue a bill of lading. After clearing Customs, a company hired by TransMaritime transferred the ocean carriers from the port to a container freight station, were they were unsealed, inventoried, loaded and resealed for motor carrier transport to Laredo. At this time, TransMaritime noticed almost 2,000 boxes were missing from the ocean carrier's bill of lading count.

The issue addressed by the Court is whether the plaintiff established a *prima facie* case under Carmack by proving tender of the goods in good condition to the carrier. The district court had held that the Customs forms submitted by TransMaritime were evidence that TransMaritime had received the full shipment. In reversing the district court, the Fifth Circuit noted that: (1) the count of the boxes listed in the Customs forms was based solely on the ocean carrier's bill of lading; (2) TransMaritime did not have the opportunity to inspect or inventory the goods prior to completing the customs forms, and 14 of the 15 containers received by TransMaritime its seals intact. At the time of receipt, the inventory conducted by Transmaritime showed a discrepancy in at least four of the containers, all of which had been sealed. Based on these findings, the Fifth Circuit reversed the summary judgment, finding a genuine issue of material fact as to whether the total shipment had been delivered to TransMaritime at the port in Long Beach.

Presenter: Dennis Minichello

<u>5. Finance USA Network.com, Inc. v. Central Transport Int'l, Inc. et al.,</u> 2013 U.S. Dist. LEXIS 95363; 2013 WL 3461692, (M.D. Fl.). Hi-Tec Art shipped LED Art with Central Transport. The goods arrived a total loss, with no salvage value. Hi-Tech assigned its claim to Finance, which moved for partial summary judgment on liability. Defendants filed a cross-motion arguing that Finance lacked standing because title to the goods belonged to the buyer/Hi-Tech's customer per Florida's Uniform Commercial Code, because the goods were shipped "free on board," and because Hi-Tech intentionally misrepresented the weight and classification of the shipment.

The court ruled that Finance had standing, but denied the Plaintiff's and Defendants' motions for summary judgment on the basis that the Defendants raised a genuine issue of material fact as to whether Hi-Tech intentionally misrepresented the weight and classification.

Presenter: Scott McMahon

<u>6. Kawasaki Kisen Kaisha and Union Pacific Railroad Co., v Plano Molding Co.,</u> 2013 WL 3791609, 2013 U.S. Dist. LEXIS 10118 (N.D. Ill.). This case is one of several cases arising out of the train derailment that gave us the Regal-Beloit. Two previous decisions involving these parties have been the subject of previous CFC meetings. This most recent decision followed a one-day evidentiary trial after remand from the Seventh Circuit. In this lawsuit, the plaintiffs, which included Kawasaki Kisen Kaisha, Ltd., an ocean carrier, and "K" Line America, Inc., their agent in the United States, as well as the UP Railroad Co., sued Plano Molding Co. seeking indemnity damages for their liability to the owners of other cargo damaged by the. Plano, an Illinois corporation, had made arrangements with CMT International, a company that assists American customers who wish to purchase products from Asia, to solicit a bid from a Chinese company for the fabrication of two steel molds for its Illinois factory. World Commerce Services, LLC, was selected to coordinate the molds' transportation from China to the United States. World, in turn, contracted with THI Group, Ltd., and "K" Line to ship the molds from China to Illinois. "K" Line then subcontracted shipping within the United States to the UP. The molds were on a UP train in Oklahoma on April 21, 2005, when it derailed, causing $4,000,000 of damage to UP and "K" Line customers.

In its findings of fact, the court determined: 1. Plano selected World to ship the molds and gave World instructions how to do so; 2. the molds were shipped FOB Shanghai; and 3. Plano is the consignee of the World bill of lading. Based on those specific findings of fact, the court concluded that Plano was bound to the World bill of lading as the purchaser of the molds and may be held liable to plaintiffs pursuant to the merchant and Himalaya clauses in the World bill of lading. The court declined to hold that Plano's liability to plaintiffs was also based on the merchant and Himalaya and subcontractor clauses under "K" Line's bill of lading. A damages trial was held on October 15, 2013, and the court's ruling is reported at 2013 WL 5609327.

Presenter: Dennis Minichello

7. LIG Insurance Company, Ltd. V. Inter-Florida Container Transport, Inc., 2013 WL 4516104, 2013 US Dist Lexis 120176, S.D. Fla. Three sealed containers containing 5,352 LCD computer monitors were stolen from a storage facility operated by Inter-Florida Container Transport, Inc. ("IFCT"). The land on which IFCT operated was owned by 10997 Project, Inc. ("10997 Project"). The owners of 10997 Project were two individuals, one of whom also owned IFCT. The plaintiff is the subrogated insurance carrier for the owner of the computer monitors and paid the claim of $552,547.00. The insurance carrier sued on a theory of breach of contract, bailment, negligence and liability for alter ego and instrumentality of fraud. Prior to trial, the court found that the claims were governed by COGSA. This trial court decision assesses the responsibility for the lost cargo to the various defendants.

The three containers were released to IFCT with the seals intact upon delivery. IFCT did not deliver the containers to their destination but transported the containers to the storage yard owned by 10997 Transport for overnight weekend storage where the containers were either stolen or emptied of all their contents. The court found that the relationships of the various defendants were intricately connected. The court also found that the storage facility had the storage yard as its only asset and received no income and had no bank account. The storage facility was specifically trying to avoid liability for any loss on the premises. The court also found that although there had been security guards prior to the delivery of the freight on Saturday, no guards were on site during the weekend. The security video camera revealed that three individuals cut through the fence and broke into the yard, hooked trucks up to the containers and removed them from the yard. While there were video cameras recording for the yard on the night the cargo was stolen, no one was watching the video feed. The court found that COGSA was the exclusive remedy for the losses. The defendants' attempts to raise the exception to liability under COGSA, *i.e.*, that they were not responsible for loss or damage "arising without the actual fault and privy of the carrier and without the fault and neglect of the agents of service of the carrier," was rejected. Finally, the court found that the defendant 10997 Transport was liable for the judgment against IFCT on the grounds that corporate formalities had not been served and the individual defendant was an alter ego along with the corporate defendants.

Presenter: Beata Shapiro

8. Saacke North America v. Landstar Carrier Services, 2013 U.S. Dist. Lexis 178313 (W.D.N.C.). Shipper Saacke shipped large pieces of machinery manufactured in Germany directly to Chicago for display. Global Experience Specialists ("GES") was the management company for all logistics for the McCormick Center in Chicago. GES prepared shipper's goods for moveout from the trade show. GES required shipper to sign a bill of lading issued by GES for movement of the goods from shipper's booth to the loading area on the roof of the McCormick Center. Shipper retained broker MIL, a Landstar agent, to coordinate delivery of the shipment away from the McCormick Center. MIL e-mailed shipper a bill of lading and selected Landstar as the carrier to transport the shipper's goods. Landstar was responsible for the dock-to-dock shipment and delivery of the goods from Chicago to Mooresville, North Carolina. At origin, Landstar's driver signed for 7 pieces of freight in good order without exception. When the driver signed the bill of lading, he was not aware that the load consisted of only 6 pieces of freight instead of seven. At destination, only six of the seven pieces of freight were received, a claim was filed, and shipper sued Landstar for the loss.

Landstar moved for summary judgment on the first prong of shipper's prima facie case. The court determined that GES held itself out to the shipper as a carrier in its bill of lading. Accompanying the GES bill of lading were the GES Logistics' terms and conditions stating that GES may act as a carrier. The court went on to find that there were not two separate shipments, but rather a single shipment. As such, when shipper tendered goods to GES, and bill of lading was issued, this was the only entity and the only opportunity for shipper to release its goods. Because GES held itself out, and in fact, operated as a "carrier" for purposes of Carmack, the shipper's evidence demonstrating good origin condition to GES at the close of the trade show was sufficient to establish a prima facie case and entitled shipper to recovery under Carmack. Because GES was a carrier under Carmack, and since shipper is permitted to bring suit against the initial, receiving or delivering carrier, the court denied Landstar's motion for summary judgment.

Presenter: Fred Marcinak

9. Sompo Japan Ins. Co. of America v. Norfolk Southern Ry. Co., --- F.Supp.2d ----, 2013 WL 4414797, S.D.N.Y., Insurers of shippers sued railway carriers alleging that carriers were liable under various common law theories for loss of insured cargo in train derailment. The district court granted summary judgment to insurers. Carriers appealed. The Second Circuit vacated and remanded. On remand, the district court, found some claims were barred by a covenant not to sue in the bills of lading. On reconsideration in part and on motion for summary judgment, the district court held that: (1) inland railway carrier was entitled to the protection of liability limitations in upstream sea waybill and bill of lading; (2) insurer received an assignment from non-vessel operating common carrier (NVOCC) of all claims NVOCC may have against railway carrier; and (3) insurer was entitled to presumption that railway carrier was negligent *under res ipsa loquitur* doctrine.

Presenter: George Wright

10. Tata AIG General Insurance v. British Airways, 2013 WL 3092828, 2013 US Dist Lexis 89830 (M.D. Tenn.). Shipper hired carrier to transport pharmaceuticals from India to Tennessee under an air waybill. The inbound plane arrived at Philadelphia, where the carrier's subcontractor handled the move from Philadelphia to Memphis via ground. Because the highway was closed due to severe flooding, the motor carrier parked the load overnight. As the flood waters continued to rise, the driver abandoned the truck and had to be rescued from the roof of his vehicle. The pharmaceuticals were submerged in water and destroyed. Shipper collected a large sum from its insurer, who then filed a subrogation suit against the air and motor carriers. The waybill incorporated the Montreal and Warsaw Conventions and limited liability. The shipper contended that because the damage did not occur during air transit, the Conventions and their liability limitations did not apply.

The court held that the damage did not occur during air transportation, and accordingly the Montreal Convention did not apply, analyzing Article 18 of the Montreal Convention and the corresponding article of the Warsaw Convention. The court further held that because the air carrier tendered the shipment to a motor carrier, the motor carrier was not a party to the air waybill or the contract of carriage, and the air carrier did not disclose the motor carrier's existence to the shipper. Accordingly, the court held that Montreal did not apply. However, the court also held that the carriers' liability was capped under the air carrier's terms and conditions.

Presenter: Jeff Cox

II. LIMITATIONS AND NOTICE

11. Williams v. North American Van Lines, 731 F.3d 367 (5th Cir. 2013). The district court granted summary judgment for North American Van Lines, concluding that plaintiff failed to include in her claim a specified or determinable amount of damages as required by 49 C.F.R. § 1005.2(b). Plaintiff had only estimated for damages. Plaintiff appealed.

On appeal, the Fifth Circuit reversed and remanded for further proceedings. In doing so, the Fifth Circuit explained that since plaintiff's demand letters unequivocally requested North American to remit payment of $182,000, the regulations were satisfied. The court further held that the plain language of the regulation's minimum filing requirements require nothing more than an unequivocal demand for a specific amount, despite the fact that the plaintiff's demand was only an estimate of damages, and said amount included damages for mental anguish and attorneys' fees. This is a change in direction from the Fifth Circuit's prior decisions on this issue.

Presenter: Eric Benton

III. LIMITATION OF LIABILITY

12. Certain Underwriters at Lloyd's v. Baldwin Distribution Services, Inc., --- Fed.Appx. ----, 2013 WL 4800626, 2013 U.S. App. LEXIS 18792 (9th Cir. 2013). Insurer filed a subrogation action for damages sustained by its insured, Netgear, when motor carrier's truck overturned, resulting in total loss of Netgear's cargo. FedEx, not a party to the action, had subcontracted with the motor carrier to transport the cargo. The parties filed cross-motions with stipulated facts and documents. The trial court ruled in favor of insurer.

The Ninth Circuit affirmed, finding that Carmack imposed absolute liability on the motor carrier. The stipulated facts and documents included a stipulation that the bill of lading limited the carrier's liability to $5 per pound, and a Master Agreement between Baldwin and FedEx did not limit liability under 49 U.S.C. § 14706(a)(1). The court focused on an absence in the stipulated facts that Baldwin would provide Netgear with a copy of the applicable rates if they were requested.

Presenter: Bill Taylor

13. Custom Shutters v. SAIA Motor Freight, 2013 WL 6145817, 2013 U.S. Dist. Lexis 166376 (E.D. Wisc.). Shipper manufactured custom made shutters and needed a heavy load of shutters transported via truck from Wisconsin to Florida. Motor carrier quoted shipper a shipping fee of $1,400, which shipper accepted. Motor carrier instructed shipper to issue a bill of lading, put the quote number on the bill of lading, and hand the bill of lading to the carrier at origin, which shipper did. Motor carrier picked up the shipment and affixed a sticker on the bill of lading which provided that the "shipment is subject to carrier's tariff." The shipment was damaged in transit.

Shipper sued carrier for $33,000, the price that the consignee would have paid for the shutters. Motor carrier argued that its tariff capped liability at $1.00 a pound, or $5,000 based on the weight of the shutters. The court held that motor carrier was not entitled to enforce its limitation of liability. In order to limit its liability, the carrier must offer the shipper a reasonable opportunity to choose between two or more levels of liability, and the carrier provided no evidence that a choice was offered. Further, the court held that the carrier's tariff was not clear as to which provision of the tariff applied to a spot price quote, stating that the tariff was incomprehensible and internally inconsistent. With respect to damages, the judge refused to accept the shipper's measure of damages which included shipper's anticipated profit if the shutters had been delivered.

Presenter: Mike Tauscher

14. <u>Donna Karan Company, LLC v. Airgroup</u>, 2013 WL 5730428 (D.N.J). Karan shipped goods through Defendant's online shipment booking system. The system provided for the shipper to check empty boxes for declared value and for the value of the shipment. Karan left both boxes blank for this shipment of goods, which was stolen in transit. The carrier, Radiant Global Logistics, Inc., d/b/a Airgroup ("Airgroup") moved for summary judgment on its limitation of liability, arguing that the online system gave Karan the chance to choose between levels of liability and declare a value. Karan filed a cross-motion, arguing that the rate for this shipment was based solely on weight, and Airgroup conceded that the rate would not change based on the declared value. The court denied Airgroup's motion for summary judgment because Airgroup's online booking system did not provide "two or more levels of liability." Providing two boxes to check was not evidence of a choice of two or more liability levels. The court also granted the shipper's motion for summary judgment stating that the value of the stolen goods was the domestic market sales value.

Presenter: Rob Rothstein

15. <u>Laing v. Frank Cordi</u>, 2013 WL 5498271, 2013 US Dist. Lexis 141588 (M.D. Fla.). The plaintiffs wanted delivery of their household goods from

Michigan to Florida. They negotiated with Pack & Ride, but were unwilling to accept Pack & Ride's terms and conditions. Plaintiffs contacted a competitor of Pack & Ride and arranged for a trailer to be delivered to their home. However, when a trailer was dropped off for the shipper, the trailer was owned by Pack & Ride and was loaded with the shipper's household goods. No contract was signed, and no bill of lading was issued. An Estes Express, Inc. tractor picked up the Pack & Ride trailer and delivered it to Fort Myers, Florida, where it was held and eventually delivered to the shippers in a damaged or lost condition. Shipper sued, and Estes moved for partial summary judgment limiting its liability to $1,590.00 pursuant to its written agreement with Pack & Ride. Though the court acknowledged that a limitation of liability with a shipper's intermediary can be binding on the shipper (citing *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 33 (2004)), the court denied Estes' motion for partial summary judgment on the grounds that Estes' limitation of liability with Pack & Ride was based on non-household goods law, section 14706(c). The court applied section 14706(f) governing to household goods and held Estes' limitation of liability unenforceable. It appears that this was a self-pack household goods move, and the cargo could have been classified as general freight, not household goods, yielding a different result.
Presenter: Wes Chused

16. Rafinasi v. Coastal Cargo Co., 2013 WL 3815957 (5th Cir.). Rafinasi, an Indonesian company, hired Coastal Cargo to unload its newly manufactured boiler from the manufacturer's railcar, store the boiler until Rafinasi's ship (owned by Rickmers) arrived, and then move the boiler shipside for loading. Coastal also maintained a separate contract with Rickmers to serve as its exclusive stevedore. Coastal successfully unloaded the boiler from the manufacturer's railcar and stored the boiler until Rickmers' ship arrived. In its attempt to move the boiler shipside, the boiler sustained significant damage.

Rafinasi and its insurance company sued Coastal for negligence, breach of warranty, and breach of contract, alleging approximately $280,000.00 in damages. Coastal responded that its liability should be limited by COGSA and filed a third party complaint against the manufacturer. The district court found that Coastal was solely responsible for the damage and that because Coastal was not an agent of Rickmers' at the time of damage, its liability was not limited by COGSA.

The issue on appeal was whether the stevedore company, Coastal Cargo Company, could limit its liability under COGSA. The Fifth Circuit reversed the district court's decision and remanded it for review. Ordinarily, COGSA's package limitation only applies from the time the goods are loaded onto the ship until the time the goods are unloaded from the ship. However, parties can extend COGSA's package limitation to periods before loading and after unloading. Rickmer's bill of lading extended the COGSA package limitation to "before the goods are loaded on or after they are discharged from the vessel" so long as the "goods at said time are in the actual custody of Carrier or any Servant or Agent." The bill of lading further defined "Agent" to include "Stevedores…." The Court found that because the clear language of Rickmers' contract defines "Agent" to include "Stevedores," the COGSA package limitation extended to Coastal – the exclusive stevedore for Rickmers.

Presenter: Jeanette Green

17. Sephora v. J.B. Hunt Transportation 2013 WL 5692215, 2012 US Dist Lexis 147046 (N.D. Cal.). During contract negotiations between the broker, JB Hunt, and shipper, Sephora, Sephora represented that the average shipment was valued at approximately $500,000.00. JB Hunt asked if Sephora wanted pricing on $500,000.00 value and Sephora responded, yes, but that if it would affect the price significantly, it carried its own insurance, and wanted different pricing to reflect lower values. JB Hunt sent Sephora rates based on cargo load values of $100,000 and $250,000; however, in the interim JB Hunt delivered shipments on a "spot-rate" basis. On June 25, 2010, Sephora asked for pricing on a shipment and JB Hunt inquired whether Sephora wanted a spot rate or a long-term rate. Sephora wanted the long-term rate. Sephora ultimately asked JB Hunt for rates based on a $100,000 limit of liability. The load was transported. Thereafter, JB Hunt e-mailed a long-term rate agreement, executed by a manager, stating that the rates would stay valid for one year but failed to mention anything about limits of liability. JB Hunt later sent an e-mail to Sephora with the title "increasing cargo value," promising to only use carriers with cargo liability limits of $250,000 or above. JB Hunt never received a response to that e-mail. Sephora hired JB Hunt to arrange the transport of a load from Utah to Washington but a miscommunication occurred between the parties. Sephora believed that no limit of liability applied because none was mentioned in the rate agreement and JB Hunt believed that the $100,000 limit of liability previously requested by Sephora applied.

JB Hunt hired a carrier to transport the load with only $100,000 limit of liability. The carrier completed a bill of lading prepared by Sephora which contained neither a statement of value nor a limitation of liability. The carrier's driver later reported the cargo stolen. A significant portion of the load was recovered, but more than $100,000 remained stolen/lost. Sephora sued JB Hunt for $329,000 in damages and $223,000 in investigative costs. Defendant argued that the $100,000 limitation of liability applied and that investigative costs went beyond what was reasonable to mitigate the loss.

The issues for the court were whether the e-mail communication unambiguously limited JB Hunt's liability to $100,000, and whether Sephora's investigative costs were reasonable attempts to mitigate its loss?

The court held that the e-mail communication between the parties concerning limiting the liability of JB Hunt was ambiguous in its use of the terms "ALL" and "them." Accordingly, the court could not determine on the face of the e-mails whether the request to provide all rates on $100,000 limit of liability applied to just those shipments or on all future shipments, too. As a result, the court denied JB Hunt's motion for summary judgment on the limitation of liability issue. The Court denied JB Hunt's motion for summary judgment on the issue of "reasonableness" because "summary judgment is only appropriate on a question of reasonableness where no reasonable jury could find that the actions were appropriate….In this circumstance, given that the total value of damages sought are less than the value of the cargo lost, a reasonable jury may find that the actions were warranted."

Presenter: Gordon McCauley

18. Stephenson Equip. v. ATS Specialized, Inc. 2013 WL 4508444, Fed. Carr. Cas. P 84,780, (N.D.N.Y.). Plaintiff, Stephenson Equipment, contracted with Defendants for the shipment of a crane from Baltimore to Troy, NY. Pursuant to this agreement, shipment of the crane was to take place in five separate loads. The crane was delivered by its manufacturer to Defendants in Baltimore in undamaged condition. The final load – which contained the "boom top" and "butt section" of the Crane – was delivered in damaged condition. The total damage was $78,474.47. Various communications between the parties during the time of contracting, including contracting and shipping documents, stated that the Crane was being shipped to a "job site, where the consignee for the crane was not Plaintiff but a non-party called 'American Iron, Inc.' or 'American Iron Construction.'" The Rate Quotation Confirmation, Bill of Lading, and Rules Tariff provided that Defendants' liability for loss or damage was limited to $2.50 per pound.

The Rate Quotation Confirmation, Bill of Lading, and Rules Tariff provided that, to declare a value greater than $2.50 per pound, Plaintiff had to (1) declare (and sign) the greater valuation on the bill of lading; and (2) contact Defendants for a written alternative rate quote. However, the Rules Tariff further provided that Plaintiff's failure to do both things would result in reversion to Defendant's liability to $2.50 per pound. Similarly, the Bill of Lading provided that Defendant's liability would revert to $2.50 per pound if Plaintiff failed to (3) sign and return the written alternative rate quote to Defendants, and (4) pay the increased rate. Plaintiff never did any of these four things. The Rules Tariff, however, provided that certain listed excess value charges shall not apply when the "declared actual cargo value" on the bill of lading is not greater than $100,000 per trailer.

The issues for the court were whether the limitation of liability provision is unenforceable pursuant to the "material deviation" doctrine; whether, in the alternative, the limitation of liability provision is unenforceable due to lack of reasonable notice; and whether Defendant had reasonable notice of special damages.

The court found no admissible evidence in the record from which a rational fact-finder could conclude that Plaintiff paid an additional charge for the specialized safety measures (e.g., the promise to ship the Crane in five different segments in a designated order, in order to lessen the risk of loss). In evaluating whether to enforce the limitation, courts consider the following: (1) whether the carrier has given adequate notice of the limitation of its liability to the shipper; (2) the economic stature and commercial sophistication of the parties; and (3) the availability of "spot" insurance to cover a shipper's exposure. Based on the record, the court found that it was unclear whether the Plaintiff ever saw the limitation of liability provision in the Bill of Lading and Rules Tariff. It was unclear whether Plaintiff was a sufficiently sophisticated shipper that routinely contracts with ocean, rail, and motor carriers to deliver millions of dollars' worth of heavy equipment. Finally, the court found it was unclear whether the Plaintiff ever received a copy of the Rules Tariff.

The court found that a genuine issue of material fact existed arising from "various communications between the parties during the time of contracting, including contract and shipping documents, stated that the Crane was being shipped to a 'job-site,' where the consignee for the Crane was not Plaintiff but a non-party called 'American Iron, Inc.' and 'American Iron Construction.'"

Presenter: Jim Wescoe

19. Tennessee Wholesale Nursery v. Wilson Trucking Corp., 2013 WL 5780124, M.D.Tenn. (Oct. 2013). Follow up decision to agenda item 40. Plaintiff Nursery contracted with defendant motor carrier to transport roots and trees to plaintiff's out-of-state buyers. Plaintiff sued defendant for failure to timely transport the shipments causing damages in the form of additional shipping costs and losses of future business. Motor Carrier moved for summary judgment on limitation of liability based on its tariff and the bill of lading, issued by the shipper, which incorporated the tariff terms. The court upheld the tariff's limit of liability, as well as the tariff's bar to special, incidental and consequential damages, especially in light of the parties' failure to contract otherwise.

Presenter: Ken Bryant

20. Tokio Marine v. Flash Expedited Services, Inc., 2013 WL 4010312 (S.D. Ohio). Nikon sold Costco 1,392 digital cameras. Nikon had a contract with Ground Freight Expeditors, and Ground Freight brokered the interstate shipment of cameras to Forward Air, which brokered the load to Defendant Flash. Forward Air and Flash had a broker/carrier agreement in place at the time of the shipment, which limited Flash's liability to $100,000. The cameras were stolen in transit. The court examines downstream carrier liability and upstream carrier agreements, eventually holding that where the shipper, or the shipper's agent, issues a bill of lading with a limitation of liability incorporated therein, the shipper is bound by the terms of its bill of lading. The court also rejected the plaintiff's material deviation arguments.

Presenter: Tom Martin

21. Verhoogen v. UPS, 2013 WL 2444716, 2013 Ohio App. Lexis 2236. Shipper hired UPS to transport a stove top from Washington to Ohio. The stove top was damaged in transit. Shipper sued UPS for $4,000, claiming the full value of the shipment and consequential damages. UPS asserted its liability was limited by tariff and conditions of service of $100.

Shipper won at trial, but on appeal, the appellate court held UPS was entitled to rely upon this $100 limitation of liability. The appellate court explained that UPS' terms and conditions and tariff are enforceable, and courts consistently enforce such provisions. The court stated that the limitation of liability actually benefits shippers by enabling carriers to charge lower rates. If carriers faced unlimited liability for every shipment, then carriers would have to charge much higher rates.

Presenter: Dennis Kusturiss

IV. PREEMPTION

<u>22. Certain Underwriters at Lloyd's v. UPS, Inc.</u>, 2013 WL 5803777 (E.D. Pa). Lloyds filed a subrogation claim for alleged thefts by UPS employees of several shipments of coins. UPS moved to dismiss the fraudulent conversion claims as preempted by Carmack and under FRCP 12(b)(9)(b) for failure to plead sufficient facts. The court granted an opportunity to amend the complaint, after which UPS refiled the motion.

The court held Carmack preempted Lloyds' claims. The conversion exception to Carmack preemption only applies to invalidate a limitation of liability, not to avoid preemption of claims. Further, Lloyds did not plead true conversion, which requires that the carrier appropriate the property for itself, or that the carrier profited from the conversion. "[Willful] blindness to the activities of third parties (even employees) does not qualify."

Presenter: Colin Bell

<u>23. Huertas v. United Parcel Service, Inc.</u>, 974 N.Y.S.2d 758, 2013 NY Misc Lexis 5033(2013). UPS made daily deliveries to a consignee—TJMaxx in Staten Island. One day, UPS made a delivery to TJMaxx stacked over three feet high. Plaintiff, an employee for TJMaxx, testified that a new UPS delivery driver delivered the packages. According to the plaintiff, the regular UPS delivery driver would place packages on a counter behind the registers located in front of the store. However, testimony by UPS reflected that package placement within the TJMaxx store was based solely upon instructions of the TJMaxx employees. Plaintiff testified that she argued with the UPS driver regarding placement of the packages and was distracted by a customer. Upon return, she ran into the three foot stack of boxes and was injured. UPS moved for summary judgment asserting FAAAA and ADA preemption. The court denied the motion. Specifically, the court reviewed the United States Supreme Court decisions in *Rowe, Wolens,* and in *Dan's City Used Cars, Inc.* to find that the stacking of boxes was too remote from any "state regulation" for the "service" "provided by an" "airline," notwithstanding the fact that packages may have come off an airplane and then traveled in a motor truck to a store. The court did found there was no contractual obligation of UPS to place the boxes in any particular location, and UPS had no duty to do so.

Presenter: Vin Merrill

<u>24. & 25. Mlinar v. United Parcel Service, Inc., et al.</u>, 2013 Fla. App. WL 5538770 (Fla. 4th DCA Oct. 9, 2013), plaintiff-appellant, Ivana Vidovic Mlinar

("Mlinar"), an artist, created two oil paintings, which were delivered to a third-party retailer to be shipped via, defendant-appellee UPS, to New York. When the container carrying the paintings arrived in New York, it was discovered that the paintings had been removed. Mlinar reported the loss to the third-party retailer and UPS, whereby she was offered $100 by the third-party retailer for the missing paintings. At some point, however, UPS sold the paintings to its lost goods contractor, who then in turn auctioned off the paintings. Two years after Mlinar lost possession of the paintings, an individual that purchased one of the missing paintings contacted her. After learning of this, Mlinar commenced this action against, *inter alia*, UPS, asserting claims for conversion; profiting by criminal activity; unauthorized publication of name or likeness; and deceptive trade practices. Subsequently, the trial court granted UPS's motion to dismiss Mlinar's action on grounds that her claims were preempted by Carmack. In affirming on appeal, the Florida Court of Appeal agreed that Carmack preempted Mlinar's claims.

The court stated, "Carmack Amendment preemption embraces all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation," and as a result, "[a] cause of action not within the ambit of the preemptive scope of the Carmack Amendment is rare." The Court mentioned that although as a general rule Carmack preempts common law fraud, conversion and unfair trade practices claims, claims "based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption."

The court first held that Mlinar's conversion claim was preempted by Carmack because it was predicated upon UPS's failure to deliver her paintings. While some courts allow an exception to preemption when there has been a "true conversion," i.e. where the carrier has appropriated the property for its own use or gain, the court declined to adopt such exception. Second, Mlinar's claim for unauthorized use of her name or likeness was also preempted as such claim flowed directly from UPS's failure to deliver the paintings. Finally, the court affirmed the dismissal of Mlinar's remaining claims because the claims were closely related to the performance of the shipping contract. On rehearing, **Mlinar v. United Parcel Service, Inc.**, --- So.3d ----, 2013 WL 6244191, 38 Fla. L. Weekly D2542, Fla.App. 4 Dist., the court came to the same conclusion, certifying a conflict to the Florida Supreme Court, and also provided good language to the effect that even intentional conversion is preempted by Carmack. Trying to draw distinctions between "true" conversions and other conversions are unworkable in practice.

Presenter: Richard Furman

26. Nieman Brothers v. XPO Logistics, No. 13-C-5375 (N.D. Ill. 2013). Shipper sued broker alleging that the broker's selected motor carrier stole a load of 40,000 pounds of almonds and sold them for a profit. The broker filed a motion to dismiss negligent hiring and negligent misrepresentation claims as being preempted by the FAAAA. In its motion, the broker contended that the negligent hiring claim related to the services of a broker concerning the transportation of property, and was therefore preempted. The court agreed, finding that XPO is a broker that arranged for the movement of the almonds, but alleging breached its duty to exercise reasonable care in locating the carrier to do so, and accordingly, the claim is preempted. The court distinguished *Dan's City*, finding that the negligent hiring claim constituted "arranging for" the delivery of the almonds and fell directly within the statutory definition of core transportation. With respect to the negligent misrepresentation claim, the court determined that the necessary factual background had not been established to determine whether the negligent misrepresentation claim concerned the "transportation of property," and denied the motion as to negligent misrepresentation.

Presenter: Tom Kuzmanovic

27. Olympian Worldwide Moving & Storage Inc. v. Showalter, 2013 WL 3875299, Fed. Carr. Cas. P 84,772, D. Ariz. This case involves an allegedly stolen wedding ring. Shippers hired an Allied Van Lines agent, Olympian Worldwide to move their household goods from Arizona to Florida. When the shippers failed to pay Olympian, it sued to collect its fees. The shipper filed a counterclaim and a third-party complaint against Allied. The defendants filed motions to dismiss the third-party complaint and the counter-claim based on Carmack preemption and because Olympian was an agent for its disclosed principal, Allied. The main issue was whether the allegations of the complaint reflected that the wedding ring was to be part of the shipment. Based upon the allegations of the complaint, the court dismissed the claim based on Carmack pre-emption and dismissed Olympian as an agent of its disclosed principal. The court allowed the plaintiffs to amend its counter-complaint to allege a Carmack claim.

Presenter: Jeff Simmons

28. Rohr, Inc. v. UPS Supply Chain Solutions, Inc., 2013 WL 5676355 (S.D. Cal.) The case involved two international shipments between Italy and Southern California. The cargo arrived in Southern California unharmed but was damaged on its inland route to its final destination. The court denied the Plaintiff's motion for summary judgment against the two defendants – UPS and Knight. Defendant UPS reached a settlement agreement with the Plaintiff Rohr for $80,000.00 despite its asserted limited liability of $50.00 per shipment. UPS moved the court for an order confirming good faith settlement under Cal. Code of Civil Procedure 877. Defendant Knight opposed the settlement, arguing that federal maritime law, COGSA, and Carmack preempted state procedural and substantive law.

The issue for the court was whether Carmack preempts California's good faith settlement statute. The Ninth Circuit held in two different opinions that California's good faith settlement statute is not preempted by Carmack. The court explained that "state settlement laws conflict with the Carmack Amendment only to the extent that those laws enlarge or limit the responsibility of the carriers' for damages to the shipper." After review of the factors under California Civil Code of Procedure 877, the court concluded that the terms of the settlement had been made in good faith and that the settlement amount paid was reasonable in light of its defenses to Plaintiff's claim. The court confirmed the good faith settlement and held that the good faith settlement statute was not preempted by Carmack.

Presenter: Steven Block

29. Rush v. MWP, 2013 WL 4532191, Fed. Carr. Cas. P 84,779, 2013 U.S. App. Lexis 17967 (4th Cir.). A furniture manufacturer and consignee purchased a 12 year old specialized used saw by internet auction for $14,000. The saw was purchased "as is, with all faults." The saw's seller hired a motor carrier to transport the saw to the consignee. Seller loaded the saw on carrier's truck. Upon arrival, the saw was inoperable, allegedly because the seller had not tarped the saw, and because the motor carrier damaged the saw's cables in transit. Because the saw was old and specialized, replacement parts could not easily be found, although the seller took measures to help repair the saw.

Consignee sued the shipper/seller and the carrier for $1,000,000, reflecting the consignee's lost income and profits together with consequential damages under theories of breach of contract, negligence and breach of bailment.

At trial, the court ruled that the consignee's claims were preempted by Carmack and awarded $118 for the cost of a replacement cable. The trial court's decision was reported on a prior agenda. On appeal, the claims were held to be preempted by Carmack. The appellate court held that the scope of Carmack preemption included the seller/shipper, since the shipper coordinated the move, loaded the truck and, in effect, subcontracted the transport to the carrier. Permitting the consignee to collect the damages sought would be a windfall, especially since the consignee purchased the used machinery as is, and affirmed the lower court's ruling.

Presenter: Wes Chused

30. VPP Group, LLC. v. Total Quality Logistics, No. 13-cv-185 (W.D. Wisc.). VPP is a beef seller. Total Quality is a freight broker. At VPP's request, Total Quality brokered a load to a motor carrier, who delivered the beef 36 hours late. VPP's customer rejected the load because of the delay. VPP sued, and Total Quality moved to dismiss VPP's negligent hiring and supervision, theft and conversion claims based on ICCTA, ADA and FAAAA preemption. The court analyzed whether the state law claims would have an economic effect on negotiated transportation prices, routes and services, and the court determined that imposing state tort law would clearly have an economic impact on prices, routes or services, and as such, were preempted. The court also held that theft and conversion claims against the broker did not relate to the broker's services and were not preempted.

Presenter: Marshal Pitchford

V. JURISDICTION, VENUE & REMOVAL

31. American Guaranty and Liberty Mutual Ins. Co. v. Crosby Trucking Services, Inc., et al., 2013 WL 3878953, 2013 U.S. Dist. LEXIS 104874 (M.D. Tenn.). A die machine was damaged in Indiana while in transit from Indiana to Tennessee. Martinreai, American's insured, hired Crosby Trucking to transport the machine, Benteler Automotive loaded the machine, and Echo Global Logistics was the broker who contracted with Crosby Trucking. Crosby Trucking moved to transfer the case to one of two federal district courts in Indiana based on 28 U.S.C. § 1404(a), either the Northern District where the Machine was loaded and the accident occurred, or the Southern District where Crosby Trucking has a terminal.

The Court transferred the case. The Court pointed out that the motion to transfer was improperly titled for "*forum non conveniens*" since it is based on the federal change of venue statute, rather than federal common law. While plaintiff's choice of forum is generally given substantial weight, it is less important when the action has a limited connection to the plaintiff's chosen forum and the plaintiff chooses a forum which is not its residence. Furthermore, convenience of non-party witnesses is one of the most important factors in the transfer analysis; Crosby Trucking would not be able to compel several of the non-party witnesses residing in Indiana, including individuals that loaded the Machine (presumably employees of Benteler, a Defendant in this case). The Court was not persuaded by the physical location of the Machine in Tennessee and the location of the parties, several non-party witnesses, and relevant documents in Tennessee, Indiana, Virginia and Ohio.

Presenter: Steven Block

32. Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas, 134 S.Ct. 568, 571 U.S. ___ (2013). Atlantic Marine Construction Co. ("Atlantic") contracted with the Corps of Engineers to construct a child-development center at Fort Hood, Texas. Atlantic then contracted with respondent J-Crew Management, Inc. ("J-Crew"), for work on the project. The Atlantic-J-Crew contract (the "Contract") contained a forum selection clause, which stated that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division." Subsequently, J-Crew sued Atlantic in the Western District of Texas, invoking that court's diversity jurisdiction, after a dispute regarding payment under the Contract arose. Atlantic moved to dismiss contending the forum-selection clause rendered venue in Texas "wrong" under 28 U.S.C. § 1406(a) and "improper" under F.R.C.P. 12(b)(3). In the alternative, Atlantic also moved to transfer the action under 28 U.S.C. § 1404(a). The district court denied both motions, and the Fifth Circuit affirmed.

Initially, the Supreme Court rejected Atlantic's contention that a party may enforce a forum-selection clause by seeking dismissal of the suit under § 1406(a) and Rule 12(b)(3). Specifically, the Court noted that 1406(a) and 12(b)(3) only allow dismissal when venue is "wrong" or "improper," and such determination "depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause." In addressing whether venue is "wrong" or "improper," the Court explained this is generally governed by 28 U.S.C. § 1391, which provides that "[e]xcept as otherwise provided by law . . . this section shall govern the venue of all civil actions brought in district courts of the United States." Accordingly, when venue is challenged, the court must determine whether the case falls within one of the three categories provided for in § 1391. If it does, venue is proper. If it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a). The Court explicitly stated, "[w]hether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories," and as a result, "a case filed in a district that falls within § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3)."

As to § 1404(a), the Court found that although a forum-selection clause does not render venue in a court "wrong" or "improper" within the meaning of § 1406(a) or Rule 12(b)(3), such clause may be enforced through a motion to transfer under § 1404(a). The Court noted, unlike § 1406(a), § 1404(a) does not condition transfer on the initial forum's being "wrong," and it permits transfer "to any other district to which the parties have agreed by contract or stipulation." As such, "Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district."

The Court also explained § 1404(a) is merely a codification of the *forum non conveniens* doctrine. Consequently, "because both § 1404(a) and the *forum non conveniens* doctrine from which it derives entails the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum."

The court of appeals erred in failing to make the adjustments required in a § 1404(a) analysis when the transfer motion is premised on a forum-selection clause. Specifically, the Court stated, "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause," and "[o]nly under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied." The presence of a valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis in three ways: (1) the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted; (2) a court considering such motion should not consider the parties' private interests; and (3) when a party bound by a contractual forum-selection clause files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice of law rules.

The Court concluded by reasoning that when parties contract in advance to litigate in a particular forum, courts should not disrupt the parties' settled expectations, as a forum selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms.

Presenter: Richard Furman

33. ConAgra Foods, Inc. v. YRC Worldwide, Inc., 2013 W.L. 6118418 (D. Neb.). ConAgra and YRC entered into a contract carrier agreement in which YRC warranted that it would not ship food products using equipment that had been used for transporting hazardous materials. YRC made a delivery to ConAgra in breach of the agreement and causing damage in excess of $66,000. ConAgra sued YRC in state court in Nebraska for breach of the agreement. YRC removed based on Carmack and subsequently moved to dismiss arguing Carmack preemption of the state law claim for breach of contract. ConAgra moved to remand asserting that Carmack was waived in the contract carrier agreement. The court held that the removability of the case is determined from the face of the complaint, which in this case presents a plausible claim for relief and reveals no federal subject matter jurisdiction. The court refused to consider YRC's potential defenses in evaluating the merits of the motion for remand, and the case was remanded.

Presenter: Bill Bierman

34. GIC v. Freight Plus, 2013 US Dist Lexis 133074 (S.D. Tex.). Shipper hired carrier to transport a tugboat from Texas to Nigeria. The ocean carrier issued a bill of lading showing Lagos as the port of discharge. The ocean carrier hired a subcarrier, who in turn hired a sub-subcarrier (but not a submarine). The sub-subcarrier issued a bill of lading showing Warri as the port of discharge. The tugboat was delivered to Warri, not to Lagos. The misdelivery was not corrected, and the tugboat remained in Warri, eventually disappearing. Shipper sued the ocean carrier in Texas. The ocean carrier sued the sub-subcarrier, arguing that the sub-subcarrier issued an incorrect bill of lading, and should be liable to the shipper.

The sub-subcarrier argued that the bill of lading contained a forum selection clause requiring disputes to be adjudicated in Louisiana, and the ocean carrier argued that the original bill of lading, without such a form selection, should govern. The court held that the sub-subcarrier's bill of lading required the lawsuit to be adjudicated in Louisiana, and the case was transferred.

Presenter: Kathy Garber

35. Harris v. All State Van Lines Relocation, Inc., 2013 WL 5912571 (W.D.Wash.) Shipper hired household goods movers to transport goods from Michigan to Washington. Shipper sued carriers in Washington state court for loss, damage and holding the shipment hostage. Carriers moved to dismiss in state court based on preemption and improper venue. The state court granted the preemption motion as to some, but not all claims, and ordered the shipper to amend by adding Carmack claims. When shipper amended, carriers removed. Shipper moved for remand, arguing that carriers missed the 30 day removal deadline, contending that the case was immediately removal, despite the absence of state law claims on the face of the complaint. Carrier argued that only the amended complaint containing explicit Carmack claims triggered the removal period.

The court granted the shipper's motion to remand the case to state court, finding that 30 days had passed from the date of service of the original complaint to the time of removal. The household goods carrier argued that it removed as soon as the federal claim was actually asserted by the shipper in a pleading. However, the court found that the 30-day clock begins to run when removability "may first be ascertained," which was the service of the original complaint.

Presenter: Kevin Anderson

36. Infinity Air, Inc. v. Echo Global Logistics, Inc., 2013 WL 3199657, 2013 US Dist Lexis 87540 (D. Or. 2013). When the broker retained a carrier to haul an aircraft spare part from New Mexico to Washington for Infinity, the cargo was damaged and suit filed. The carrier moved to transfer the case from Oregon to Illinois pursuant to a forum selection clause contained both on the website of the transportation broker and in a credit application signed by the shipper, Infinity Air, Inc. The court held on summary judgment that the property broker was not subject to the provisions of the Carmack Amendment and its venue provisions. Furthermore, the court found that the forum selection clause contained both in the credit application and on the broker's website were enforceable. Rather than dismiss, the court transferred the case to the United States District Court for the Northern District of Illinois.

Presenter: John Anderson

37. Lion v. Echo Global Logistics, Inc., 2013 WL 5718728, 2013 US Dist Lexis 150337 (E.D.Cal.), A shipper engaged Echo Global Logistics and Estes Forwarding Worldwide to transport custom wooden benches from Arizona to California. Apparently, the cargo was eventually delivered by a motor carrier, Arizona Express Delivery. Upon delivery, the benches were damaged beyond repair. Shipper filed suit in state court, and Estes removed to federal court, whereupon the shipper moved to remand. Although the allegations of the complaint stated that the shipper hired Echo and Estes to haul freight in interstate commerce and the amount in controversy exceeded $10,000.00, the court looked outside of the allegations of the complaint to find that Estes and Echo were acting in their capacity as brokers and considered evidence presented by the shipper that neither Echo nor Estes actually acted as a motor carrier. Because the Carmack Amendment does not apply to claims against brokers and because the court felt that under Ninth Circuit precedent, it could look beyond the allegations of the complaint, the court granted the motion to remand.

Presenter: Hillary Booth

38. Mitsui O.S.K. Lines, Ltd. V. Evans Delivery Company, Inc., 2013 WL 2477271 (D.N.J.). Mitsui is a Japanese vessel operating common carrier that has an office in Edison, New Jersey. Defendants are motor carriers. For several years, Mitsui utilized Defendants' services to transport cargo shipments from foreign countries to inland destinations in the US. Mitsui would issue a transportation order ("TPO") to the motor carrier for each shipment of cargo. The TPO states (1) where the cargo is to be picked up; (2) where the cargo is to be delivered; and (3) the amount of money that Mitsui will pay the motor carrier. After delivery in accordance with a TPO, the motor carrier would issue an invoice. All invoices were sent to Mitsui's office in Edison, New Jersey. Mitsui would then issue payment on each invoice. Mitsui discovered that Defendants diverted a large number of shipments, but invoiced Mitsui as if those shipments had been delivered to their intended destinations. According to Mitsui, those shipments were diverted to locations that required Defendants to travel fewer miles than if they had transported the shipments to their intended destinations.

Mitsui filed a complaint in state court against a host of motor carriers, alleging claims for fraud, breach of contract, unjust enrichment, and conversion ("Action 1"). Defendants removed Action 1 and moved to dismiss. Mitsui moved to remand. Defendants filed a complaint in federal court against Mitsui seeking declaratory relief against the claims asserted in Action 1("Action 2"). Mitsui moved to dismiss. arguing that (1) federal question jurisdiction was lacking under ICCTA and COGSA; and (2) diversity does not provide a basis for removal. Defendants opposed, arguing (1) all shipments were governed by the ICCTA; (2) removal under the ICCTA was proper under the doctrine of complete preemption; (3) admiralty jurisdiction provides an additional ground for removal; and (4) diversity jurisdiction provides yet another ground for removal the Action 2 Complaint.

The court remanded, rejecting jurisdiction under ICCTA, COGSA and diversity. Further, the court found there was no diversity jurisdiction and dismissed Action 2 because it would interfere with the underlying state court case.

Presenter: George Wright

39. Pyramid Transportation, Inc. v. Greatwide Dallas Mavis, LLC. 2013 WL 3834626 (N.D.Tex.). Pyramid hired Greatwide Dallas Mavis to transport a dump truck from Georgia to Texas for a shipper, Claudio Macias. The truck was damaged in transit. Pyramid hired a third party to transport the damaged truck to Texas, where it was stored. Until he received compensation for the damaged dump truck, the shipper refused to pay Pyramid approximately $80,000.00 in services rendered, and Pyramid, in turn, refused to pay Greatwide on services rendered on other jobs. Pyramid sued Greatwide in state court on behalf of itself and its customer Macias. Greatwide removed the case based on Carmack preemption. Pyramid dropped Macias as a party but obtained a durable power of attorney to act on Macias' behalf related to the cargo claim. Pyramid attempted to raise claims on behalf of Macias for cargo loss. The Court raised, *sua sponte*, the issue of whether Pyramid lacked standing.

The issue was whether a durable power of attorney provided the broker with rights under the substantive law to make a Carmack claim on the shipper's behalf. The court held that prudential standing requirements state that a party cannot sue in federal court to enforce the rights of third parties. In Texas, a power of attorney, allows an agent to sue in its name but only on behalf of the principal. The Court found that since Carmack did not provide Pyramid with any substantive rights, it could only sue Greatwide under Carmack while acting on behalf of the principal Macias.

Presenter: Stephen Dennis

40. Tennessee Wholesale Nursery v. Wilson Trucking Corp., 2013 WL 3283515 (M.D. Tenn.). Plaintiff Nursery contracted with defendant motor carrier to transport roots and trees to plaintiff's out-of-state buyers. Plaintiff sued defendant for failure to timely transport the shipments causing damages in the form of additional shipping costs and losses of future business. Plaintiff sued in Tennessee state court, and defendant removed. Defendant also filed an answer including counterclaims for breach of contract, unjust enrichment, quantum meruit and charges and penalties under defendant's tariff. Plaintiff moved to remand. The court denied remand, finding that repeated references to contracts between the parties and complaint make it clear that plaintiff's claims are breaches of contracts to ship goods interstate, and as such, all claims are governed by Carmack and are preempted. The court also found that plaintiff's alleged damages for failure to timely deliver goods is also preempted by Carmack, even though such claims do not involve the loss or damage of property.

Presenter: Ken Bryant

41. ThyssenKrupp Materials v. M/V Federal Shimanto, 2013 WL 3947749, 2013 U.S. Dist. Lexis 108976 (S.D. N.Y.). Shipper engaged an ocean carrier to transport steel from Turkey to Houston. Nine steel plates went missing during the shipment. The shipper sued the ocean carrier in New York per the bill of lading venue provision. Shipper's suit was based upon an OS&D report from the Stevedore confirming a shortage of steel plates. The ocean carrier produced a different OS&D report from another source, showing that all steel plates were delivered. Once the conflicting reports were discovered, the shipper requested that its lawsuit be transferred to Texas. In a colorful holding, the court compared horse races to lawsuits and denied the motion to transfer venue.

Presenter: David Schneider

VI. CARRIER—BROKER—THIRD PARTIES

42. Great West Casualty Company v. Cobra Trucking, Inc., 2013 WL 431949, 2013 U.S.Dist. LEXIS 15036 (D. Montana, 2013). Tractor-trailer, driven by an owner-operator contracted to Cobra Trucking, was involved in an accident while returning to Wyoming, after delivering a load for Cobra Trucking. Cobra was a trucking company that hauled sand to well sites in western states. Bills of lading were issued by a Cobra employee and listed Cobra as the carrier. Insurance company claimed that Cobra Trucking was acting as a broker and, therefore, insurance company was not required to provide coverage for the accident involving the owner-operator. Plaintiff insurance company claimed that the express terms of the insurance policy exclude "transportation broker operations" from coverage.

The court addressed whether Cobra was a broker or a motor carrier. The term "broker operations" was not defined in the insurance policy. The court looked at USDOT definitions of "broker," "brokerage," and "brokerage service." Although a carrier may act as a broker, the court found that 49 C.F.R. §371.2(a) states that a motor carrier is not a broker if the motor carrier is arranging transportation for shipments that the carrier is legally bound to transport. Because Cobra Trucking was legally obligated to transport the sand in the owner-operator's truck, the load was not a brokered load. The court noted that motor carriers must issue bills of lading for all interstate shipments, and Cobra Trucking had done so. Therefore, Cobra's dealings with the owner-operator were not "brokerage operations" under the policy exclusion. Finally, because the policy did not define "broker operations," the court found the term to be ambiguous in the insurance policy and construed the term against the insurance company.

Presenter: David Sauvey

VII. FREIGHT CHARGES

43. Apex v. Carnival Corp., 123 So. 3d 94 (Fla. App. 3 Dist. 2013). Shipper hired motor carrier to transport cargo interstate. The shipper and carrier signed a contract which permitted the carrier to subcontract the load. The carrier remained liable to the shipper even if the carrier hired a subcontractor. Shipper tendered seven shipments to the carrier, who engaged a subcontractor to move the shipments. The shipper timely paid the carrier for the services, but the motor carrier did not pay its subcontracting carrier. The subcontracting carrier sued both the motor carrier and the shipper. The motor carrier dissolved and disappeared. The subcontractor argued that it performed the services and deserved to be paid regardless of the shipper/carrier contract. The subcontracting motor carrier further argued that the bill of lading was the contract between the shipper and the subcontracting motor carrier. The shipper argued it should not have to pay twice.

The court ruled the shipper did not have to pay twice. The bill of lading was not a contract between the motor carrier and the subcontracting motor carrier, but rather served only as a receipt. The shipper/carrier contract protected the shipper from having to pay for the shipments twice, and the court upheld summary judgment in favor of the shipper.

Presenter: Scott McMahon

44. CSX Transportation, Inc. v. ABC&D Recycling, Inc., 2013 WL 3070770, 2013 U.S.Dist. LEXIS 84063 (D.Mass. 2013). CSX sued for $270,320 in unpaid freight charges, $46,950 in fuel charges, late charges of 10%, and finance charges of 12% per year against the Defendant, a company for which CSX shipped construction and demolition debris. Defendant did not dispute the amount of the freight charges but disputed any fuel, late, or finance charges. CSX moved for summary judgment.

The court found that the charges were incorporated into the contract between the parties by reference to CSX tariff series 8100 in emails from CSX. While the emails did not contain the provisions of CSX 8100, they were available online. CSX 8100 provides finance charges of 12% per year for overdue freight charges and 10% in late charges. The e-mail stated "[b]y ordering such transportation services, you are accepting and agreeing to the foregoing rates, terms, and conditions with respect to that transportation." The fuel surcharges were also stated in the emails. Since Defendant never rejected the offer, but rather shipped 109 shipments with CSX, Defendant objectively manifested its assent to this term.

Presenter: Chris Merrick

45. Estes Express Lines v. United States, --- F.3d ----, 2014 WL 26244, Ct. Fed. Cl. (Jan. 3 2014). After broker failed to pay freight charges, Plaintiff motor carriers filed suit against shipper in federal court to collect interstate freight charges. Motor carriers filed the case based on federal question jurisdiction; there was no diversity. District court granted summary judgment in favor of shipper. After motor carriers appealed, shipper moved to dismiss the case for lack of jurisdiction. The court addressed whether a federal court has federal question jurisdiction over an action to collect interstate freight charges.

In the absence of a filed tariff, a federal court does not have federal question jurisdiction over an action to collect interstate freight charges. The Supreme Court's decision in Thurston Motor Lines was premised on the existence of a filed tariff, and the ICCTA abrogated this requirement. Nothing in the ICCTA grants a federal court jurisdiction over what is, at the end of the day, a state-law breach of contract cause of action.

Significance: District court cases have been trending in this direction, but this is the first federal appellate court to reach this decision. This could carry significant weight with other courts and may signal the end of federal court adjudication of freight charge collection actions, in the absence of diversity jurisdiction. Note that the court's language addressing the 18-month statute of limitation to collect freight charges is confusing. It suggests the limitation applies only to causes of action brought under the ICCTA, and it held that the instant case did not bring such causes of action. However, the statute itself says that the limitation applies to any motor carrier subject to the Secretary's jurisdiction, which includes any motor carrier transporting property in interstate commerce. It is possible that the court interpreted the 18-month statute of limitations incorrectly, or, the limitation does not apply to state law breach of contract actions to collect interstate freight charges. This may provide an opening for an argument that the state law statute of limitations—usually longer than 18 months—applies to such actions in lieu of the federal statute.

Presenter: Rob Moseley

46. Gaines Motor Lines, Inc. et al. v. Klaussner Furniture Industries, Inc., 734 F.3d 296 (4th Cir. 2013). At issue was federal subject matter jurisdiction over a freight charge dispute. All parties, except one, are incorporated in North Carolina. The underlying dispute involved $562,326.30 of unpaid freight charges which Salem, the defunct freight broker, failed to pay the carriers. The district court ruled for the shipper, finding the non-recourse provision in the bills of lading protected the shipper from having to pay the freight charges a second time to the motor carrier after already paying the broker/Salem, even though there was a "prepaid" designation on the bill of lading. The court found that Salem's role as the party required to pay the carriers was clear to the carriers (see, contra, In re: GMJ Global Logistics, Inc. in this agenda).

The Fourth Circuit ruled that the district court lacked jurisdiction, remanding the case with instructions for dismissal. The court found that there was no federal jurisdiction over freight charge disputes not involving federal tariffs under either 49 U.S.C. § 14701(b)(1), which allows parties to privately negotiate rates, under § 13701, which does not impose obligations as to the rates charged, or under § 13706, which governs obligations of a consignee. The court also held that §14501(c)(1), preempting any state law or regulation relating to price, route, or service of any motor carrier, does not create a federal common law cause of action here because the outcome of this case turns on the meaning of the "prepaid" and non-recourse provisions in the bills of lading, rather than any state law or regulation as to price, route, or service. Section 14705, establishing an 18 month statute of limitations for freight charge claims, also does not confer federal jurisdiction.

Presenter: Rob Moseley

47. In re: GMJ Global Logistics, Inc. v. Redmond, Ch. 11 Trustee of Sports Associated Transportation, Inc. v. IGT, Inc., U.S. Bank. Ct. D. Kan., Case No. 12-06078 (2013). Debtor, a broker, sued IGT for $87,339.49 in unpaid freight charges (amount not disputed by IGT) for various shipments of gambling devices and related products shipped for IGT. IGT counterclaimed for $408,788.32 paid to motor carriers for freight charges when Debtor failed to pay them after having been paid by IGT. IGT moved for summary judgment for set-off of the debt pursuant to 11 U.S.C. § 553.

The court concluded that IGT was required to settle the freight charge claims by the unpaid carriers, noting the majority view generally places the liability for freight charges on the shipper. The non-recourse provision in some of the bills of lading did not constitute an exception to this rule because those, and the other bills of lading, also contained a "prepaid" provision. The court concluded that where there is a "prepaid" provision and a non-recourse provision, the effect of the non-recourse provision is to preclude the carrier from seeking payment of additional charges from the shipper, rather than seeking any payment from the shipper as would occur if the BOL did not contain the "prepayment" provision. Since the damages did not include any post-shipment additional charges, IGT was liable. As these charges/debt were incurred before the commencement of the bankruptcy action, set-off is appropriate under § 553.

Presenter: John Husk

48. Cherry Hargrove v. Universe Express, Inc. Moving and Storage, 2013 WL 5218104, 2013 US Dist Lexis 133637 (E.D.N.C.). This is a primer both on how not to practice in federal court and on binding/non-binding estimates in interstate transportation of household goods. Plaintiff appeared *pro se* seeking a restraining order and preliminary injunction to restrain the defendant household goods carrier from selling her household goods. Confusion in service upon the defendant apparently resulted in the appearance by a lawyer for the motor carrier just a few minutes before the hearing. Defense counsel appeared in the North Carolina court telephonically from New Jersey and was not allowed to participate with regard to the merits of the litigation. According to the findings of fact, the motor carrier e-mailed an estimate of $1,098.18 to move 1,736 pounds of the plaintiff's household goods from New Jersey to North Carolina on July 12, 2013. After some negotiation, the parties agreed to an estimate of $1,348.00 with the same terms as the original estimate. Plaintiff alleged that she believed the estimate to be "binding." Apparently, the original bill of lading reflected a balance due of $5,008.00. The court entered a preliminary injunction based upon the plaintiff's testimony. The court discussed the difference between a binding estimate under 49 C.F.R. § 375.403(a)(3) and a non-binding estimate per 49 C.F.R. § 375.405(b)(1). The court determined that once the plaintiff's shipment was loaded (apparently weighing more than had been anticipated in the original estimate), the motor carrier failed to comply with the regulatory requirements regarding estimates and therefore could not collect more than $1,348.00 (original estimate), nor could it collect storage costs from the plaintiff.

Presenter: Todd Suter

VIII. DAMAGES & COSTS

49. Cincinnati Cas. Co. v. TMO Global Logistics, LLC, 2013 WL 5372807, 2013 US Dist Lexis 136957 (W.D.Va.). Cincinnati Casualty wrote a bond for TMO Global Logistics, a transportation broker. Cincinnati Casualty interpled the bond, and two carriers made claims. Cincinnati made a claim for its attorney's fees and costs. Exercising its discretion to award attorney's fees and costs, the court analyzed the statutory requirements for broker bonds and noted that awarding costs to the bond issuer would substantially diminish the funds available to the bond claimants and defeat the purpose of the bond. The court denied Cincinnati's request for attorney's fees and costs from the bond principal, and directed Cincinnati to recover its fees and costs from TMO Global.

Presenter: John Husk

<u>50. Daybreak Express, Inc. v. Lexington Ins. Co,</u> 2013 Tex. App. LEXIS 12731; 2013 WL 5629813 (2013). The case resulted from damage to a 2002 shipment of Burr's computer equipment by Daybreak and by T. Orr Trucking, Inc., Daybreak's sister company. Lexington, Supor's insurer, settled Burr's claim after Daybreak rejected an alleged settlement agreement between Daybreak's independent adjuster, Cunningham Lindsay, hired to investigate the claim, and Burr, for the full replacement value. After a convoluted procedural history following the 2005 subrogation suit filed by Lexington, initially for breach of the alleged settlement agreement, and subsequently for damages under the Carmack Amendment, the trial court awarded Lexington the $85,500 it paid Burr to settle the claim less salvage value and attorney's fees. On the original submission, the court reversed and rendered a take nothing judgment for Daybreak based on the Carmack claim, which was added via an amended complaint more than two years after Daybreak denied the claim, holding that the amended claim did not relate back to the sole claim in the original complaint for breach of the settlement agreement. The Texas Supreme court reversed that judgment. Daybreak filed a motion for rehearing as to the attorney's fees, as a result of which the Supreme court affirmed the judgment in favor of Lexington, finding that the 2007 amended claim under Carmack related back to the original complaint for breach of the settlement agreement as arising under the same transaction or occurrence, but remanded to the court of appeals the issue of attorney's fees. The Court denied the claim for attorney's fees as preempted under Carmack.

Presenter: Dan Fulkerson

<u>51. Mafcote, Inc. et al. v SAIA Motor Freight</u>, S.C. State Court (2013). Plaintiff Royal Consumer / Mafcote (shipper) sued Defendant motor carrier for cargo damages on under Carmack. Plaintiff sought, in addition to actual loss to the freight, consequential damages for penalties imposed on it by its customers for late deliveries, pallet damage, non-conforming quantities of freight, etc. The shipper's bill of lading, created by Plaintiff and its attorneys, allowed for recovery of these consequential damages as well as costs, interest, and attorney's fees incurred as a result of its efforts to collect them. Plaintiff later amended its complaint to add claims for punitive damages based on bad faith. Motor carrier moved to dismiss the punitive damage claim based on Carmack preemption and counterclaimed for freight charges owed to it as a result of Plaintiff's setoff of the claimed penalties from freight charges owed to carrier and Plaintiff's eventual non-payment of invoices. Motor carrier claimed its tariff applied because it was duly published and Plaintiff was aware of it, because it was incorporated into pricing the carrier provided to Plaintiff, and because Plaintiff's own bill of lading incorporated the tariff. Motor carrier claimed that under its tariff, the penalties were non-recoverable, Plaintiff's setoff of penalties from freight charges was impermissible, Plaintiff's recovery of interest, cost, and attorney's fees was disallowed, Plaintiff's damages were subject to a released rate, and Plaintiff's bill of lading was merely a receipt and not a contractual document. Plaintiff contended Defendant's tariff was inapplicable. Both parties moved for summary judgment.

Addressing the issue of whether the motor carrier's tariff or shipper's bill of lading applied, the court held The Carmack Amendment applies unless it is expressly waived in writing. Because it applied, Plaintiff's state law claims for punitive damages and bad faith were dismissed. Additionally, because Carmack had not been waived, the motor carrier's tariff, which had been published in accordance with 49 U.S.C. 13710(a)(1), controlled because, even if Plaintiff did not have actual knowledge of it (which it did), it had constructive knowledge because it failed to ask for a copy of the tariff and because a shipper is "responsible for determining the conditions imposed on the transportation of all shipments" (citing U.S. Code Congressional and Administrative News, 104111 Congress-1st Sess. 1995, Vol. 21 at p. 908). Thus, the tariff applied, and Plaintiff could not recover penalties or offset those penalties from freight charges owed to Defendant. The court held Defendant was entitled to enforce its released rates, collect its freight charges, deny Plaintiff's claims for penalties, and collect its own attorney's fees and costs.

Presenter: Fred Marcinak

IX. MISCELLANEOUS

52. *Canadian Law Update.* In the past decade, as a result of a shortage in oil pipelines in North America, it has become common practice for tankers carrying crude oil to travel by rail to refineries. The Lac-Mégantic disaster forced the government to reconsider its rail safety regulatory regime.

On July 6, 2013, a train carrying crude oil derailed in Lac-Mégantic, Quebec; it exploded and killed forty-seven people. The train was classified as DOT-111 (a non-pressurized tank car which can carry both dangerous and non-dangerous goods). Following the Lac-Mégantic disaster, the Minister of Transport and Transport Canada took the following measures to ensure the safe shipping of dangerous goods by rail:

- Issuing an Emergency Directive related to specific operating procedures for locomotives transporting dangerous goods as well as unattended locomotives.

- Requiring any person engaged in crude oil transport to immediately conduct classification tests on the oil.

- Directing rail companies to share information with municipalities regarding dangerous goods.

- Improving the skills and training of inspectors and the quality of inspections.

In addition, there are *proposed* changes to the regulatory framework of which railway companies who ship dangerous goods should be aware:

- The *Railway Safety Act* was amended in May 2013 to include provisions aimed at improving railway safety and penalizing non-compliance. As a result, the *Railway Safety Management System Regulations* are also in the process of being amended; these amendments will require railway companies to identify an "accountable executive" as a way of ensuring accountability for the safety of a railway company's operations.

- There are pending proposed amendments to the *Transportation of Dangerous Goods Regulations* which were published in the *Canada Gazette* on November 16, 2013. The proposed amendments will update references to safety standards and international recommendations. It will "adopt five new standards for new types of means of containment and update nine standards on means of containment already in the TDG Regulations."

- Enhancing safety standards for DOT-111 tank cars. Interestingly, the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration recently sought public comment on proposals to enhance the standards for DOT-111 tank cars.

- Potentially designating crude oil a "highly dangerous substance." Crude oil is currently listed as flammable, but not highly explosive. The government will require an Emergency Response Assistance Plan for shipping crude oil.

Presenter: Heather Devine

APPENDIX

Consolidated Pipe Company v. Rowe, 2013 WL 6504744, 213 U.S. Dist. Lexis 173950 (E.D. Tenn.). Shipper engaged motor carrier to transport pipes to designated location. Under the terms of the contract between the shipper and its buyer, title to the pipes transferred to the buyer as soon as the pipes left the shipper's facility bound for the designated location. The pipes were damaged in transit, and they were rejected by the consignee. The issue addressed in the decision is the buyer/consignee's status as owner, but not shipper. The buyer sued the motor carrier under Carmack and won in a jury trial. The motor carrier raised a post-trial motion seeking to nullify the decision, arguing that because the buyer was not the shipper, and the buyer was not the consignee, the buyer was not a party to the bill of lading and could not lawfully recover under Carmack. The buyer argued that the motor carrier was too late in raising this argument, having conceded by the evidence and its conduct of the lawsuit that the buyer was the owner of the pipes and had standing to sue.

The court held that the motor carrier's motion was effectively a motion to dismiss for failure to state a claim, and the motion was waived because it was not timely made. The court further held that the buyer had an interest in the shipment and was entitled to sue even though it was not mentioned in the bill of lading. If the motor carrier challenges the buyer's right to assert claims, it should raise that argument at the outset of the lawsuit, and not after trial.

Savanna Auto Sales v. Mediterranean Shipping Co., 2013 WL 3753155, 2013 U.S. Dist. Lexis 99943 (S.D. N.Y.). Shipper hired carrier to ship four cars and assorted automobile parts from New York City to Iraq via ocean carrier. The automobiles and parts were described on the bill of lading as "unpackaged multiple units of used autos and one lot of used auto parts." All of the cargo was placed in one container. On delivery in Iraq, ocean carrier released the cars and parts, but did so to an unauthorized person, perhaps a thief. The shipper sued the ocean carrier for $75,000, the full value of the cargo. The carrier argued that its liability was capped at $500 per package pursuant to COGSA, and argued alternatively that if each automobile transported was a single package, maximum liability would be $2,000. The shipper argued that the ocean carrier's delivery of the cargo to an unauthorized person nullified COGSA's limits of liability.

The court held that COGSA applied, that the container was not the package, and hence, the carrier was not entitled to a $500 liability limitation. The shipping documents lacked clear language indicating that the container was a package. Further, because the description of the contents on the bill of lading ("unpackaged multiple units"), an automobile is not a package, and therefore, the ocean carrier was not entitled to a $2,000 cap on its liability. Instead, the carrier was entitled to a liability of $500 per "customary freight unit." The court determined that more evidence was necessary to determine the meaning of a customary freight unit in this context, and denied the remaining relief sought, pending submission of additional evidence.

<u>Dover v. British Airways</u>, 2013 WL 5970688, 2013 U.S. Dist. Lexis 160127 (E.D. N.Y.). Passengers were members of British Airways' frequent flyer program. Passengers redeemed frequent flyer points in exchange for free tickets. The terms and conditions of British Airway's frequent flyer program allowed the airline to charge the passenger a fuel surcharge when points were redeemed for free tickets. When British Airways charged an $854 surcharge for roundtrip tickets from San Francisco to London, the passengers sued the airline, alleging the rewards program imposed impermissible fuel surcharges. Specifically, the passengers argued that the fuel surcharge bears little if any relationship to the price of fuel, but rather it is purely designed to raise additional revenue. British Airways argued that the lawsuit was preempted by the Airline Deregulation Act.

The court held that the plaintiffs' claims were not governed by the DOT regulations, but rather by the contractual definition of the term "fuel surcharge" in the frequent flyer program. The court dismissed British Airlines' motion to dismiss, refusing to evaluate the validity of the plaintiff's statistical analyses.

<u>AIG Europe v. General System</u>, 2013 W.L. 6654382, 2013 U.S. Dist. Lexis 176560 (D. Md.). Broker TBB hired motor carrier Global to transport a load of pharmaceuticals. Broker and motor carrier had a written agreement. The broker did not advise the motor carrier of the value of the load. Global generally carried $100,000 in insurance. The load was stolen. Shipper's insurer paid the claim and sued the motor carrier. The defendant motor carrier sued the broker as a third party defendant. The broker filed a motion to dismiss the third party complaint. Broker argued that the indemnity claim under the contract was separate and distinct from the Carmack claim brought by the shipper. The court held that because the third party action by the motor carrier against the broker was not derivative of the Carmack claim, but rather was separate from the shipper's claim against the motor carrier, the third party action would be dismissed.

Richards v. Singapore Airlines, 2013 WL 6405868, 2013 U.S. Dist. Lexis 173570 (C.D. Cal.). Passenger (an attorney) purchased two roundtrip first class tickets from Los Angeles to Bangkok. Internet connections were supposed to be available during the flight, but the internet connection was inoperable. Passenger had intended to work during the flight, but he was unable to do so. The passenger claimed he charged $650 per hour for his services, and he would allegedly have billed ten hours during the flight, so he was out $6,500 in lost billings. The passenger sued Singapore Airlines in state court for $23,000 representing the cost of the tickets and the lost billings, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing and negligence. Singapore removed the lawsuit and filed a motion to dismiss based on Montreal Convention preemption.

The issue was whether the Montreal Convention applied to the flight. The evidence showed that Thailand is not a signatory to the Montreal Convention, and because the flight was from Los Angeles to Bangkok, the plaintiff's claims are not subject to the treaty's provisions. The court granted a motion to remand the suit to state court.

Insurance - Coverage for Newly-Acquired Locations

Amera-Seiki Corp. v. Cincinnati Ins. Co., 721 F.3d 582 (8h Cir. 2013). This case concerns insurance coverage for newly-acquired and temporary locations of motor carriers and shippers. Amera-Seiki imported a lathe from Taiwan for delivery to a customer in Illinois. The lathe was unloaded at the Port of Los Angeles, and Amera-Seki retained a trucking company to store the lathe at the port until a truck could transport it to Illinois. The lathe was destroyed when a worker at the terminal dropped it while moving it to a location where the trucking company could pick it up. Amera-Seiki filed a claim for $337,000 with its insurance company. The insurer determined the policy provided only $10,000 of transportation coverage, which it paid. However, the insurance company denied the remainder of the claim because coverage extension for losses at "newly acquired property" did not apply. Amera-Seiki sued insurer in Iowa state court, and the case was removed to federal court.

Insurer argued that temporary storage arrangements at the terminal were too passive and too transient to qualify the terminal as a location that Amera-Seiki had acquired under any reasonable interpretation of the newly acquired property extension. Amera-Seiki argued there was no substantive distinction between the degree of possessory interest, dominion or control with regard to the temporary acquisition of a location at a ‘fair, trade show, or exhibition’ (which were specifically excluded from coverage) and temporary acquisition of the location at the terminal. The district court had reasoned, among other things, that the former is expressly excluded, and the latter is not, and, therefore, the latter is within the coverage of the policy.

Affirming the district court’s decision that temporary acquisition of the location at the terminal constituted a newly-acquired location within the meaning of the policy, the Eighth Circuit said an insurance policy is ambiguous if the language is susceptible to two reasonable interpretations. Court found that the word “acquire” generally has a broad meaning. Although not persuaded that the newly acquired property extension unambiguously extended coverage to the terminal, the court agreed that the phrase “any location you acquire” was susceptible to the reasonable interpretation advanced by the insured. The policy terms could also be interpreted reasonably to require a greater level of possession and control than Amera-Sekiki had at the terminal during its brief storage of the lathe in transit from Taiwan. Neither interpretation was unreasonable, therefore an ambiguity existed, and the court construed the ambiguity to find coverage.

Insurance Coverage

<u>Central Marketing Association, Inc. v. Robert Cresap Trucking and Daily Underwriters of America</u>, 2013 WL 4081054, 2013 U.S. Dist. LEXIS 1114105 (S.D. Ohio). Meijer hired CMA to transport cherries from Washington to Ohio. Cresap Trucking was the motor carrier. The cherries were rejected on delivery as not being maintained at the proper temperature. The failure was deemed to have been caused by the reefer chute dislodging, possibly during loading. Daily Underwriters of American (“DUOA”) denied coverage under the Refrigeration Breakdown Endorsement issued to Cresap on the basis that the chute is not part of the reefer as the chute is not considered part of the refrigeration unit by the manufacturer and is sold separately as an accessory. Evidence indicated that the reefer performed without issue. The Endorsement stated in relevant part that coverage would be provided where spoilage resulted from “a malfunction or mechanical breakdown of the temperature control and/or refrigeration unit attached to any vehicle covering the Covered Property.” CMA filed a motion for partial summary judgment seeking coverage.

The court addressed whether the failure of the chute to properly circulate the refrigerated air constituted a "malfunction" of a "temperature control." The court looked to a U.S. Dept. of Agriculture handbook (regarding protection of perishable food during transportation, stating that air circulation is one of the most important factors) and concluded that the function of the chute is to control the temperature throughout the trailer. The court also determined that the insurance contract language did not support the insurer's argument as the use of "and/or" between "temperature control" and "refrigeration unit" in the endorsement indicates that the two units are separate and distinct and that one or the other could malfunction and trigger coverage.

Administrative Law

Chamber of Commerce of the United States v. National Labor Relations Board, 721 F.3d 152, 196 L.R.R.M. (BNA) 2001, 163 Lab.Cas. P 10,601 (4th Cir. 2013). The Fourth Circuit succinctly describes the process through which a reviewing court goes in analyzing a federal agency's regulations. A reviewing court must first find that the agency has express or implied statutory power to promulgate regulations, even before that court applies the Chevron standard of review.

NLRB promulgated a rule that would require employers subject to the National Labor Relations Act to post an official NLRB-prescribed notice that would inform employees of their rights under the National Labor Relations Act. Any employer failing to post the notice would be subject to (1) a finding that it committed an unfair labor practice; (2) a tolling of statutes of limitation for charges of any other unfair labor practices; and (3) a finding of anti-union animus that would weight against the employer in any proceedings before the NLRB.

The NLRB claimed that Section 6 of the NLRA conferred rulemaking powers on the NLRB, providing it with the "authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedures Act, such rules and regulations as may be necessary to carry out the provisions of the National Labor Relations Act."

The NLRB argued that the challenged rules were to be upheld by courts if those rules are "reasonably related to the purposes of the enabling legislation." Under the NLRB's view, as long as the NLRB could show some relationship between the enabling statute and its regulations, the court must "defer to the informed experience and judgment of the agency to which Congress delegated appropriate authority." The NLRB argued that it should be considered to have the power to promulgate the rule unless Congress expressly withheld that authority.

In determining whether an agency has power to promulgate administrative rules, is the relevant question whether Congress intended to withhold authority to issue the challenged rules, or is the relevant question whether Congress intended to grant that authority? The NLRB argued that if nothing in the statute prohibited the rulemaking, then the court should approve its rules as long as the NLRB could point to some purpose for those rules which related to its statutory mandate.

The Fourth Circuit found that the NLRB had no statutory authority to promulgate the poster regulations. A court must defer to the informed experience and judgment of the agency only after it has found that the agency has, in fact, express or clearly implied affirmative authority to promulgate administrative rules. The issue is correctly framed as whether Congress intended to delegate such jurisdiction to the agency. The Fourth Circuit found that there was no general grant of power to the NLRB outside the roles of addressing unfair labor charges and conducting representation elections. The court recited the Chevron factors: "We ask 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously express intent of Congress'....Only 'if the statute is silent or ambiguous with respect to the specific issue' is a court to proceed to Chevron's second step, asking 'whether the agency's answer is based on a permissible construction of the statute." The NLRB's rule was struck down because the agency has neither specific authority to adopt the rule nor did it have general regulatory authority to do so.

Fair Labor Standards Act - Motor Carrier Exemption

McCall v. DAV, 2013 U.S.App. LEXIS 15622 (8^{th} Cir., 2013). McCall was a driver for Disable American Veterans (DAV). The trucks he drove had a gross vehicle weight rating (GVWR) of more than 10,000 pounds. However, the actual weight on the trucks he drove was usually less than 10,000 pounds. McCall sued DAV for overtime pay under the Fair Labor Standards Act. He argued that because the actual weight of the trucks he drove was always less than 10,000 pounds, he was entitled to overtime compensation.

At issue was whether gross vehicle weight rating (GVWR) or actual vehicle weight should be used to determine whether a driver is entitled to overtime pay under the Fair Labor Standards Act (FLSA).

Under the FLSA, employees engaged in interstate commerce are to be paid one and one-half times their regular salary rates for all work performed in excess of 40 hours per week. However, this provision of the FLSA does not apply to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." 29 U.S.C. §207(a)(1). This exemption is commonly referred to as the Motor Carrier Act Exemption (MCAE).

Under 49 U.S.C. §31502(b)(2), the Secretary of Transportation may prescribe requirements for qualifications and maximum hours of service of employees of a motor private carrier. A "motor private carrier" is defined at 49 U.S.C. §13102(15), and before August 2005, "motor private carrier" described a private carrier employee who transported property in any motor vehicle, regardless of the vehicle's weight. In 2005, Congress enacted SAFETEA-LU, under which the MCAE only exempted employees from the FLSA when they operated a "commercial motor vehicle" as that term is defined in 49 U.S.C. §31132." The relevant element in the definition of a "commercial motor vehicle" is its weight. A "commercial motor vehicle" has a "gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater." Following technical amendments to SAFETEA-LU in 2008, the overtime pay provisions of the FLSA were extended to drivers employed by private carriers when the vehicles they drive weigh 10,000 pounds or less. The court found persuasive the Department of Labor's Wage and Hour Division interpretation that it would continue to use GVWR to determine the relevant vehicle weight after the amendments to SAFETEA-LU and the FLSA. Therefore, because the DAV vehicles had a GVWR of more than 10,000 pounds, the driver was not entitled to overtime compensation under the MCAE.

Administrative Law

Medco Energi US, L.L.C. v. Sea Robin Pipeline Company, L.L.C. 729 F.3d 394 (5th Cir. 2013). The Fifth Circuit applied the filed rate doctrine to find that a shipper could not sue a pipeline carrier for negligence, negligent misrepresentation, detrimental reliance, fraud and violations of Louisiana's Unfair Trade Practices Act. It was unnecessary to analyze the case under field preemption precepts because the filed rate doctrine barred plaintiff's state-law claims.

Sea Robin Pipeline transports natural gas from wells in the Outer Continental Shelf to connections with onshore transportation facilities. Medco Energy was an "interruptible service" customer that shipped gas through Sea Robin's lines. Sea Robin's "interruptible customer" tariff charges and provisions, filed with the Federal Energy Regulatory Commission (FERC), offered interruptible service to customers at 1/30th the cost of firm service and limited or disclaimed liability for interruptions to interruptible service. Sea Robin's tariff stated that it made no representation, assurance or warranty that capacity would be available on Sea Robin's pipeline system at any time, and Sea Robin would not be required to perform service unless all facilities necessary to render the requested service exist and were in good operating condition.

Hurricane Ike damaged Sea Robin's pipeline and interrupted service to Medco Energy, who sued Sea Robin in state court under Louisiana state law. Among other things, Medco claimed that Sea Robin's assurances as to the time by which the pipeline would be ready to operate supported its claims for negligence, negligent misrepresentation, detrimental reliance, and fraud. Sea Robin removed the case.

The Fifth Circuit, affirming the district court's decision in favor of Sea Robin, determined that the filed rate doctrine barred shipper's claims. All rates, charges, classifications, practices and regulations affecting those rates and charges, together with all contracts which affect those rates, charges, classification must be filed with the FERC, and a pipeline may charge only what FERC determines is "just and reasonable." Any change to rates or services in the tariff must be filed in advance with FERC. The filed rate doctrine recognizes the broad authority granted to agencies, and not to the courts, to determine whether rates, including the services classifications, and practices included in the filing are reasonable. Once approved by the governing agency, a filed rate is *per se* reasonable and unassailable in judicial proceedings brought by ratepayers.

Even if Sea Robin's misrepresentations were intentional, allowing Medco to recover damages for not being able to use Sea Robin's pipeline while it was being repaired would be a "special advance" not provided in the tariffs and, therefore, prohibited by the filed rate doctrine. Unlike tort claims (which may possibly escape prohibition under the filed rate doctrine), the damages asserted by Medco are derived from its inability to use Sea Robin's pipeline. Because each of its claims relates directly to the transportation of gas, they are subject to the tariff's provisions and, therefore, are barred by the filed rate doctrine.

Rodriguez v. RWA Trucking Co., 2013 Cal. App. Lexis 726. The trial court awarded restitution to truck drivers under the California unfair competition law (UCL) for unlawful wage deductions and denied disgorgement as to liability insurance costs. The drivers were owner-operators and independent contractors. The trucking company, which was registered as a federal motor carrier, deducted from the drivers' earnings the costs of liability insurance and workers' compensation insurance. The company charged an administrative fee for arranging insurance for the drivers.

The Court of Appeal reversed the award of restitution as to the cause of action for unlawfully transacting insurance, affirmed the award of restitution as to the cause of action for unlawful reimbursement of workers' compensation insurance, affirmed the denial of disgorgement for liability insurance, and remanded for the trial court to exercise its discretion with regard to awarding prejudgment interest under its equitable powers. The court held that federal law preempted a claim based on unlawfully transacting insurance because motor carriers are permitted (49 C.F.R § 376.12) to charge back the cost of the federally required liability insurance (49 U.S.C. § 13906(d)) to drivers and to charge an administrative fee. The McCarran-Ferguson Act (15 U.S.C. § 1012) did not prohibit a preemption finding because the controlling federal statutes and rules specifically relate to the business of insurance. A claim for unlawful deduction of workers' compensation costs as applied to independent contractors electing to obtain insurance was not preempted (49 U.S.C. § 14501(c)(1)) because any economic influence on motor carriers was only indirect.