CONFERENCE OF FREIGHT COUNSEL
SUMMER 2015 MEETING
FRANCIS MARION HOTEL
CHARLESTON, SOUTH CAROLINA
JUNE 13-15, 2015

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I. CARRIER LIABILITY

1. ***Tokio Marine & Nichido Fire Ins. Co., Ltd. v. Flash Expedited Services, Inc.,*** United States District Court for the Southern District of Ohio (Feb. 9, 2015). This case involves the entry of judgment when the Court has previously decided that the carrier's limitation of liability is $1,556.00 when the subrogating insurer paid its insured $361,864.00 for a stolen load of digital cameras. This case is currently on appeal to the Sixth Circuit Court of Appeals. The facts are straightforward: Nikon sold nearly 1,400 digital cameras to Costco. Nikon had a contract with Ground Freight to move the freight from a UPS facility in Louisville, Kentucky to New Jersey. That agreement limited the liability of the carrier to $0.50 per pound. Ground Freight brokered the load to Forward Air who in turn brokered the load to Flash Expedited pursuant to a Broker/Carrier Agreement which limited the liability of the carrier to a maximum liability of $100,000.00. The trial court previously held that the shipper/subrogee was bound by the $0.50 per pound limitation in the Nikon/Ground Freight contract.

Issue: Whether Plaintiff, as subrogee for a shipper, had proven a *prima facie* case against the carrier under the Carmack Amendment.

Decision: Yes, with minimal objection, the Court entered judgment in favor of the subrogee and against the motor carrier for $1,566.00. Upon information and belief (and discussions with counsel for the parties), the case was settled.

Presenter: Bill Bierman

2. ***Elmira Brown v. United States Postal Service***, Eastern District of New York (December 18, 2014). This is a pro-se/small claims case by a disgruntled E-Bay consumer for a postal delivery that never happened. Ms. Brown, the plaintiff, purchased a $3,700 purse on E-Bay, and arranged with UPS for delivery to Ms. Brown's home in Staten Island. Brown was assigned a UPS tracking number, and patiently waited for her Gucci purse. At one point Brown was informed by UPS the purse arrived, when it had not. UPS informed Brown that computer records showed she was not at home to accept delivery. Ms. Brown visited the "New Drop Post Office", only to be given "excuses and promises the purse was on its way." The purse never arrived, falling into an abyss and (per UPS) returned to the E-Bay seller. Meanwhile, Ms. Brown was out $3,700, and still with no purse to show for it. After Ms. Brown filed a small claims case for negligence in Richmond County, UPS removed the matter to the Eastern District of New York. UPS promptly moved to dismiss, arguing the Federal Tort Claims Act (FTCA) afforded UPS sovereign immunity. That motion was granted.

Issues: Was Brown's claim subject to the provisions of the FTCA ?

Decision*:* First off, and given Ms. Brown was a pro se plaintiff, District Judge Vitaliano generously re-pled her common law tort complaint to be under the FTCA. This statute affords the exclusive remedy arising from any claims against United States Government, or its agents. As an agency of the Federal Government, UPS fell within the FTCA. Next, under the "*postal matter exception*" to waiver of sovereign immunity, all postal services have immunity "for claims arising from the loss, miscarriage or any letters or postal matters". Given Ms. Brown's allegations, no matter how pled, arose from a failure to deliver her purse, she was shut out.

Presenter: Kathy Garber

3. ***American Home Assurance Company v A.P. Moller Mearsk et al***, Second Circuit Court of Appeals (March 25, 2015). American Home, subrogee of Crown Equipment, sought damages from Maersk, an ocean carrier, arising from a 2006 train derailment in California which destroyed cargo in transit from Ohio and Indiana to Australia. Maersk had issued a through bill of lading for the transportation. In the decision discussed in our June 2014 meeting, the District Court granted Maersk's summary judgment motion, through which Maersk argued that the Court should apply a prior ruling in the case that the Carmack Amendment governs the entire scope of the plaintiff's claim; and that, because Carmack's application does not extend to ocean carriers and Maersk did not contract into Carmack liability, Maersk cannot be held liable to plaintiff. All claims against Maersk were therefore dismissed. American Home appealed that decision to the Second Circuit, seeking alternative ways to impose liability on Maersk.

Issue: Is Maersk liable under a breach of contract theory by virtue of the fact that it issued a through bill of lading, assuming responsibility for the entire move?

Decision: No. Because plaintiff American Home affirmatively argued before the District Court that the Carmack Amendment governs the entire case, any other theory of liability has been waived (plaintiff "must live with the consequences"). Furthermore, any new contract claim is preempted by the Carmack Amendment. The judgment of the District Court was therefore affirmed.

Presenter: Paul Keenan

4. ***Oilmar Co., Ltd v. Energy Transp. Ltd.***, 2014 WL 8390659 (D. Conn. Oct. 6, 2014). This court decision, on plaintiff Oilmar Co., Ltd.'s motion to vacate an arbitration award issued in favor of defendants P.T. Cabot Indonesia and Energy Transport Limited, addresses liability under the Fire Statute (46 U.S.C. § 30505) and the fire exemption to COGSA. The dispute arose out of a failed attempt to ship carbon black feedstock from the United States to Indonesia in 2003. The tanker vessel, owned by Oilmar and chartered by ETL, an affiliate of Cabot, suffered a fire and explosion, which caused the deaths of three crew members and extensive damage to the ship and its cargo. Following a court-ordered arbitration of Cabot and ETL's claims against Oilmar that spanned over five years, a decision was issued in favor of the defendants in this action (Cabot and ETL). Oilmar challenged the decision under the Federal Arbitration Act.

Issue: Whether the arbitration panel's ruling that Oilmar's negligence was the cause of the cargo damage should be vacated pursuant to the Federal Arbitration Act as a manifest disregard of the law.

Decision: Oilmar's motion to vacate the arbitration award was denied. The dispute turned on whether the arbitration panel properly applied the Fire Statute (which provides that the owner of a vessel is not liable for loss or damage to merchandise on board unless the fire resulted from the "design or neglect of the owner") and the fire exemption to COGSA (which exempts the carrier from liability unless caused by "the actual fault or privity of the carrier") in its analysis of Oilmar's liability. The Court affirmed the arbitrators' findings that Oilmar was negligent in that the risk of an explosion was a foreseeable result of Oilmar's managers' performance of welding work on the ship's damaged gas system lines during the voyage without proper ventilation and without proper supervision and in conscience disregard of the properties of the cargo (a low-grade fuel oil residue). "The court cannot say that the Panel's basis for reaching its result was so tenuous as to constitute manifest disregard." The award was therefore confirmed under the FAA.

Presenter: Steve Block

5. ***Clark v. Arend S. Kool operating as United Van Lines, United Van Lines (Canada) Ltd., et al***. In this case, the Canadian plaintiff claimed damages in the approximate amount of $75,000 for breach of contract and negligence as against all Canadian defendants joint and severally for a shipment of household goods allegedly damaged during either origin permanent storage with Canadian mover or during cross-border transportation from Calgary, Alberta to Fishers, Indiana. The action has now been resolved and discontinued as against all of the defendants: United Van Lines, United Van Lines (Canada) Ltd., Campbell Bros. Movers Limited, Planes Moving & Storage, Inc and ABC Ltd. were not properly named as defendants. Nonetheless, the case brings up some general cross-border issues that may arise in a similar case.

Jurisdiction. Before attorning to the jurisdiction of a Canadian province by serving and filing a defence, consider whether to bring a motion for *forum non-conveniens*, and commence a declaratory action in the U.S. to take advantage of U.S. laws which are not (generally) applicable in Canada. Here, the Carmack Amendment provides an opportunity for the carrier to limit its liability for cargo loss or damage during interstate transport (49 U.S.C. Section 14706). In addition, 49 U.S.C. §13907 (a) provides that disclosed household goods agents in the U.S. acting under a carrier's interstate moving authority will not be subject to any liability separate and apart from the carrier.

Did an Unknowing Plaintiff even name the Proper Defendants? Consider whether the plaintiff named the proper defendant(s) – if not, one can move to strike the claim, or perhaps use this to advantage to gain early settlement.

Contract or Common Law? If a decision is made to defend, consider whether there is a contract governing the relationship between the parties in the law suit, or whether the relationship falls within Provincial common laws. If the common laws apply, the case will be fact-based. Consequently, damages, any applicable limitations of liability, principal-agent relationships, potential indemnification of a principal by an agent (and vice versa) will all depend upon the facts which can make a case unpredictable and will likely increase costs.

Joint and Several Liability for Damages and Legal Fees & Disbursements Are Very Different in Canada. In Canada, if the plaintiff proves any fault or liability on the part of one of the defendants, even as low as one percent (1%), then that defendant can be obligated to pay the entire amount of the plaintiff's claim by being required to pay the portion of damages owed by the defendants liable for the other 99%. We refer to this as being jointly and severally liable. Further, a defendant who is liable for only 1% of damages, in addition to paying its own legal fees and disbursements to defend the claim, can be required to pay a portion, or all, of the legal costs and disbursements of the plaintiff and co-defendants. These factors significantly increase the potential liability and exposure for attorney's fees for any defendant. To assess the potential risk for a defendant, one must factor in the following:

- Legal fees and disbursements to defend the claim
- Potential obligation to be required to pay for the full loss and damages, even if only partially liable.
- Potential to pay for the legal fees and disbursements of the plaintiff and co-defendants (on a scale ranging from about 55% to actual cost depending upon the discretion of the judge).
- The lack of force behind Canada's motion for summary judgment laws
- The unpredictability of a fact based action in Canada, where discoveries (depositions) are limited to one representative of a party only, for 7 hours meaning that all other witnesses at trial will be examined for the first time live at trial.

Presenter: Heather Devine

6. ***Dragna v. A & Z Transportation, Inc., et al.,*** United States District Court for the Middle District of Louisiana (Case No. 12-449)(Feb. 19, 2015). A district court grants summary judgment to a motor carrier and a broker in finding that a plaintiff could not establish vicarious liability, a joint venture nor negligent hiring against them in the retention of a motor carrier involved in a highway accident with a motor vehicle. KLM Transport Services has two operating divisions: KLLM Transport (a licensed motor carrier) and KLLM Logistics Services (a licensed broker). BASF requested KLLM to pick up a load in Louisiana. KLLM referred the request to KLLM Logistics which in turn hired A&Z Transportation (A&Z). An A&Z driver failed to yield while making a left turn and hit Dragna.

Issues: Whether plaintiff had presented sufficient evidence to establish vicarious liability on the part of KLLM for the actions of the A&Z driver, whether KLLM and A&Z were "joint venturers" and whether KLLM could be held liable for negligent hiring of A&Z.

Decision: The court granted summary judgment finding initially that KLLM Logistics and A& Z were independent contractors and that KLLM Logisitics did not assert "operational control" over A&Z (including the evidence of "call-in" requirements). Second, the court upholds the contractual relationship between BASF and KLLM Transport on the one hand, and KLLM Logistics and A&Z Transportation on the other hand. As a result, the court holds that there was not a "joint venture" between KLLM Transport and A&Z Transportation. Finally, the court determines that KLLM Logistics relied upon Carrier411 which confirmed a number of positive factors about A&Z. The court held that the fact that A&Z was "unrated" did not require KLLM Logistics to investigate further based upon federal motor carrier safety regulations (citing 49 CFR §385.13)

Presenter: Pamela Johnston

7. ***Kawasaki Kisen Kaisha, LTD., "K" Line America, Inc., and Union Pacific Railroad Co., v. Plano Molding Co.*****,** U.S. District Court of Appeals for the Seventh Circuit. A Union Pacific freight train was carrying two steel injection molds being delivered to Plano Molding Company, a company that designs, manufacturers, and sells plastic boxes. The molds broke through the floor of the shipping container, causing the train to derail and resulting in approximately $4 million in total damage. The appellants, Kawasaki Kisen Kaisha, LTD., "K" Line America, Inc., and Union Pacific Railroad Co., were involved in shipment of the molds and sustained damages from the derailment. Collectively, they sued appellee Plano Molding, alleging the appellee was at fault because the company the appellee hired packed the molds improperly. The appellants further alleged that packing the molds improperly was a breach of the World Bill of Lading, which provided contractual terms for shipment of the molds.

The appellants provided experts who claimed the molds were packed in a way that did not sufficiently distribute their weight and were not properly secured. The appellee's experts argued that container was defective and the molds fell through the floor of the shipping container because the container was defective. Under federal maritime law, the district court found in favor of the appellee Plano Molding Co., holding the appellants had not provided enough evidence to prove that the molds were improperly packed. The court also made the factual conclusion that the derailment was caused by deficiencies in the container.

Issue: On appeal, the appellant's mainly contested the district court's finding that the appellant failed to prove the appellee breached the World Bill of Lading, the district court's allocation of the burden of proof to the appellants, and asserts the *res ipsa loquitur* doctrine.

Decision: The Seventh Circuit affirmed the district court and agreed with its findings. The court found the district court properly allocated the burden of proof to the appellants because the appellee had no "peculiar means of knowledge" as to how the shipping container was loaded. Furthermore, the court concluded the appellant provided insufficient evidence to prove the molds were improperly packed because there was no information on how the molds were packed and derailment made it difficult to determine how the molds had been packed. Finally, the court rejections importing the res ipsa loquitur doctrine into contract law, and concluded that the

appellants could have included a similar provision in case of derailment in their Bill of Lading, but did not.

Presenter: Ken Hoffman

8. ***Florence Muzi v. North American Van Lines, Inc.,*** U.S. District Court, District of Nebraska. Plaintiff Florence Muzi contracted with defendant North American Van Lines, Inc. to transport her personal property from Alabama to Nebraska. Plaintiff alleged that the defendants acted as insurers and entered a contract in which they agreed to insure the plaintiff's property and provide her an additional payment in event of its loss. The plaintiff alleged that pursuant to the Bill of Lading, the parties agreed the total value of the property being transported was $125,000. That aforementioned Bill of Lading included a binding estimate for an "insurance surcharge." Additionally, the Bill of Lading included different protection options. Under the protection options, a maximum value protection of $125,000 was shown and the option of a $250 deductible was circled. Under the page labeled "Customer Declaration of Value," the plaintiff signed under both the first option for "Standard Full Value Protection" and the option for "Waiver of Full replacement Value Protection." The plaintiff then initialed near the first option, the $250 deductible, and handwrote $125,000 as total value to be provided by the customer.

Plaintiff further alleged that her property was then damaged by water and mold. The plaintiff raised a state law tort claim for bad faith refusal to settle in connection with an insurance policy. Defendants filed a motion to dismiss the state law claim under Fed. R. Civ. P. 12(b)(6). They additionally contend the state-law claim was preempted by the Carmack Amendment.

Decision: The court denied the motion to dismiss because the court was unable to determine if the plaintiff purchased a separate insurance policy. The court found that further development of the record was necessary to determine the issues that relate to the Carmack Amendment preemption. The court noted that depending on the evidence, the plaintiff may be able to pursue a state law claim with respect to a separate contract of insurance that is governed under state law. The court also noted that carriers of household goods may offer to sell or obtain for a shipper separate liability insurance when the individual shipper releases het shipment for transportation at a value not exceeding 60 cents per pound per article. If a carrier sells, offers to sell, or procures liability insurance coverage for loss or damage, it must 1) issue a policy or evidence of the insurance that shipper purchased, 2) provide a copy of policy or other evidence at time it sells or procures insurance, 3) issue policies written in plain English, and 4) clearly specify the nature and extent of coverage under policy. If carrier fails to do any of the requirements, they are subject to full liability. See 49 C.F.R. § 1375.303(c)(1)-(4). Additionally, separate liability insurance from a third party is optional insurance regulated under state law.

Presenter: Chad Stockel

II. LIMITATIONS AND NOTICE

9. ***Burgett v. Delta Airlines, Inc.***, 2015 WL 1057870 (D. Utah Mar. 10, 2015). This is the sad tale of an international shipment of live dogs that went horribly awry. The shipment, containing one adult French bulldog and ten puppies of the same breed, flew as Delta cargo from Budapest, Hungary to Salt Lake City, Utah in April 2008. Upon the dogs' arrival in Utah, Ms. Burgett was informed by Delta agents that her adult dog had died. In response, Ms. Burgett

"blacked out and fainted and fell to the ground." After she regained consciousness, Ms. Burgett proceeded to the cargo area, where she observed that there was no food or water dishes in the dogs' crates and that her puppies were in critical physical condition. The following day, an autopsy determined that the adult animal had died from heatstroke and accompanying dehydration; and a veterinarian diagnosed the puppies with dehydration with secondary pneumonia. Approximately three months later, two of the remaining puppies died from congestive heart failure caused by the heatstroke suffered during the flight and eight puppies were left with varying degrees of permanent health problems.

Six years later, in May 2014, Ms. Burgett filed an action against Delta alleging claims for breach of contract, deceptive advertising and consumer sale practices, failure to disclose, breach of good faith and fair dealing and pain and suffering. Delta filed a motion to dismiss the complaint.

Issues: (1) Does the Montreal Convention apply to Ms. Burgett's claims; and (2) are her claims time-barred?

Decision: The Court agreed with Delta that the Montreal Convention, which applies to "all international transportation of persons, baggage or cargo" that "originates in the territory of one of the States Party to the Convention and terminates in that of another," governs Ms. Burgett's claims and that all such claims, including those for willful and intentional conduct, are preempted by the Convention. Having concluded that the Montreal Convention applies and has pre-emptive effect over all of Ms. Burgett's claims, the Court then applied the two-year suit-filing deadline contained in Article 35 of the Convention. Her suit, filed six years after delivery of the dogs, was therefore determined to be time-barred. Accordingly, Delta's motion was granted, resulting in the dismissal of all of Ms. Burgett's claims.

Presenter: Tom Martin

III. LIMITATIONS OF LIABILITY

10. ***A & A Trading Ltd. v. Dil's Trucking Inc.*** 2015 ONSC 1887. Plaintiff hired defendant to carry a shipment from Toronto to its customer in Calgary. The shipment was valued at $263,000. Plaintiff filled out its standard bill of lading with no declaration of value. The shipper attached a copy of the supply invoice showing the value and a packing slip. This paper work was provided to the pickup driver, who also completed a separate bill of lading, upon which he referenced the plaintiff's invoice number. The shipment was stolen while in transit. The plaintiff issued a lawsuit and subsequently sought summary judgment against the defendant for the value of the lost goods. The defendant sought to limit liability to $100,000 (the shipment weighing 50,000 pounds) pursuant to the $2 per pound limitation of liability in Ontario's "Uniform Bill of Lading", arguing that there was no declared valuation on either bill of lading. Pursuant to "Uniform Bill of Lading" in Ontario this limitation is deemed to apply unless a value is declared on the "face of the contract of carriage". The plaintiff argued that the contract of carriage was broader than the bill of lading, relying on the fact that the defendant was aware of the value, having provided verbal assurances that it had adequate insurance to cover the value of the cargo and, in particular, that the sales invoice was incorporated into the defendant's bill of lading.

Issues: At the summary judgment motion the Court noted that while the regulation deeming the application of the "Uniform Bill of Lading" does not define a "contract of carriage" it

does not limit or equate a contract of carriage to a bill of lading. Drawing on case law precedent holding that a bill of lading is not necessarily by itself the operative contract "though it has been said to be excellent evidence of its terms" the Court found that the *contract of carriage* in this case – being more than the bill of lading itself – did, in fact, feature a declaration of value by the shipper.

Holding: The plaintiff was entitled to full recovery, the value of the shipment having been declared in the contract of carriage. No doubt this case turned on specific facts and should be read with caution as concerns shipments from origin points in Canada other than Ontario. While the "Uniform Bill of Lading" is essentially identical as prescribed by various provinces, this case highlights an important difference between Ontario and the other provinces. Ontario's version of the Uniform Bill of Lading provides that a value must be declared on the face of the *contract of carriage* while the other provinces with Uniform Bills of Lading provide that a value must be declared on the face of the *bill of lading*.

Presenter: Gordon Hearn

11. ***Outokumpu Stainless USA, LLC v. M/V Vegaland,*** United States District Court for the Southern District of Texas (May 13, 2014). This is a COGSA limitation of liability case. Plaintiff sought to ship a "63-ton tilt drive industrial machine" or a "melt shop" from Italy to Houston, Texas. At destination, the melt unit was tipped on its side and damaged and plaintiff filed a claim for $566,000.00. Defendant Nordana, the common carrier for the steamship M/V Vegaland, seeks to enforce the $500 per package limitation of liability found in COGSA and the plaintiff seeks to avoid the limitation of liability in cross-motions for partial summary judgment.

Issue: Whether the melt shop is to be considered a "package" under COGSA allowing the defendant ocean carrier to enforce the $500/package limitation of liability.

Decision: Yes, the liability of the defendant ocean carrier is limited to $500 as the entire melt shop was a "package" under COGSA. Specifically, the melt shop was wrapped in plastic, and fully enclosed in a crate made of wooden slats, notwithstanding the plaintiff's arguments that the freight was visible to the defendant as having a value in excess of $500.00, the "package column" on the bill of lading was blank and the freight charges were calculatyed on a weight and measure basis. The Court reviewed the Fifth Circuit's decision in *Tamini v. Salen Dry Cargo AB,* 866 F.2d 742 (5th Cir. 1989) in which the court affirmed a denial of enforcement of the COGSA limitation of liability and distinguished *Tamini* even though the court recognized it was "a close call". Motion for partial summary judgment granted in favor of the ocean carrier as to the applicability of the $500 per package limitation of liability under COGSA.

Presenter: Vic Henry

12. ***RG Steel Sparrows Point, LLC V. Kinder Morgan Bulk Terminals, Inc., d/b/a Kinder Morgan Chesapeake Bulk Stevedores***, 2015 U.S. App. LEXIS 6996 (4th Cir. 2015). This case arose in the aftermath of the catastrophic collapse of a bridge crane during a tornado that was operated by stevedore Kinder Morgan Bulk Terminals Inc. ("Kinder Morgan") to unload coke used to fuel a steel mill located near Baltimore, Maryland. At the time of the accident, RG Steel Sparrows Point LLC ("RG Steel") owned the steel mill and the bridge crane and leased it to Kinder Morgan to unload coke shipments from vessels. Kinder Morgan neglected to deploy hurricane tie-

downs during the tornado and automatic rail clamps had been previously removed. Kinder Morgan argued that a limitation of liability provision in a purchase order for unloading coke applied instead of the Lease's indemnity clause. The Lease indemnity clause was all-encompassing; and the limitation of liability absolved Kinder Morgan of consequential and special damages including lost revenue and profits. RG Steel sued for negligence and breach of contract. The Court ruled in favor of RG Steel and awarded RG Steel $15.5 million in compensatory damages for the destruction of RG Steel's property and consequential damages for business losses, i.e. demurrage and change in commercial terms with its coke suppliers. Kinder Morgan only argued on appeal that the consequential damages were subject to the limitation of liability and that RG Steel's damages expert was not qualified.

Issue: Does a subsequent agreement stating that contradictory specific terms in an earlier relevant agreement trump a limitation of liability in the subsequent agreement?

Holding: Yes. Lease's all-encompassing indemnity clause specifically corresponds with subsequent purchase order limitation of liability provision and thus governs.

Presenter: David Popowski

13. ***Fubon Ins. Co. v. Travelers Transp. Servs.*****, Inc.**, 2015 WL 156807, 2015 U.S. Dist. LEXIS 2978 (N.D. Ill. Jan. 12, 2015)**.** Acer arranged with Schenker Logistics, a motor carrier, to ship its computer equipment from Illinois to Ontario in 2011. Schenker then arranged with Travelers Transportation to handle the actual shipment. Travelers received the shipment and signed Acer's bill of lading. The shipment was never delivered to its intended destination. Fubon paid Acer under its insurance policy; and then sued Travelers for reimbursement. Travelers asserted as a defense a limitation of liability provision purportedly contained in the agreement between Acer and Schenker; and sought summary judgment in its favor on the defense.

Issue: Whether Travelers was entitled to the benefits of an alleged $2.00 CAD per pound limitation clause in the rate schedule issued by Schenker to Acer.

Decision: Fubon disputed that a rate schedule issued by Schenker's agent to Acer, which contained a $2.00 per pound cap on liability, constituted a binding agreement between Acer and Schenker (referring to it as an "unsigned proposed rate increase" with a "proposed . . . liability limitation"). The Court then focused on whether Travelers had an agreement in place to limit its liability. Finding no agreement to show that Schenker, as the intermediary, acquiesced to a liability limitation by Travelers, the Court looked to Travelers' communications with Acer. As Travelers did not provide Acer with a reasonable opportunity to choose between multiple levels of liability, did not obtain Acer's written consent to the alleged limit (the fact that Acer chose to procure third party coverage does not in and of itself demonstrate that Acer accepted the liability cap) and did not provide a bill of lading prior to shipping the cargo, the Court denied Travelers' summary judgment motion.

Presenter: Wes Chused

14. ***CH Robinson International v. Burlington Northern Santa Fe,*** 2015 U.S. District Court for the Central District of California (May 14, 2015). This is an extension of the *Kirby* limited agency rule to a Direct Suit Prohibition Clause in BNSF's Intermodal Rules & Policies

Guide ("IR&PG") incorporated by reference into the rail waybill between BNSF and the agent of an intermediary, Hyundai Intermodal, Inc. ("HII"). The facts were largely undisputed: CHR contracted with Hyundai Merchant Marine ("HMM") to haul polyester flags and rubber mats from China to St. Louis. For the rail/inland portion of the trip from Los Angeles to St. Louis, HII contracted with BNSF via a waybill which incorporated by reference a service agreement and the IR&PG (which contained the deadly Direct Suit Prohibition Clause). The train derailed and a portion of the cargo was destroyed. Insurance carrier for the owner of the cargo sued CHR and CHR in turn sued BNSF (and HMM in China).

Issues: (1) Did HII contract with BNSF as an agent of HMM, the entity with whom CHR contracted for the entire international movement of the freight? (2) If so, is the Direct Suit Prohibition Clause of the IR&PG incorporated by reference into the rail waybill issued by BNSF?, and (3) is CHR bound by the limitation of liability contained in the downstream contract with a carrier, BNSF?

Decision: (1) The court handled the agency issue quickly with the benefit of the International Transportation Agreement between BNSF and HMM which expressly states that HMM is acting "by and through Hyundai Intermodal, Inc." (2) The court also shot down BNSF's argument that the Direct Suit Prohibition clause of the IR&PG could not be incorporated by reference into the waybill because the reference to the contract ("MA-32") which in turn incorporates the IR&PG was "cryptic" and that there was no evidence to establish that the contract was available for review. The court simply noted that the evidence revealed that the contract was not cryptic or secret to HMM. (3) And finally, and perhaps most importantly, the court held that CHR was bound by the limitations on liability negotiated by its intermediary (HMM) in a downstream contract with a carrier, BNSF. Following the language in *Kirby* as reiterated in *Sompo v. Norfolk Southern,* the court determined that "[a] provision restricting which parties are permitted to bring suit, like a Direct Suit Prohibition, is a limitation on liability." And the *Kirby* reasoning stands firm notwithstanding a provision in the CHR and HMM contract which states that CHR must only sue inland carriers directly rather than suing HMM.

Presenter: Bruce Rider

15. ***Medvend, Inc. v. YRC, Inc., d/b/a YRC Freight,*** U.S. District Court, Eastern District of Michigan, Southern Division. Plaintiff Medvend, Inc. contracted with defendant YRC., Inc. to ship medication dispensing machines from Florida to Michigan, which were allegedly damaged in transit. The defendant filed two motions for summary judgment. In the first motion, the defendant argued that under the Carmack Amendment, the plaintiff's damages were subject to the limitation of liability clause referenced in the bill of lading. In the second motion, the defendant argued that the plaintiff's damages were limited due to an initial loss listed on a damage claim submitted by plaintiff to defendant.

Issues: The issue presented with the first motion is whether the defendant effectively limited its liability in accordance with the Carmack Amendment. Generally under the Carmack Amendment, to limit liability the freight carrier must pay the actual value of damage to the cargo unless they give a shipper a choice between two or more rates, limiting their liability. The defendant claimed they limited their liability, as required, in their online bill of landing. In response, the plaintiff argued that they were not able to choose between rates and did not sign a written agreement.

Decision: The court held that a freight carrier must provide the shipper with reasonable opportunity to choose between levels of liability. In the case Toledo Ticket Co. v. Roadway Express, Inc., the Sixth Circuit required freight carriers to provide reasonable opportunity to choose, obtain shipper's written agreement as to choice of limited liability, issue a receipt or bill of lading prior to moving the shipment, and to maintain approved tariff rates with ICC. Some circuits have held that this case was overruled by the 1995 revisions to the Carmack Amendment. The court held that until the Sixth Circuit expressly overruled Toledo Ticket, they would still abide by it. Under these requirements, the defendant did not provide evidence that it gave the plaintiff reasonable opportunity to choose between different levels of liability, thereby denying the first motion.

The court held that at the time of an initial damage claim, the claimant may not know specific know specific value of the articles that were lost and may need more time to obtain this information. The court found that the plaintiff's damages were not limited to those listed on the initial claim because the plaintiff provided the defendant with an inspection report within the time limit set by the defendant, thereby denying the second motion.

Presenter: Dirk Beckwith

IV. PREEMPTION

16. ***Marx Companies v. Western Trans Logistics,*** United States District Court for the District of New Jersey (filed January 21, 2015). This is a cargo theft case brought by a shipper against a freight broker and addresses FAAAA preemption of a negligence claim and dismissal of the breach of contract claim. The case involved two stolen truckloads of frozen boneless beef moving from California to Missouri. Shipper sued broker for negligent hiring of a rogue motor carrier and breach of the shipper-broker agreement (actually a credit application) which said little if anything about the quality of the carrier to be retained.

Issues: (1) does FAAAA preempt the shipper's claim for negligence against the broker, and (2) did the shipper properly plead a breach of contract claim against the broker.

Decision: Citing victories of former CFC chairmen, Jeff Simmons in *ASARCO, LLC. v. England Logistics, Inc.* and Wes Chused in *Ameriswiss Technology, LLC v. Midway Line of Illinois, Inc.*, the court granted the motion of the broker to dismiss the negligence claims on the grounds of FAAAA preemption. The court dismissed the breach of contract claim because the "credit application" contained no express promise regarding the engagement of a motor carrier.

Presenter: Barry Gutterman

17. ***Tech Data Corp. v. Mainfreight, Inc.,*** United States District Court for the Middle District of Florida (Feb. 12, 2015). This case involves indemnification by parties within the chain of transportation, preemption, venue issues and the "first to file" doctrine. A shipper sued Mainfreight in Florida for theft to cargo hauled from Pennsylvania to a terminal in Georgia where the cargo was stolen. The motor carrier (Vitrans) and the warehouseman (Central) filed suit in Pennsylvania on the indemnification claims which were third-party claims in the Florida litigation. The third party defendants move to dismiss the indemnification and breach of implied bailment

theories on the grounds of preemption, and on the grounds that Florida is an improper venue and the Pennsylvania case was filed first.

Issues: Whether the Carmack Amendment preempts the third party claims of indemnification and implied bailment, whether Florida was a proper venue for the dispute and whether the Pennsylvania litigation was the "first to file" warranting dismissal or transfer.

Decision: The court granted the motion to dismiss the indemnification and implied bailment claims on the ground that Carmack defines the word "transportation" broadly enough to include claims that arise in a variety of circumstances including storage and handling of the cargo. Furthermore, the court determined that Florida was the proper venue for the dispute under 49 USC §14706(d)(1) because the proof revealed that the carrier, Vitran, operated in Florida (notwithstanding the provision in §14706(d)(2) which sets venue where the loss occurs). Finally, having knocked out two of the four claims and with the plaintiff conceding that its common law indemnity claims was preempted, the court dismissed the remaining claim (Count I for Carmack indemnification) and allowed it to be decided by the pending case in Pennsylvania.

Presenter: Fred Marcinak

18. ***Tobin v. Federal Express Corp.,*** United States Court of Appeals for the First Circuit (Dec. 30, 2014). An interesting ADA preemption case involving a mislabeled and mis-delivered package of two vacuum-sealed bags of weed. Apparently there are two "Tobins" in Plymouth, Massachusetts, who both live on streets that start with an "S" at the house number "21". Plaintiff and her 11-year old daughter opened the misdirected package, became upset, and also became the targets of the intended recipient trying to recover the package of weed. Plaintiff believed that Fed Ex had not only mislabeled and misdelivered the package but that it had also informed the intended recipient (or the sender) of the plaintiff's physical location. Plaintiff sued Fed Ex for invasion of privacy, intentional and negligent infliction of emotional distress and negligence. Fed Ex moved for summary judgment on all claims.

Issue: Are the claims of the plaintiff preempted by the ADA?

Decision: The court determined that the Plaintiff's initial claim of disclosure of her location to a third party was undisputed and not supported by the material evidence. As for the claims associated with the mislabeling and misdelivery of the package, the court held that all claims were preempted by the ADA as interpreted by the United States Supreme Court noting that "[t]his is a hard case". In its ADA analysis, the court determined that the common law claims were sufficiently "related to" a "service" of Fed Ex. Plaintiff argued that her claims were not preempted by the ADA because she did not bargain for an unwanted package and therefore, she and her children were strangers to the transaction. The appellate court held that ADA preemption is not thwarted by virtue of the fact that the plaintiff was a stranger to the contract of carriage. The court finally determined that plaintiff's claims were "related to" the services provide by Fed Ex and that preempted was required to prevent intermeddling in the business of an air carrier. Labelling and delivery of air packages should be regulated by the marketplace and not by individual state laws. The court affirmed the granting of the motion to dismiss by the trial court.

Presenter: Kathleen Jeffries

19. ***Belnick, Inc. v. TBB Global Logistics, Inc.,*** United States District Court for the Middle District of Pennsylvania (May 19, 2015). Belnick is a furniture distributor and TBB is a freight broker. The parties entered into a "Subscriber Agreement" whereby TBB agreed to negotiate rates with third party motor carriers to transport Belnick furniture nationwide. The Subscriber Agreement required Belnick to use TBB for at least 90% of its shipments for the term of the annual contract which was evergreen unless terminated "within 60 days of the end of each annual term". The Agreement required TBB to provide rate quote information and to route shipments at competitive prices but not necessarily the lowest rates. However, Belnick wanted out of the Agreement and claimed that TBB not only breached the Agreement but also committed several torts (breach of fiduciary duty, tortious interference, and fraudulent inducement). In response, TBB stuck to its Agreement and filed a counterclaim alleging that Belnick never met the 90% requirement, violated the confidentiality provisions of the Agreement and violated the Uniform Trade Secrets Act. The parties filed summary judgment motions which included TBB's argument that Belnick's tort claims were preempted by 49 U.S.C. §14501(c)(1), or FAAAA.

Issues: (1) Were the tort claims of Belnick preempted by 49 U.S.C.§14501(c)(1) because they had a connection with the rates, routes and services of a freight broker in more than a peripheral manner, (2) Were there genuine issues of material fact as to the remaining claims of breach of contract and the counterclaims involving TBB's claim that Belnick violated the 90% Agreement, the confidentiality provisions, and the Uniform Trade Secrets Act.

Decision: The magistrate judge made short shrift of TBB's FAAAA preempotion argument, citing *Morales* and *Wolens* and federal district court opinions reviewing 49 U.S.C. §14501(c)(1). Belnick claimed that TBB tortuously interfered with Belnick's ability to contract with other brokers or 3PLs, fraudulently induced Belnick to continue under the Agreement with false promises without the intent to perform and breached fiduciary duties that Belnick claimed TBB owed to Belnick as its agent.

As for the remaining claims that TBB breached the Agreement and that Belnick was liable to TBB under the counterclaim, the magistrate judge held that there were myriad genuine issues of material facts in dispute. TBB sought a narrow/contained reading of the Agreement, while Belnick sought a broad view with oral testimony to reveal alleged modifications of the Agreement.

The magistrate judge therefore granted the motion for summary judgment of the broker, TBB, as to the tort claims of the shipper, Belnick, on the grounds of FAAAA preemption, but denied the motions as to the remaining contract claim against TBB and Belnick's effort to dismiss the counterclaim of TBB against it.

Presenter: George Wright

What follows are two related decisions. First a Report and Recommendation by a Magistrate Judge from the Oregon District Court. Second, a ruling on Objections from the Magistrate's findings to Federal District Judge Michael Simon. The decisions are referred to as "*Complete* I and II"

20. ***Complete Services Inc v All States Transport LLC*****, *"Complete I":*** Magistrate Judge Dennis Hubel, from the District Court of Oregon (Nov. 21, 2014). Pacific contracted with the broker plaintiff, Complete, under a shipper brokerage agreement to arrange for the shipment of

Pacific's nutritional products from Washington to Florida. The deliveries were under two separate shipments with load confirmation sheets issued for the pick-up and delivery locations. The problems began when the motor carrier/defendant, All States, accepted the (2) shipments under separate bills of lading, then combined the shipments in one trailer before leaving for Florida. All States had an ongoing practice of consolidating shipments brokered by Complete in this manner. The All States' driver, traveling with the consolidated shipments at issue, was involved in an accident in Oregon that resulted in a total cargo loss.

Complete paid Pacific for nearly half the $169,844.47 loss, in exchange for a release and assignment of Pacific's claims against All States. Complete filed against All States under the Carmack Amendment, and for breach of contract. All States counter-claimed alleging Complete "negligently failed to notify All States that the shipments' value exceeded All States' cargo coverage limits." All States also raised the following affirmative defenses: (1) that Complete's breach of contract claims were pre-empted by Carmack; (2) the Court did not have proper supplemental jurisdiction over Completes contract claims; (3) that Complete's contract and indemnity claims were trumped by Oregon's "anti-indemnity statute", and (4) that Complete's case was "premature" due to an arbitration clause in the broker carrier agreement requiring disputes be submitted for binding STB adjudication. Complete moved to dismiss All States' negligence counter-claim under Rule 12(b)(6), and to strike the aforementioned defenses *in toto*.

Decision: **First**, the Magistrate struck the carrier's Carmack pre-emption defense, finding Complete had standing (as a broker) to bring a Carmack claim under a valid assignment from the shipper for a cargo loss arising from a bill of lading. Carmack did not pre-empt Complete's breach of contract and indemnity claims given those claims were based on separate contractual obligations unrelated to cargo damages as claimed under the bill of lading. As to the claim that All States breached its agreement by combining prior shipments tendered under separate freight bills, the Magistrate ruled there was proper supplemental jurisdiction (28 U.S.C. Section 1367) as they arose from the "same set of operative facts" as the cargo loss under Carmack.

Second, the Magistrate granted Complete's Motion to Dismiss and Strike All States' negligence based counter-claims and defenses, which were predicated upon Complete's "duty to inform All States that the shipment values exceeded All States' cargo insurance coverage". The Magistrate concluded that, *in the absence of a contractually agreed upon duty*, there is no common law tort duty upon brokers to hire motor carriers with specified insurance coverage limits. Rather, held the Magistrate, a broker's duty is limited to arranging for transportation and ensuring the carrier had valid operating authority. (*Note*: *KLS* involved a "shipper/broker" dispute regarding carrier cargo insurance, not a broker carrier dispute).

Third, the court allowed to stand All States' defense that the STB arbitration provision was a condition precedent to Complete filing in federal court. And **fourth**, the Magistrate addressed an interesting pre-emption issue regarding All States' defense under the Oregon's anti-indemnity statute. Complete countered argued the Oregon statute "...related to a price, route or services of a motor carrier or broker...with respect to the transportation of property", and was thus pre-empted by FAAAA. The Magistrate held that, given Complete adduced no facts to support the legal

conclusions of its pre-emption claim, it could not determine if the facts showed the Oregon was related to the "...price, route or services" of the motor carrier.

Presenter: Kevin Anderson

21. ***Complete Distribution v All States Transport LLC***, ***"Complete II",*** 2015 U.S. Distr. LEXIS 37379 (March 25, 2015). This case came upon the parties' Objections to the Magistrate's rulings granting and denying in part Complete's Motions to Dismiss and Strike portions of All States' counter-claims and defenses.

Decision: **First,** and perhaps most significantly, the District Court affirmed the orders dismissing All States' claims and defenses that Complete *negligently failed* to inform All States (as a motor carrier) of the shipments' value such that All States was subject to exposure in excess of its cargo liability policy limits. All States argued that imposing such a duty on brokers would allow carriers to make "informed decisions on obtaining supplemental coverage to protect them in the event of a loss." In referencing the *KLS* decision relied upon by the Magistrate, the court acknowledged that although (unlike *KLS*) this was not a shipper-broker dispute, *KLS* nonetheless afforded "persuasive reasoning for extending the lack of duty" pronouncement to broker-carrier relationships.

Second, the court then addressed All States' claim that Complete nonetheless had a contractual duty arising from an "implied duty of good faith and fair dealing" to inform All States of the value of the loads being delivered. All States claimed that, "as a matter of industry practice, brokers routinely inform carriers of the shipment's value." Unlike All States negligence claim, the Court refused to strike this defense, finding the industry standard allegations and evidence were sufficient to raise a justiciable issue of fact precluding summary judgment. Complete was therefore allowed to advance its "duty to inform" the motor carrier claim, albeit under an "implied contract" as opposed to a negligence or tort theory.

Finally, the court reversed the Magistrate's rulings on proper subject matter jurisdiction over Complete's breach of contact claims regarding All States practice of impermissibly combining shipments (89 times, to be exact). The court held supplemental jurisdiction, under 28 U.S.C. §1367, was not triggered because "the evidence, facts and witnesses material to the prior combined shipments were sufficiently distinct from the material facts applicable to Central's Carmack claim addressing the cargo loss at issue".

Presenter: Kevin Anderson

22. ***Indemnity Insurance Company of North America a/s/o Calsonic Kansei N.A. v. Averitt Express, Inc.,*** U.S. District Court, Southern District of Texas, Houston Division. Plaintiff, Indemnity Insurance Company of North America, as subrogee of Calsonic Kansei N.A., sued defendant Averitt Express, Inc. to recover damages to a shipment of automotive electronic capacitors and related parts while defendant was transporting the capacitors pursuant to a bill of lading. Plaintiff alleged (1) violation of Carmack Amendment, (2) bailment, and (3) negligence. Defendant filed a Motion to Dismiss the state-law causes of action in the Complaint, arguing that the state law claims are preempted by the Carmack Amendment.

Decision: The court found that, within the Fifth Circuit, the Carmack Amendment preempted state law claims because it provides "exclusive cause of action for loss or damages to goods arising from the interstate transportation of those goods by common carrier." Thus, the court granted the defendant's motion, dismissing the defendant's claims for bailment and negligence with prejudice.

Presenter: Lindsay Sakal

V. JURISDICTION, VENUE, REMOVAL

23. ***Dabecca Natural Foods, Inc. v. RD Trucking, LLC et al,*** United States District Court for the Northern District of Illinois (May 20, 2015). This case presents an issue involving the venue provisions of the Carmack Amendment, 49 U.S.C. §14706(d). Debecca contracted with Total Quality Logistics to arrange for the transportation of 6,900 pounds of pre-cooked bacon from Iowa to Illinois. Dabecca agreed to terms and conditions in which Total Quality was identified as a broker and contained a forum selection clause identifying Ohio as the exclusive venue with respect to any disputes. Total Quality hired RD Trucking to haul the bacon at a temperature of 26 degrees which was listed on the bill of lading. Allegedly, Total Quality gave RD Trucking the wrong temperatures and the bacon was 48 degrees at destination. Although Dabecca instructed Total Quality not to salvage the bacon, Total Quality "worked with" RD Turcking to sell the bacon for human consumption causing Dabecca damages. Dabecca asserted a Carmack claim against Total Quality claiming it was a carrier or at least a freight forwarder. Total Quality moved to dismiss of the grounds that venue was improper in Illinois and the case should be brought in Ohio.

Issues: Did Dabecca properly allege that Total Quality was a carrier/freight forwarder subject to the Carmack Amendment and also could Total Quality enforce the forum selection clause of the terms and conditions notwithstanding the venue provisions of the Carmack Amendment?

Decision: In a rambling decision, the district court could not decide the home to which the bacon should be brought. It decided that it could not decide whether the complaint, as amended, alleged that Total Quality was acting as a carrier or a freight forwarder subject to Carmack. After discussion and analysis, the court determined that the allegations of the amended complaint suggested that Total Quality "did more than merely arrange for the transportation of goods." Nonetheless, the court could not conclude that Total Quality was a broker as a matter of law. The court went further to analyze whether a colorable Carmack claim meant that the forum selection clause was unenforceable. It determined that Carmack supplanted a forum selection clause and that Carmack required suit to be brought in the forum in which the carrier did business (Ohio) or in the forum in which the loss or damage occurred (unknown). The court determined that the loss *did not occur* in Illinois where Dabecca was located and where the bad bacon was delivered. Given the inability of the court to decide the issue of whether Carmack applied and because Dabecca had not met its burden of establishing the proper venue, the court "direct[ed] the parties to confer" and allowed sur=reply briefs and scheduled a status conference foe June 17, 2015.

Presenter: Bruce Spitzer

24. ***AIG Europe Ltd v General System Inc. Et al***, United States District Court for Maryland (March 19, 2015). This is a broker/motor carrier dispute arising from a shipment of stolen pharmaceuticals, with some interesting procedural issues. The broker, TBB Global ("TBB"), contracted with motor carrier General for the shipment of pharmaceuticals to UPS in Louisville, Kentucky. General's driver emerged from a truck stop en route, only to discover his fully loaded tractor trailer was missing. Although discovered later, the trailer was empty. The shipper's subrogated carrier, AIG, paid for the loss in full and filed suit against the motor carrier General under the Carmack Amendment. After which TBB was brought into the case by a third party complaint, only to be dismissed as a third party defendant for failure to state a claim upon which relief could be granted and/or improper venue. The specifics of the orders dismissing TBB on the third party claim are not explained. After procedural maneuvering and rulings on the pleadings, AIG filed an amended complaint naming General and TBB as direct defendants, with a claim against TBB for breach of contract.

General then filed a cross claim against TBB for breach of contract claiming the Court had supplemental jurisdiction over the same. General alleged TBB misrepresented the content of the shipments and failed to inform General their value exceeded General's $100,000.00 cargo limits. TBB moved to dismiss General's cross-claim, arguing it was moot and failed to properly invoke the federal court's supplemental jurisdiction under 28 U.S.C. Section 1367. Before addressing the merit of TBB's motions, the Court granted TBB's Motion to Dismiss AIGs claims. The basis of that ruling is also not clear from the record, although it had an impact on TBB's pending motion to dismiss General's cross claim.

Issues: (1) Did General's cross claim against TBB "arise out of the same facts and transactions" as the underlying Carmack claims ? (2) Was General's cross claim against TBB moot given the dismissal of AIG's claim against TBB ?

Decision: The Court granted TBB's motion to dismiss General's cross-claim. First, General acknowledged its cross claim was proper *only if* the Court found AIG alleged a cognizable claim against TBB. Given AIG's claims against TBB were dismissed a matter of law, General could not sustain a cross claim under Rules 13 or 14 of the Federal Rules of Civil Procedure as TBB was not a "co-party". Second, and from a comity standpoint, General's breach of contract claim necessitated addressing complex legal and factual issues under Pennsylvania state law, which the Court found "totally separate from whether General was liable to AIG under the Carmack Amendment."

Presenter: Colin Bell

25. ***Central Transport LLC et al v. Main Freight Inc.*****,** Eastern District of Pennsylvania (February 11, 2015). This is a decision representing a tutorial in Federal Procedure while addressing the enforcement of liability limits under the Carmack Amendment. Vitran Express was a motor carrier hired by the broker, Main Freight, to transport expensive computer equipment from Pennsylvania to Georgia. Vitran subcontracted the load to plaintiff Central Transport ("Central") The parties operated under a broker carrier agreement. Although not clear, given the court's decision, the carrier must have issued a bill of lading referencing its tariffs and liability limits. While in transit, over $236,000.00 worth of freight was stolen from Central. The shipper, Tech Data, filed suit in Florida District Court, alleging breach of contract against Main Freight only, and not Central.

On the eve of a settlement conference in the Florida action, Central filed the at issue declaratory judgment action in the Eastern District of Pennsylvania, naming both the shipper and Main Freight as parties. Central sought a judicial declaration confirming its liability limits under the bill of lading, asking to limit Central's liability for the theft to $429.70. Within days Tech Data filed an amended complaint naming *Central and Main Freight* in the Florida District Court action. Main Freight cross claimed against Central, triggering motions to dismiss. In short, the Florida District Court was up to its ears in the case before Central sought declaratory relief in Pennsylvania. A fact noticed by Main Freight in moving to dismiss the declaratory action, arguing Central was "forum shopping, procedurally fencing and engaging in a pre-emptive strike".

Issue: Whether Central's declaratory complaint seeking confirmation of its liability limits could be pursued in Pennsylvania, given the underlying Carmack litigation was already proceeding in the Florida Federal District Court ?

Decision: The Court dismissed Central's declaratory Complaint and sent Central packing to Florida. In so ruling, the court focused not only on the statutory criteria for a declaratory action, but also on judicial economy and Central's forum shopping motives. Under Third Circuit criteria, the judge aptly concluded that allowing the action to proceed in Pennsylvania would "...result in duplicative litigation, a waste or judicial time and resources, and create conflicting "res judicata" rulings between the Pennsylvanian and Florida courts". Beyond that, and from a comity standpoint, the tariff issues presented in the declaratory case were not federal in nature, and involved the interpretation of conflicting written agreements (presumably the bill of lading and broker/shipper/carrier agreements) dependent on the interpretation of Pennsylvania state law principles.

Presenter: Mike Tauscher

26. ***Chartis Seguro Mexico et al. v HLI Rail Rigging LLC et al.*** Southern District of New York (February 9, 2015). This decision demonstrates the tenuous nature of vague and incongruent liability limits that carriers incorporate into their bills of lading. This case was brought by the Chartis as the subrogated insurance carrier to the shipper, Prolec. Prolec contracted with rail carrier HLI under a through bill of lading for the delivery of two electrical transformers from Mexico to Port Arthur, Texas. HLI transported the cargo from Mexico to Laredo, Texas, and subcontracted the remainder of the shipment to KCSR for delivery to Port Arthur. KCSR (apparently) issued its own Bill of Lading for the United States inland leg, after which two KCSR cars derailed, significantly damaging both transformers. Chartis brought suit under Carmack against both HLI and KCSR, with cross claims between the two rail carriers ensuing.

KCSR' cross claimed against HLI and asserted defenses under Section 11706, claiming KCSR's liability was contractually limited to $25,000 per rail car. KCSR also claimed HLI agreed to indemnify KCSR "from any claims in excess of the liability limits, plus for its attorney's fees and costs". At issue here was the KCSR Bill of Lading, which included (or incorporated) the terms of a "Price Quote" containing the liability limits, and which incorporated KCSR's Rules Publication 9012 by following language; "Price is subject to 9012". The Rules Publication (9012) was further available in full only online at KCSR's website. If discovered, it referenced the indemnity provisions and general instructions on opting out of the KCSR liability limits.

HLI filed motions for summary judgment, arguing as a matter of law, it had no reasonable opportunity to discover the liability limits and/or to chose between two or more levels of liability under the Carmack Amendment.

Issues: Were KCSR's liability limits and indemnity claims enforceable under the Carmack Amendment ?

Decision: First, Judge Andrew Carter found the "liability limit" notice offered by KCSR, through incorporation of a "Price Quote" and as benignly referenced Rules Publication, was not enforceable as a matter of law. The court found the Price Quote's incorporation of the Rules Publication into the Bill of Lading was vague and not commercially reasonable. The court also focused on the fact that the Rules Publication was available only on KCSR's website, which compounded the vagary given the website was not mentioned in the Price Quote or Bill of Lading. Summary judgment was therefore granted to HLI, and KCSR's liability limit affirmative defenses were dismissed with prejudice.

Second, Judge Carter was equally unimpressed with KCSR's indemnity cross claims, also granting HLI's summary judgment on the same. Relying on New York common law standards regarding "incorporation by reference contract interpretation", the Court held no reasonable jury could find HLI was put on reasonable notice of the indemnity provisions. The reason being that reference to "*Price is subject to 9012*" was too vague and did not specifically refer to KCSR "*Rules Publication 9012*". Once again, that the Publication was an internal document available only on KCSR's website did not help KCSR's cause. In short, the liability limits and indemnity provisions sought to be enforced by KCSR were, as a matter of law, legally deficient.

Presenter: Fritz Damm

27. ***Home Source Indus., LLC v. Freightquote.com, Inc.***, 2014 WL 6609051, 2014 U.S. Dist. LEXIS 162659 (D. N.J. Nov. 19, 2014)**.** In March 2014, Home Source, which had become a Freightquote.com customer in August 2012, requested a quote from Freightquote, a licensed broker, for the transportation of a shipment of furniture from New Jersey to a trade show in Las Vegas, with a date-certain delivery requirement. Through a series of emails, Freightquote provided a price quote and assured Home Source that the shipment would be delivered on time. The shipment was picked up on time, but was not timely delivered to the trade show. Home Source sued Freightquote in New Jersey. Freightquote, relying on the forum selection clause in its Terms and Conditions, moved to transfer the action to Missouri.

Issue: Is Freightquote's forum selection clause, contained in its Terms and Conditions, the hyperlink to which was sent to Home Source via email on numerous occasions and a statement of assent to which was included in each bill of lading corresponding to the shipment orders placed with Freightquote, a valid part of the agreement between the parties covering the shipment at issue and therefore enforceable in this action despite the fact that the shipper never read the Terms and Conditions?

Decision: The Court concluded that Freightquote satisfactorily demonstrated that the forum selection clause contained in its Terms and Conditions applies to the transaction at issue, finding that the Terms and Conditions were brought to Home Source's attention through a hyperlink in the

initial August 2012 account-activation email, the confirming email for the subject shipment and the confirming emails for ten previous shipments. Though Home Source was at no time asked to sign an agreement evidencing its assent to Freightquote's Terms and Conditions, by agreeing to conduct business with Freightquote, Home Source's assent is presumed. The Court gave little weight to Home Source's argument that the forum selection clause should not be enforced because it did not click on the hyperlink, relying on long-established law that failure to read a contract does not excuse performance unless fraud or misconduct by the other party prevented the party from reading; and finding no indication that fraud or misconduct caused Home Source's failure to read the Terms and Conditions. Having raised none of the recognized bases for defeating enforcement of a prima facie valid forum selection clause, plaintiff Home Source was bound by Freightquote's provision. The motion to transfer the case to Missouri was therefore granted.

Presenter: David Sauvey

28. ***JM-Nipponkoa Insurance Co., LTD., et al, v. Dove Transportation, LLC, et al.*** U.S District Court, Southern District of Ohio, Western Division. Plaintiff sued defendants Dove Transportation, LLC and Geneva Logistics, LLC, under the Carmack Amendment, 49 U.S.C. § 14706(a), alleging defendants were joint and/or severally liable after Makino's customer rejected a large machine transported from Virginia to California by the defendant.

Issues: Defendant Dove filed a motion to dismiss, arguing lack of personal jurisdiction. Plaintiff then filed a motion for default judgment against defendant Geneva as well as an amended complaint with additional jurisdictional facts and new state common law claims. Defendant Dove subsequently moved to dismiss the amended complaint for lack of personal jurisdiction and for preemption of the state law claims under Fed. R. Civ. P. 12(b)(6). In response, plaintiff filed a motion to dismiss, or in the alternative, a transfer of venue. Plaintiff then filed a second amended complaint that did not include state law claims, and defendant filed a motion to strike the amended complaint.

Decision: The court considered each motion individually. The court first denied defendant's motion to strike plaintiff's second amended complaint because the second amended complaint was identical to the first amended complaint with respect to jurisdictional allegations. However, since the second amended complaint did not include the state law claims, those claims were considered moot and dismissed with prejudice.

The court found that the Carmack Amendment does not confer personal jurisdiction over a non-resident defendant, but rather, provides only a venue provision. The court noted that the venue provision does not trump personal jurisdiction requirements. Instead, the plaintiff must prove that the jurisdiction is properly exercised under Ohio's long-arm statute because Ohio does not recognize general jurisdiction over a non-resident. The court granted defendant's motion to dismiss for lack of personal jurisdiction because the plaintiff was unable to show personal jurisdiction under Ohio's long arm statute. The court concluded there was lack of personal jurisdiction under the long arm statute because defendant Dove's assorted and attenuated contacts with Ohio were not causally related to damages, and does not transact business, engage in a regular course of conduct, or derive substantial revenue from the state of Ohio. The court also noted that jurisdiction in Ohio would be a violation of the defendant's Due Process rights.

The court granted the plaintiff's motion to transfer venue to Virginia because original venue lacked personal jurisdiction. To avoid the risk of inconsistent adjudication that is posed by default judgment when an action charges several defendants without joint liability, the court denied plaintiff's motion for default judgment against defendant Geneva

Presenter: John Husk

29. ***Cindy Mitchell v. United Parcel Services*****,** U.S. District Court, Western District of Kentucky. Pro se plaintiff Cindy Mitchell sued the defendant United Parcel Services ("UPS") to recover $95,000 in monetary damages because the defendant delivered her package to an old address, rather than her current address.

Decision: Court dismissed the case for lack of subject matter jurisdiction. Plaintiff did not establish federal question jurisdiction because she did not assert that she was deprived of a federal statutory or constitutional right. The plaintiff also did not establish diversity jurisdiction because both parties are from the same state and the alleged damages were not a recoverable amount.

Presenter: Jeremy Handschuh

30. ***Ester Reta Montes De Oca v. El Paso-Los Angeles Limousine Express, Inc.*****,** U.S. District Court, Central District of California. Plaintiff Ester Reta Montes De Oca sued defendant El Paso-Los Angeles Limousine Express, Inc., alleging the defendant's negligent conduct caused plaintiff bodily harm. Defendant removed the case to federal court, claiming a federal question. Defendant also argued that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 14501(c)(1) preempts state jurisdiction because claims for personal injury "are a veiled attempt at regulating the 'services' offered by freight broker."

Plaintiff moved to remand the case to Superior Court.

Decision: The court held the ICCTA does not preempt a personal injury claims. The court noted the ICCTA provision is nearly identical to the Airline Deregulation Act ("ADA"), in which the Ninth Circuit rejected a broad interpretation of 'service" and concluded that the ADA does not preempt personal injury claims. Like the ADA provision, the court concluded that preempting personal injury claims under ICCTA would prevent a plaintiff from obtaining any recourse against illegal and/or tortious conduct. The court also rejected the defendant's assertion that brokers should be insulated from tort liability. Thus, the plaintiff's motion to remand was granted.

Presenter: Kathleen Jeffries

VI. CARRIER-BROKER-THIRD PARTY

31. ***Northrich Company v. Group Transportation Services, Inc.,*** United States District Court for the Northern District of Ohio (March 23, 2015). This case addresses the issues of broker liability and for the carrier involved, standing and the failure to satisfy the Carmack requirement that goods be delivered to the carrier in good condition. Northrich was apparently a distributor of heat exchangers or coils which were sold to Oberlin College. Northrich contacted Group Transportation Services ("GTS") to have the coils shipped from the manufacturer in Texas to

Oberlin in Ohio. GTS hired FedEx to deliver the coils to Ohio and upon delivery, two of the three coils were damaged. Northrich sued GTS and FedEx under the Carmack Amendment.

Issues: (1) Is GTS, a freight broker, liable to Northrich under the Carmack Amendment? and (2) does Northrich have standing to assert claims against the carrier, FedEx, and has Northrich met its burden of proof with regard to delivery of the coils in good condition by a preponderance of the evidence?

Decision: Motion for summary judgment granted as to both GTS and FedEx. GTS is a broker and as such is not liable to Northrich under the Carmack Amendment. Furthermore, Northrich cannot argue that GTS is an agent of FedEx because it failed to seek discovery on the issue and discovery is closed. As well, Northrich signed an agreement with GTS waiving any claims against GTS for damages of any sort. FedEx is also not liable to Northrich under Carmack because Northrich had no interest in the cargo at issue and therefore did not have standing. In addition, Northrich could not prove that the coils were delivered to FedEx in good condition. Interestingly, the freight moved on a Shipper's Bill of Lading on which the shipper/manufacturer certified that the goods were "in proper condition for transportation according to the applicable regulations of the DOT." The Court held that this was not a certification by Northrich and furthermore found that the statement merely addressed packaging. In addition, no driver for FedEx signed the carrier certification on the bill of lading which also stated that the contents of the packages were unknown. As a result, the Court concluded that the document was not a clean bill of lading showing that the goods were delivered in good condition. Northrich did not meet its burden of proof as to the first element of a Carmack claim even if it had standing to sue.

Presenter: Eric Zalud

32. ***OFI International, Inc. v. Port Newark Refrigerated Warehouse,*** United States District Court for the District of New Jersey (Jan. 12, 2015). This is a warehouseman liability case. Plaintiffs are owners of nearly a million pounds of frozen shrimp and other seafood products which were allegedly subject to temperature abuse at the defendant's warehouse in New Jersey. The Product was delivered to the defendant's warehouse and for each delivery, defendant submitted a Standard Non-Negotiable Warehouse Receipt to plaintiffs. Plaintiffs disagreed with defendant as to whether they received a copy of the back of the Receipt which contained limitations of liability which would reduce the $5 million claim to $445,000.00. Hurricane Iren struck on August 28, 2011 causing two of the defendant's warehouses to be shut down for varying time periods. The hurricane also allegedly caused the warehouses to become over-filled which affected the temperature for the Product. These facts were all disputed by the parties. The parties filed cross-motions for summary judgment

Issues: As a matter of undisputed material fact (1) whether defendants were able to enforce the limitation of liability on the terms and conditions of the warehouse receipt, (2) whether plaintiffs' mitigated their damages, (3) whether defendant was liable for conversion (for refusing to allow plaintiffs to inspect/recover the Product, (4) whether defendant breached the covenant of good faith and fair dealing, (5) whether the over-crowding caused the damage to the Product, (6) whether the plaintiff inspected a proper representative sampling of the Product, and (7) whether the plaintiffs could recover for allegedly undamaged Product.

Decision: The court denied both motions for summary judgment on the grounds that there were numerous questions of fact regarding whether the plaintiffs agreed to the terms and conditions which contained a limitation of liability. At the outset, the defendants made an ill-fated effort to strike the expert and fact witness affidavits of the plaintiffs, which the Court summarily overruled in large part. However, the expert testimony presented provided strong material questions of fact as to the actual cause of the damage to the Product and the actions of the parties both before and after the Hurricane hit New Jersey. Interestingly, the Court denies the limitation of liability argument notwithstanding the language on the Receipt which expressly references the "Terms and Conditions On Reverse Side".

Presenter: Rob Moseley

33. ***Prussin v. Bekins Van Lines, Inc.,*** United States District Court for the Northern District of California (Feb. 3, 2015). An odd decision as to the liability of a broker (or really an agent for a household goods carrier) under the Carmack Amendment. Plaintiffs sued both Bekins and TCM, the local intrastate carrier for Bekins in New York for damages to their household goods in a move from New York to Florida, and then later to California. Plaintiff sued on theories of negligence and violation of the Carmack Amendment.

Issues: Is defendant a broker rather than a carrier such that it cannot be held liable to Plaintiffs under the Carmack Amendment?

Decision: Motion for summary judgment as to the "broker" is denied on the grounds that there are genuine issues of material fact as to whether the "broker" held itself out, nonetheless, as a carrier. The Court seems to treat the motion for summary judgment as a motion to dismiss as states that it is "drawing all reasonable inferences in the [Plaintiffs'] favor". The Court denied the effort of the Plaintiffs to defeat summary judgment by somehow arguing that the "broker" was liable because Carmack preempts all state law claims. In any event, the Court denied the motion for summary judgment as to the "broker" and never addressed the argument that the "broker" was an agent for a disclosed principle, Bekins.

Presenter: Marian Sauvey

34. ***Atiapo v Goree Logistics Inc., et al,*** North Carolina Court of Appeals (March 17, 2015). This case may not be well received by the transportation brokerage industry. It presents a unique twist under North Carolina's "statutory employer" law regarding broker exposure for a worker's compensation claim arising from a motor carrier driver's on the job injuries. Defendant Owen Thomas ("Owen") was retained as a broker to arrange for the transportation of shipper Sunny's cargo. Under a "Broker Carrier Agreement", Owen then contracted with motor carrier, Goree, for the interstate delivery of the cargo, said agreement providing Goree "*..had full control over the work performed in delivering the cargo, and assumed responsibility for all workers compensation coverage*". The plaintiff, Atiapo, was a Goree driver and by agreement Goree's independent contractor. Atiapo was directed to transport the freight to Wyoming, after which it was rejected. On returning the rejected cargo to Georgia and while traveling through Colorado, Atiapo was injured in a work related accident. Atiapo filed claims against Goree and Owen for temporary and total disability payments with the North Carolina Industrial Commission ("IC"). Both Goree and Owen denied the claims, arguing they did not employ Atiapo for purposes of workers compensation benefits. The IC disagreed.

First, and on discovering Goree carried no workers compensation coverage whatsoever, the IC directed its attention to Owen as a "principal contractor" under a North Carolina statute providing a "principal contractor or subcontractor" (as defined) in the interstate carrier industry "...shall be liable as an employer for purposes of payment of workers compensation benefits". The IC concluded Owen's status as a licensed federal transportation broker was "a distinction without difference". According to the IC,, since Goree selected and contracted to pay Goree as the motor carrier for the benefit of Owen's shipper/customer Sunny, Owen was effectively a "principal contractor" and thus responsible for Atiapo's compensation benefits.

Owen appealed this decision to the North Carolina Court of Appeals.

Issues: First, was Owen a "principle contractor" under North Carolina Statute, Section 97-19.1(a). Second, and even if so, was Atiapo's claim against Owen nonetheless pre-empted by the FAAAA ?

Decision: First, the North Carolina Court affirmed the IC's "principal contractor finding" against Owen. Namely, finding that since Owen contracted with its shipper customer/Sunny to transport the cargo, was paid by Sunny for this services, hired a motor carrier, and controlled the manner and method of the carrier delivery, Owen has effectively "employed Goree as a subcontractor". Finally, and since Goree did not carry workers compensation coverage, Owen was responsible for worker's compensation benefits as if Owen's employed Atiapo.

Second, Owen raised FAAAA pre-emption to the North Carolina statute under 49 U.S.C. Section 14501(c). However, the court focused on the exception to pre-emption, finding that FAAAA pre-emption cannot restrict the state's ability to regulate "...minimum amounts of financial responsibility *relating to the (state) insurance requirements*..." *See* 49 U.S.C. Section 14501(c)(2)(A). Owen claimed this exception was applicable only to motor carriers, and not transportation brokers. In tortured ruling without substantive analysis regarding Owen's core broker duties, the North Carolina court concluded Owen "was not acting as a broker but as a principle and/or general contractor who contracted with a motor carrier". The court effectively held that Owen as "a motor carrier, *despite that Owen itself owned no vehicles*".

Presenter: Scott McMahon

35. ***Hayward v. C.H. Robinson Co.***, 2014 IL App (3d) 130530, 24 N.E.3d 48 (App. Ct. Ill. Dec. 9, 2014). In February 2009, a driver employed by carrier Pella Carrier Services was attempting to make an illegal U-turn when his tractor-trailer collided with a passenger vehicle, killing the driver of the car. The deceased driver's husband filed suit on behalf of the decedent's estate against, among other defendants, C.H. Robinson, the broker that arranged for Pella's services. Robinson successfully moved for summary judgment, asserting that Pella was operating as an independent contractor, not an agent, of Robinson; that Robinson had no control over Pella's operations; and that Robinson did not negligently hire or supervise Pella or its driver. Following denial of plaintiff's motion for reconsideration of the summary judgment decision, the Court entered final judgment and plaintiff appealed.

Issue: Does a question of material fact exist regarding whether Robinson negligently hired or supervised Pella prior to the collision to render summary judgment improper?

Decision: The Court affirmed the decision of the lower court granting summary judgment for Robinson. Plaintiffs did not challenge the trial court's finding that Pella was an independent contractor with respect to the service provided to Robinson by written contract, but asserted that Robinson is liable for negligent hiring. To succeed on that theory, stated the Court, plaintiffs must show that Robinson knew or should have known that Pella was unfit for the contracted job so as to create a danger of harm to other third parties. The record showed that, for four years, Pella safely hauled a large number of loads for Robinson without incident and maintained a satisfactory rating with the FMCSA (checked by Robinson at the time it entered a contract with Pella and annually thereafter); that Pella's driver had a valid CDL for seven years prior to the accident, with no record of traffic tickets or moving violations; and that the driver's vehicle was in good condition, with no equipment safety violations when the accident occurred. The Court found that, based on this evidence, Robinson complied with the standard of care described by plaintiffs' expert for selection of carriers by brokers. Evidence of the safety record of another entity owned and operated by the owner of Pella was irrelevant. Robinson was therefore not negligent in hiring Pella to haul freight as an independent contractor; and summary judgment was properly entered.

Presenter: Rob Rothstein

36. ***Blake Robert Hobbs v. Rui Zhao***, 2015 WL 427819, 2015 U.S. Dist. LEXIS 11762 (N.D. Okla. Feb. 2, 2015)**.** In or around December 2012, Amazon sent a bid for transportation of a shipment from its distribution center in Hebron, Kentucky to its distribution center in Phoenix, Arizona to all transportation companies that Amazon had previously approved as "primary carriers." TLC, one such company, accepted Amazon's bid to carry the cargo. TLC brokered the freight to ATE, another logistics company, who then brokered the freight to Grand, another logistics company, who then contacted Zhao, the owner and sole driver of R&M, informing him of the cargo's location and the requirements for delivery. Amazon had no contact with ATE, Grand or R&M; and its only contact with Zhao was when he arrived at the warehouse in Kentucky to pick up the cargo. Zhao used his own tractor and trailer. While en route with the cargo, Zhao was involved in an accident, resulting in severe injuries to plaintiff. Plaintiff sued Amazon under the theories of negligent entrustment and negligent hiring; and Amazon moved for summary judgment.

Issues: (1) Whether the cargo Amazon gave Zhao to haul in his tractor-trailer constitutes a dangerous instrumentality sufficient to support a claim of negligent entrustment under Oklahoma law; and (2) whether Amazon is liable for negligent hiring when Amazon did not select the actual driver but rather selected the first in a chain of brokers, the last of whom brokered the freight to the driver.

Decision: For purposes of negligent entrustment under Oklahoma law, an owner or provider of a vehicle or other dangerous instrumentality has a duty to use ordinary care to avoid lending it to another whom he knows or reasonably should know is intoxicated/careless/reckless/incompetent to drive. Plaintiff acknowledged that Amazon did not provide a vehicle to Zhao, but asserted that the cargo tendered by Amazon constituted a dangerous instrumentality. Though noting that Oklahoma has not defined what constitutes a dangerous instrumentality, the Court ruled that, as a matter of law (looking to another state's definition), no reasonable jury could find the cargo to be a dangerous instrumentality, i.e., any instrumentality or substance which by its very nature is calculated to do injury. Summary judgment was therefore granted on the negligent entrustment count.

In the negligent hiring count, plaintiff asserted that Amazon owed plaintiff a duty of care in selecting Zhao to transport the cargo. Oklahoma law requires a company like Amazon, which routinely ships goods, to exercise reasonable care in selecting a competent carrier. The Court concluded, however, that Amazon did not select Zhao and therefore is not liable for Zhao's negligence. There was no evidence – and no assertion by plaintiff - that Amazon did not use reasonable care in its selection of TLC. Summary judgment was therefore granted on the negligent hiring claim; and Amazon was terminated as a defendant.

Presenter: Steve Dennis

37. ***Midwest Trading Group, Inc. v. GlobalTranz Enterprises, Inc.,*** 2015 WL 1043554 (N.D. Ill. March 5, 2015). Plaintiff, Midwest Trading Group, Inc. ("Midwest"), filed a lawsuit in to recover damages arising out of the theft of a shipment of Android tablets from GlobalTranz Enterprises, Inc. ("GlobalTranz"), a broker. Midwest asserted three claims against GlobalTranz: that GlobalTranz fraudulently induced Midwest to enter into a contract with GlobalTranz by misrepresenting that it would provide insurance for the shipments; that GlobalTranz negligently failed to take steps necessary to assure the shipments were not stolen during transit; and that GlobalTranz breached its contract with Midwest by failing to obtain the insurance that it agreed to procure.

Issue: GlobalTranz moved for summary judgment asserting that the Interstate Commerce Termination Act ("ICCTA"), 49 U.S.C. § 14501(c)(1), preempted Midwest's fraud and negligence claims, and that Midwest's only viable claim against GlobalTranz was for breach of contract. GlobalTranz disputed that it contracted to procure shipper's interest insurance for Midwest, but nonetheless moved for summary judgment on Midwest's breach of contract claim asserting that even if Midwest's allegations were accepted as true, GlobalTranz's standard terms and conditions limited GlobalTranz's liability for any breach of contract to the amount of the fees charged by GlobalTranz, which were less than $5,000.

Decision: In its initial ruling, the Court granted GlobalTranz's motion based on ICCTA preemption of Midwest's negligence claim, but denied the motion with respect to the fraud claim. *Midwest Trading Group, Inc. v. GlobalTranz Enterprises, Inc*. 59 F. Supp. 3d 887 (N.D. Ill. 2014). The Court, citing *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013), reasoned that the ICCTA only preempted state laws that concern the "motor carrier's transportation of property," and not alleged acts or omissions that occur before or after the motor carrier's transportation of property. In the view of the court, the alleged fraud based on misrepresentation concerning insurance related to pre-transportation conduct, and therefore, was not preempted by the ICCTA.

The court also denied summary judgment on Midwest's breach of contract claim. The Court concluded that there was a question fact as to whether the parties intended for the imitation of liability contained in the terms and conditions to apply to the GlobalTranz's breach of the alleged obligation to procure insurance, noting that "[i]t would not make sense for Midwest to pay a higher fee for added protection on the shipments, yet not actually be entitled to afford themselves of that protection if GlobalTranz did not satisfy the obligations under the agreement."

GlobalTranz filed a motion to reconsider, asserting that the Court failed to appreciate that a property broker's services are provided prior to actual transportation, and that the Courts' rationale would effectively preclude the preemption of all claims against property brokers. The Court agreed

and acknowledged that it had misread *Dan's City*, recognized that the definition of "transportation" in Title 49 includes "arranging for… the movement of property" and, therefore, concluded "[a]broker arranges for the movement of cargo *before* it is moved, but that service is nevertheless within the scope of 'transportation," as defined in Chapter 49. Furthermore, the Court recognized that the ICCTA not only preempts claims arising from the performance of the broker's services, *i.e.*, the arranging of transportation, but also to claims which "relate to" those "services." The court recognized that the term "services" has been construed broadly to "encompass all elements of the [] service bargain," and concluded that in this case, the service bargain allegedly included the purchase of insurance. Therefore, the court concluded Midwest's fraud claim based on alleged misrepresentations concerning insurance "related" to the services of a property broker, and therefore, was preempted by the ICCTA.

GlobalTranz also asked the Court to reconsider its ruling with respect to the breach of contract, arguing that the limitation of liability was broad enough to include a breach of contract for the failure to procure insurance, but the Court declined to revisit its ruling.

Presenter: Dennis Minichello

VII. FREIGHT CHARGES

38. ***Federal Marine Terminals, Inc. v. Dimond Rigging Company, LLC,*** United States District Court for the Northern District of Ohio (Case No. 1-13-1329). This case involved a claim by Federal Marine Terminals, Inc. ("FMT"), a marine terminal and stevedore business in Cleveland, Ohio, against Dimond Rigging Company LLC, d/b/a Absolute Rigging & Millwrights, seeking payment for terminal services provided by FMT to Absolute with regard to a shipment of machinery from Cleveland, Ohio, to China in 2011. FMT based its claim both on a breach of contract, as well as a marine terminal operator schedule which it explicitly incorporated into its rate quotes to Absolute, and which is also an implied contract under federal law. Absolute defended the case by asserting that it had satisfied its contractual obligations to FMT by paying $100,000 for terminal services, and also counterclaimed against FMT for financial losses it claimed were the result of FMT's mishandling and misloading of the cargo onto the ocean vessel.

In the first decision in this case (discussed at the January 2015 meeting), the court granted FMT's motion for summary judgment on the counterclaim, applying COGSA and finding that the counterclaim was time-barred under the one-year statute of limitations in COGSA. The case went to trial on the breach-of-contract action in January 2015 before an advisory jury. The advisory jury returned a verdict in the amount of $160,000. After post-trial briefing, the court took the case under advisement for its official decision.

The court adopted FMT's proposed findings of facts, supported by the joint uncontested stipulation of facts and evidence introduced at trial, including trial exhibits and the testimony of FMT's two trial witnesses. The court determined that FMT met its burden of proof that it and Absolute had a contract for marine terminal stevedoring services that were subject to the terms and conditions of the MTO schedule on the rates set forth or authorized therein. Those were enforceable and binding on Absolute as an implied contract because the MTO schedule was published on FMT's website and made available to customers upon request, and because the rate quotes issued by FMT to Absolute before handling of the cargo expressly incorporated the terms and conditions of the MTO schedule. The court determined that, under the Shipping Act of 1984,

as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998, marine terminal operator schedules are automatically binding and enforceable. The fact that Absolute had not signed the *pro forma* invoice was of no consequence because it had paid $100,000 in advance funds to FMT, evidencing acceptance of the contract, and because Absolute never objected to the terms of the rate quote or the MTO schedule incorporated therein at any time before it started delivering its cargo to FMT for loading onboard the ocean vessel. There was no evidence to suggest that Absolute and FMT had agreed to limit the total costs for FMT's work to $100,000, as contended by Absolute.

Therefore, the court entered judgment in favor of FMT in the amount of $235,243.43, consisting of the principal damages for the unpaid invoices in the amount of $153,656.39 and contractual interest in the amount of $81,557.04.

Presenter: Dennis Minichello

39. ***Freightmaster USA, LLC. V. FedEx, Inc.,*** 2015 WL 1472665, United States District Court for the District of New Jersey (May 31, 2015). Plaintiff, Freightmaster, performed cargo and freight delivery services for Defendant, FedEx from approximately December 2008 to April 2010 pursuant to a June 2009 Agreement. Freightmaster alleges is sent numerous letters to FedEx asserting the debt. Predecessor counsel for Plaintiff previously filed suit against FedEx in New Jersey State Court for services performed from November 2003 through September 2007. That case was dismissed without prejudice on October 30, 2013. Predecessor counsel for Plaintiff then brought a nearly identical case against FedEx in New Jersey State Court but covering a different period of time then the prior lawsuit. FedEx removed the case and moved to dismiss asserting it was not properly served with the summons and complaint.

Issues: (1) is the plaintiff allowed to re-serve the defendant after removal, (2) is the plaintiff precluded from bringing another lawsuit given the prior suit, and (3) has the contractual limitations period of 9-months expired?

Decision: Regarding service, the Federal Court had to look to the New Jersey rules of civil procedure and the "good faith" exception to a lack of proper service. Freightmaster opposed the motion and took the position the issue as not relevant inasmuch as FedEx was not prejudiced because they appeared in the case. Applying the New Jersey six year period of limitations to the cartage agreement, the Court found there was no prejudice in denying the Defendant's motion but there could be prejudice to Plaintiff if the motion were to be granted. As such, the Court allowed Freighmaster a short time frame to re-name the proper FedEx entity and re-serve.

As for the claim preclusion argument, the Entire Controversy Doctrine requires that all issues have to be raised in one case or they may be waived. Nevertheless, because the current lawsuit was for contract damages for a different period of time then the damages in the first lawsuit and because there was no adjudication on the merits of that prior lawsuit, the Court held that the Entire Controversy Doctrine did not bar the instant case.

Defendant also moved to dismiss taking the position the case was time barred by a nine month provision in the contract. Plaintiff argued that the nine month period was for the Plaintiff to issue and invoice, not a suit limitations provision. The Court agreed with Plaintiff and held the

nine month provision in the contract was not a bar to the lawsuit. As such, the Court denied that part of Defendant's motion as well.

The Court however did grant that part of Plaintiff's motion to dismiss certain causes of action of unjust enrichment and for promissory estoppel. The Court ruled that those causes of action are quasi-contract causes of action and are not otherwise permitted if, as here, the parties had a contract.

As such, the Court dismissed the unjust enrichment and promissory estoppel causes of action but allowed the case to proceed on causes of action for breach of contract, breach of the duties of good faith and fair dealing, negligence, and bad faith.

Presenter: Tom Martin

40. ***Mark IV Transportation & Logistics, Inc. v. Lightning Logistics, LLC, et al.,*** U.S. District Court, District of New Jersey. Plaintiff Mark IV Transportation & Logistics sued defendant Lightning Logistics, alleging (1) collection of the amount due under a book account and (2) breach of contract. Plaintiff alleges that it entered into a business relation with defendant Lightning Logistics to provide delivery services, and Lightning Logistics owes plaintiff approximately $100,758.67 for services rendered. Plaintiff also alleged that Scott Evatt, the president of Lightning, used Lightning and Crosstown Courier as an alter ego and then restructured and dissolved Lightning to avoid paying its debts. Plaintiff filed an amended complaint adding additional parties, Scott Evatt and Crosstown Courier, Inc, as defendants. In the second amended complaint, the plaintiff sought to pierce Lightning Logistics' corporate veil and impose alter ego liability on Crosstown and Evatt.

Defendant filed a motion to dismiss plaintiff Mark IV Transportation & Logistics, Inc.'s second amended complaint pursuant to Fed. R. Civ. P 12(b)(2) and 12(b)(6), or in the alternative, a motion for summary judgment. The court referred the motion to a United States magistrate judge who issued a Report and Recommendation recommending the motion to be dismissed for lack of personal jurisdiction and deny as moot the motions to dismiss under Rule 12(b)(6).

Issues: Plaintiff raised the following six objections to the Report and Recommendation: (1) the statement that plaintiff did not explain how piercing the corporate veil leads to personal jurisdiction, (2) the application of Tennessee law, (3) the legal standard applied to the claim against Evatt, (4) failure to properly analyze certain facts by relying primarily on financial transactions, (5) the credibility determinations with respect to a loan between defendants, and (6) the judge's misapplied the law and failed to mention and consider relevant facts.

Decision: After responding to each objection, the court adopted the Report and Recommendation and dismissed the plaintiff's complaint for lack of personal jurisdiction. Ultimately, the Report and Recommendation also concluded that the plaintiff failed to meet its burden in showing that the defendant Lightning's corporate veil should be pierced, and that Crosstown was Lightning's alter ego. The court found Crosstown Couriers to be a separate entity from Lightning, as they were formed at different times for different purposes.

The court noted that the plaintiff provided insufficient evidence to warrant piercing the corporate veil because the plaintiff was unable to show that the corporation was a "sham or a

dummy" or that piercing Lightning's veil is "necessary to accomplish justice" as required by law. The evidence presented merely warranted as discretionary actions of an informally run LLC which resulted in an inability to pay a creditor.

Presenter: Edwina Kessler

VIII. MISCELLANEOUS

41. ***Soo Line Railroad Co. v. Werner Enterprises***, United States District Court for the District of Minnesota (Jan. 20, 2015). This is a property damage case involving post-trial motions for judgment and for a new trial by a railroad carrier hit by a tractor-trailer owned by Werner. A Werner truck driver collided with a train operated by Canadian Pacific, which filed suit seeking collision clean-up costs on theories of negligence, nuisance and trespass. Before trial, the court ruled that the FMCSA regulations *did not* preempt Werner's state law arguments "rooted in the common-law doctrine of sudden incapacitation". The jury returned a verdict in favor of Werner and Canadian Pacific filed motions for a judgment as a matter of law and for a new trial.

Issues: Whether Werner proved its "sudden incapacitation" defense by a preponderance of the evidence, and whether the court properly instructed the jury that a violation of the FMCSA regulations constitutes negligence per se.

Decision: The court denied both motions. The court determined that Werner had submitted expert testimony that the Werner driver became incapacitated just before the accident and that the jury's finding was not unreasonable notwithstanding the issues presented by Canadian Pacific as to the driver's complaints of fatigue before the accident. Finally, the court determined that it had properly instructed the jury as to negligence per se and the effect of the FMCSA regulations.

Presenter: Eric Benton

42. ***Nikorak v. Fedex Corporation,*** U.S. District Court, District of New Jersey. Plaintiff Gary Nikorak was employed by Omni-Serve LLC to operate de-icing equipment at the Newark Liberty International Airport. Omni-Serve leased plaintiff to Contego, who then provided de-icing services to defendant FedEx. FedEx then reimbursed Contego for the plainiff's wages as well as trained and supervised the plaintiff. The plaintiff alleged that while de-icing a FedEx plane at the FedEx facility, he was standing on a bucket on top of the de-icing truck. While still on top of the bucket, the de-icing truck drove away, the bucket was struck by the tail of the plane, causing the plaintiff's injuries. The plaintiff sued the defendants, FedEx and Contego, for negligence. Defendants FedEx and Contego filed a motion for summary judgment.

Decision: The court found that the plaintiff's tort claims against the defendants were barred because the court found the defendants to be a "special employer" under the New Jersey's Workmen's Compensation Act. To be a special employer, there must be (1) an express or implied contract for hire between employee and employer, (2) the work being performed by the employee is essentially the work of the employer in question, (3) the employer has right to control the details of the work, (4) the employer pays employee's wages and benefits, and (5) the employer has the power to hire, discharge, or recall the employee.

The plaintiff had conceded that Contego was a special employer. The court found FedEx to be a special employer because the plaintiff consented to defendant FedEx's direction and control creating an implied contract. The court also found that plaintiff's work de-icing planes was essentially work FedEx could also do, that FedEx controlled the plaintiff's work by providing supervision, and FedEx paid the plaintiff's wages by reimbursing Contego who then reimbursed Omni-Serve. Finally, the court found that FedEx had the power to hire, discharge, or recall the Plaintiff because FedEx had the right to control whether the plaintiff was assigned to work for FedEx. Thus, the court granted defendant's motion for summary judgment.

Presenter: Tom Koziol