CONFERENCE OF FREIGHT COUNSEL
WINTER 2015 MEETING
SOUTH SEAS PLANTATION - CAPTIVA ISLAND, FLORIDA
JANUARY 10-12, 2015

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I. CARRIER LIABILITY

1. ***Zurich American Insurance Company v. Team Tankers.*** 2014 U.S. Dist. LEXIS 89260 (S.D. NY, June 30, 2014). Shipper engaged carrier to transport 3,500 metric tons of a liquid chemical from Texas to South Korea via ocean. The chemical degraded. The parties disputed whether the degradation occurred during transit, or whether it happened after the chemicals were unloaded and stored at the destination. During the period of transit and thereafter, the market value for the chemical dropped. Thus, shipper ultimately sold the chemical at a much lower price than he had initially intended. The price was low due to the degraded quality of the chemical as well as the plunge in market value. Shipper alleged that carrier failed to clean out its chemical holding tanks, thus contaminating the chemicals. Carrier contended that the chemical degraded and discolored after it left the ship and while the chemical was being stored in tanks at destination. An arbitration panel applied COGSA to the claims, ruling in favor of the ocean carrier. The shipper filed suit in U.S. District Court to vacate the arbitration award for manifest disregard of the law.

HOLDING: Under COGSA, if a shipper does not give notice of cargo damage within three days of delivery, acceptance of the cargo is prima facie evidence that the goods were delivered undamaged. In other words, the goods are presumed to have been delivered in good condition. The shipper did not overcome this presumption, and the court ruled in favor of the ocean carrier because the shipper's evidence did not establish the damage took place aboard the ship. The

arbitration award was confirmed, and the shipper's motion to vacate the arbitration award was denied.

Presenter: Scott McMahon

2. ***Mediterranean Shipping Co. v. Cargo, Inc.*** 2014 U.S. Dist. LEXIS 87380 (S.D. NY, June 23, 2014). Ocean carrier transported four containers from California to Brazil. The containers were not cleared from the terminal within the free time allowed by the ocean carrier's tariff, and demurrage charges accrued. The ocean carrier sued the party listed on the bill of lading for $232,000 in accrued demurrage charges because that company was the entity named on the bill of lading. Defendant conceded that the ocean carrier was entitled to demurrage, and that the calculations of demurrage were correct. However, the defendant argued it was not the shipper, but rather was merely an agent for the shipper who arranged the shipment. Defendant contended that the ocean carrier should be suing the true shipper. Defendant further argued that it disclosed that it was merely an agent, therefore was not liable for the demurrage charges. Ocean carrier contended that under the terms of its tariff, the bill of lading and other shipping documents, defendant was defined as the "merchant," which is a broader term than "shipper," and as the merchant, defendant was bound to the carrier and responsible for demurrage.

HOLDING: The court determined that defendant was a "merchant," regardless of whether or not it was the shipper or an agent of the shipper. Pursuant to the bill of lading, defendant was obligated to pay the demurrage, and the ocean carrier's motion for summary judgment was granted.

Presenter: Steve Block

3. ***Adler v. Westjet Airlines.*** 2014 U.S. Dist. LEXIS 92332 (S.D. Fla., July 8, 2014). Plaintiff boarded a plane in Fort Lauderdale bound for Canada. At the time of the operative events, the plane had not yet left the ground in Fort Lauderdale. Plaintiff was accompanied by her four pound Yorkshire terrier, which was a "service dog." Plaintiff alleged that she suffered from an unspecified disease of the nervous system which required her dog to accompany her on the flight. Prior to takeoff, plaintiff took a sleeping pill and fell asleep with the dog on her lap. Westjet's flight attendant was uncomfortable with the circumstance of a sleeping passenger with a dog on her lap. Apparently, the flight attendant felt this situation could be a hazard during the takeoff phase of the flight. Westjet required the passenger to leave the plane. This caused significant difficulties, because the passenger was groggy from her sleeping pill, but she nonetheless left the plane under protest. The next day, plaintiff flew to Canada on another flight. Plaintiff sued Westjet for unspecified damages alleging injury and humiliation. Plaintiff stated claims for negligence, fraudulent misrepresentation and negligent training and supervision. Plaintiff also alleged discrimination based on her disability.

HOLDING: The court held that the negligence and the negligent training claims could proceed, but the court dismissed the fraudulent misrepresentation and negligent supervision claims. The court held that the Montreal Convention applies to plaintiff's claims, but the Montreal Convention does not compel dismissal of the lawsuit at this stage. The court held that Westjet's removing the passenger from the plane constituted an "accident" under the Montreal Convention. The motion to dismiss was granted in part and denied in part.

Presenter: Beata Shapiro

4. ***Campbell v. Air Jamaica.*** 2014 U.S. App. LEXIS 13056 (11th Cir., July 8, 2014). Plaintiff Campbell's Air Jamaica flight from Kingston to Fort Lauderdale was delayed. After being allowed to board, he was recalled to the boarding gate and forced to reschedule on another flight the next day, when his permanent residence alien card was scheduled to expire. Air Jamaica charged him a $150 fee to change flights and refused to board him in a hotel. Because the airline terminal was under repair, he was required to spend the night outside, exposed to the elements. In his complaint, Campbell alleges this ordeal caused him to be hospitalized with a heart attack. Campbell sued Air Jamaica for $5,000,000 alleging he suffered an "accident" during embarkation or disembarkation within the meaning of the Montreal Convention. Air Jamaica moved to dismiss, and the trial court dismissed the case, from which dismissal Campbell appealed to the 11th Circuit.

HOLDING: The 11th Circuit held that while Campbell's lawsuit was timely, there was no "accident" within the meaning of Article 17 of the Montreal Convention. Campbell's being moved from the plane and rescheduled on another flight is a routine travel procedure and inconvenience. As such, does not constitute an "accident" under the Montreal Convention. Thus, Campbell cannot recover damages from Air Jamaica based on being bumped. In addition, Air Jamaica's refusal to provide Campbell with a free hotel room is not an "accident" under the Convention, and Campbell is not entitled to recover under this theory. Once Campbell refused to pay for a hotel room, his roaming through the terminal and spending the night outside was his own choice. The areas outside the terminal were not controlled by Air Jamaica, and Campbell was not under the control of the air carrier. Accordingly, any events occurring outside the terminal were not attributable to Air Jamaica. However, the court held that Campbell was entitled to pursue carrier for return of the $150 change fee under Article 19 of the Convention, which permits recovery of certain economic damages. Campbell will be entitled to pursue this portion of his case.

Presenter: Stephen Dennis

5. ***Burlington Coat Factory v. Jay Dee Trucking.*** 2014 WL 2440729 (N.J. Super A.D., June 2, 2014). Driver sued his employer Burlington Coat Factory for personal injury suffered while cargo was being unloaded from the truck owned by defendant Jay Dee Trucking at Burlington's loading dock. Burlington sued the motor carrier and its insurance carrier claiming defense and indemnity under Jay Dee's truckers policy. The court granted summary judgment to the insurer and Burlington appealed. The underlying plaintiff's accident arose when he slid between the dock and the trailer during unloading. The underlying plaintiff's lawsuit was couched in premises liability. Burlington claimed defense and indemnity because the underlying claim was an accident covered by Jay Dee's auto insurance policy.

HOLDING: The court held that the negligence of the premises owner in failing to maintain its loading dock, resulting in the underlying plaintiff's injury, cannot be viewed as a negligent use of the truck that would trigger insurance coverage under the motor carrier's insurance policy. The attempt to adjust the loading dock and its equipment, although necessary to unload the truck, should not be construed to constitute use of the truck. Accordingly, once it was determined that

the fall was caused by the condition of Burlington's premises, coverage was precluded under the truck policy.

Presenter: Hank Seaton

6. ***OshKosh Storage Company v. Kraze Trucking, LLC.*** Case No. 13-C-1246 (E.D. Wis., July 17, 2014). OshKosh retained Kraze to deliver a truckload of kosher cheddar cheese from Minnesota to Wisconsin under a bill of lading. The shipment was made pursuant to specifications of OshKosh's customer, Dairy Concepts. At the time of delivery, Kraze's driver checked in with OshKosh, had his paperwork stamped, and received a lot number. OshKosh told Kraze's driver to pull up to the north side of the building and OshKosh's man would break the seal. Kraze's driver parked his truck, opened the seal and the trailer doors. OshKosh rejected the load because the seal was broken. OshKosh sued Kraze alleging that a rejection of the load was required by Kraze's breaking the seal prematurely. Kraze asserted that the absence of the seal does not mean the shipment was contaminated or otherwise damaged, and as such, there was no "actual damage" under Carmack.

HOLDING: The court determined that whether the broken seal constituted damage under Carmack often depends on the actions of the end customer. Food products transported with a broken seal may be accepted by a customer, however, food distributors have a duty to ensure that food is safe for the public, requirements that shipments be unsealed only by authorized personnel are intended to provide assurance that the shipment has not been contaminated. Based on this reasoning, the court determined that OshKosh established a prima facie case under Carmack. Further, because the Kraze driver did not refute OshKosh's showing that verifying unbroken seals is industry practice, Kraze was not successful in demonstrating that it was free of negligence. The court granted summary judgment to OshKosh.

Presenter: George Wright

7. ***Open Systems Technologies v. Transguard Insurance Company.*** 2014 WL 3625737 (W.D. Michigan, S.D., July 22, 2014). Plaintiff arranged for shipment of two computer arrays from Oklahoma to Michigan. One of the arrays was damaged. Specifically, the array was shipped from Oklahoma to the consignee's facility on East Beltline in Grand Rapids. The shipment went to the Beltline location because the intended location on Bradford Street was under construction. Approximately 2-1/2 months after delivery to the Beltline location, a subsequent shipment, by another carrier, moved the array from Beltline to Bradford. Plaintiff sued defendants in state court for damage to the array. Defendants removed arguing that the transportation of the array from Oklahoma to the Bradford location constituted one continuous act of shipping, and thus was an interstate shipment falling within the jurisdiction, and preemption, of the Carmack Amendment. Plaintiff argued that delivery of the array of the Beltline location terminated the interstate shipment, and subsequent shipment was intrastate.

HOLDING: The court determined that the parties separated the shipment of the array into distinct portions with separate contracts. Because plaintiff contracted with one carrier to ship the array from Oklahoma to Beltline, and executed a separate contract with a separate carrier and separate bill of lading to move the array from Beltline to Bradford, this was not a true

interstate shipment, and accordingly, the second leg of the shipment was intrastate. The court concluded that Carmack did not apply to the case and remanded.

Presenter: Mike Tauscher

8. ***Mahmoud Shaban and Sons Co. v. Mediterranean Shipping Co., S.A*****,** 2014 WL 6480669 (S.D. New York, November 14, 2014). The case involves a series of shipments of 22,000 metric tons of rice from the facility of the Shipper's agent in Williams, California to Aqaba, Jordan. The Plaintiff shipper purchased the rice from a third party seller (American Commodity Company or "ACC"). ACC stored the rice for various periods of time spanning a few days to in some cases two weeks. The rice was loaded into multiple one ton tote bags and then was containerized. ACC contracted with an NVOCC called Globerunners to coordinate the transportation from Williams, California to the Port of Oakland, California and then on to Aqaba, Jordan. Mediterranean Shipping Co., was the ocean carrier. The subject rice arrived in a damaged condition either with insects, water damage or odors.

Plaintiff moved for summary judgment taking the position it had proved its *prima facie* case under COGSA and that the $500.00 per package limitation did not apply. The Court denied both motions.

Plaintiff argued it could prove delivery to the carrier in good condition based on a series of Bills of Lading, survey reports, outgoing inspection reports and USDA reports all showing the containers or the tote bags of rice were either "fit for human consumption" or "clean onboard." The Court denied summary judgment because, upon review of the reports, they only related to either the outside of the totes or the outside of the containers but not the condition of the contents. None of the inspectors issuing their reports actually saw, confirmed and verified the condition of the rice itself as it went into the one ton totes. Moreover, there was evidence the infestation could have begun at the seller's warehouse where, at times, the rice sat for days or weeks. Accordingly, the Court found there were questions of fact and that the Plaintiff could not prove its *prima facie* case under COGSA at least not on summary judgment.

As to the motion for summary judgment against the $500.00 per package limitation, Plaintiff argued the course of the voyage to take the rice past Aqaba, Jordan, and traveling an additional 1,142 nautical miles or 3,886 nautical miles (as the case may be) before circling back to Aqaba, Jordan was an "unreasonable deviation" that included additional risk to the freight. As such, Plaintiff argued the $500.00 per package limitation would not be applicable as per COGSA. The Court denied that motion holding that "unreasonable deviation" can only be determined upon an assessment of all of the surrounding circumstances. There was also evidence the practice of the ocean carrier in traveling past Aqaba, Jordan and then returning was part of the carrier's normal route, that it made transportation more efficient and that the Plaintiff knew about it beforehand all made the question of "unreasonable deviation" an issue of fact for trial.

Presenter: Steve Block

9. ***Architectural Contractors, Inc. and The Cincinnati Insurance Company, Inc. v. Schilli Transportation Services, Inc.***, 2014 WL 7014337, 2014 U.S. Dist. LEXIS 172324 (W.D. Ark., December 10, 2014) and 2014 U.S. Dist. LEXIS 177893 (W.D. Ark., December 29, 2014).

Plaintiff, ACI, purchased building materials from a supplier for use in a construction projection. Defendant, Schilli, an interstate motor carrier, handled two of the loads at the supplier's request, one of which was the subject of this case when the wall panels arrived at the job site damaged. Due to contractual deadlines on the construction project, ACI installed the panels so that it could pour the concrete floor before winter, and subsequently replaced the damaged panels with new panels. ACI made an insurance claim and was paid approximately $14,600.00. In this suit, ACI and its insurer seek from Schilli under the Carmack Amendment the cost to remove and replace the damaged panels, including materials, labor, equipment, overhead and profit.

HOLDINGS: After denying the parties' cross motions for summary judgment, through which plaintiffs sought a ruling on liability under Carmack and Schilli sought enforcement of the nine-month claim rule in its agreement with ACI's supplier, the Court conducted a one-day bench trial on the issues. Finding that ACI had neither actual nor constructive knowledge of the nine-month claims-limitation period (ACI was not familiar with the carrier's agreement with the supplier and nothing on the bill of lading mentioned the agreement or the nine-month rule), the Court held that the claim, filed two years after delivery, was timely; and denied relief to Schilli. The Court then turned to the elements of plaintiffs' prima facie case, finding sufficient evidence that Schilli received the panels in good condition and delivered them in damaged condition. Plaintiffs, however, were limited in their recovery to the replacement cost of the damaged panels, approximately $6,300.00. The Court found that plaintiffs failed to meet their burden to establish with sufficient specificity the amount of freight and equipment expenses that related solely to the replacement panels; and failed to show that the carrier had knowledge of the terms of ACI's construction schedule with which it could have reasonably foreseen ACI's claimed need to complete the project with damaged panels and later incur the expenses of replacing them. Plaintiffs' claims for special and consequential damages in the form of replacement labor, overhead and profit were therefore denied.

In the later decision, the Court ruled on plaintiffs' motion for costs and prejudgment interest, again giving plaintiffs' only some of what they requested. Over objections by Schilli, the Court ruled that, because plaintiffs' damages were reasonably ascertainable, plaintiffs are entitled to prejudgment interest – compound, not simple – at the applicable federal rate from the date that notice was given to the carrier, not the date of loss, through the date of the Court's decision. The extensive briefing on the subject resulted in an award of $15.83 in interest. In ruling on plaintiffs' request for costs, the Court first addressed defendant Schilli's contentions that, because plaintiffs recovered less than half of what they sought and lost on some counts at the summary judgment stage, it is defendant that was the prevailing party. As the party in whose favor a judgment was rendered, regardless of the amount of damages awarded, it was plaintiffs that the Court determined to be the prevailing party, entitled to recover all accurate costs associated with conducting depositions.

Presenter: Marshal Pitchford

10. *Sodikart USA v. Geodis Wilson USA, Inc.*, 2014 U.S. Dist. LEXIS 111249 (S.D. Fla. 2014). This is a "*res judicata*" case arising from the loss of machinery and parts during shipment from France to Arizona. Plaintiff hired defendant Wilson Freight Services to arrange for the shipment pursuant to a contract that had been in existence three years prior to the subject shipment. In the Complaint, plaintiff averred that the defendant had represented to it that the

price for each shipment would include "complete insurance against any loss." Plaintiff allegedly tendered freight to defendant for three years under this mistaken assumption.

Predictably, a loss occurred and when plaintiff submitted a claim to defendant for the loss, defendant advised plaintiff that its assumptions regarding the procurement of insurance for the subject shipment, and all other previous shipments, were erroneous. Defendant, in addition to denying the claim for insurance coverage, also denied liability for the loss.

Plaintiff sued in Florida state court, alleging a violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), and a fraud count. Defendant removed the case to federal court based upon diversity. Plaintiff then amended its Complaint and dropped its fraud claim. Thus, the only claim remaining was the FDUTPA claim. However, this was not the first case that plaintiff filed against defendant arising from the same loss. Prior to filing the aforementioned lawsuit, plaintiff had filed a separate lawsuit, in the same federal court where the second suit was removed to, alleging a single claim under Carmack. (The "Prior Case").

The two Complaints were identical in terms of the factual averments. As noted, however, the Prior Case was filed before the instant case. As part of the Prior Case, plaintiff sought to amend its Complaint to add claims for fraud and punitive damages beyond the deadline for amendment of pleadings set forth in the Court's Scheduling Order. According to the Court's Opinion, the plaintiff engaged in subterfuge to obtain the Court's approval to amend, and once the Court learned of the subterfuge, leave to amend was reversed. Plaintiff then sought an Order to amend the original Scheduling Order in an effort to extend the deadline to amend retroactively. The Court denied this petition, and, in doing so, closed the door on the fraud and punitive damage claims in the Prior Case. The Prior Case, therefore, contained only the Carmack claim.

The case on the Agenda concerns plaintiff's effort to re-litigate the fraud and punitive damages claims by asserting a separate, subsequent Complaint under the FDUTPA. Defendant argued that the FDUTPA claim in the instant case was precluded by *res judicata*. Plaintiff acknowledged that it failed to satisfy the four-part test for *res judicata* under Florida law, but it nonetheless argued that a federal court exercising diversity jurisdiction must apply state law. Thus, under Florida law, plaintiff argued that since the Complaints were not "identical," *res judicata* did not apply.

RULING: The Court strongly disagreed with plaintiff's arguments. The Court ruled that while a federal court sitting in diversity must apply state law when determining if *res judicata* bars a previously litigated state court claim, it must apply federal law when determining if *res judicata* bars a previously litigated federal case. Since the Prior Case was considered in federal court, federal law would apply.

The Court then determined whether the present claims could have been raised in the Prior Case, using the four-part test. The Court specifically considered whether the procedural rulings in the Prior Case, where the Court denied plaintiff's petitions to amend its Complaint (thus shutting the door on those claims in the Prior Case), constituted an "adjudication on the merits." Finding that the orders in the Prior Case did, in fact, constitute an "adjudication on the merits" of the fraud and punitive damages claims, the court in the instant case dismissed plaintiff's Complaint based upon FDUTPA.

Presenter: Ron Horowitz

11. *Hongbo Han v. United Continental Holdings, Inc.,* 2014 U.S. App. LEXIS 15433 (7th Cir. 2014). This case concerns the proper interpretation of an airline's frequent flyer agreement. (FFA). Plaintiff was a member of United's MileagePlus Program and filed suit in Illinois federal court alleging that United breached the terms of the FFA by crediting him for miles flown based upon the distance between airports, rather than upon the actual miles flown. He argued that he should have gotten credit for weather diversions and landing delays, so that he would get credit, literally, for every mile that the aircraft stayed in the air for a trip.

The trial court ruled in favor of United, finding that the FFA provided United with the ability to interpret the contract terms, even though the FFA did not specifically define "miles flown." Plaintiff appealed to the Seventh Circuit. The Seventh Circuit examined the terms of United's FFA under plaintiff's breach of contract claim. The court noted that the FFA did not specify the method by which United would determine a "mileage credit." United argued that the silence precluded the Court from adding terms to the FFA. The court disagreed and found that the silence created ambiguity. Plaintiff argued that the ambiguity must be construed in his favor, but the court rejected this argument as well. The court found that the remaining provisions of the FFA clearly allowed United to interpret how to calculate miles, so long as the interpretation was reasonable. Plaintiff did not argue that United's interpretation was unreasonable. He merely argued that his interpretation was better. The Court found this argument to be fatal and affirmed the trial court's ruling.

RULING: The affirmed the trial court's ruling that plaintiff failed to sufficiently allege that United breached the terms of its frequent flyer agreement because the program rules allowed United to use its own discretion to interpret the meaning of the FFA, and because United's interpretation was reasonable. Thus, the basis for calculating miles under the FFA was affirmed, and the dismissal of plaintiff's Complaint was affirmed.

Presenter: Chris Merrick

12. *Exel Inc. v. Southern Refrigerated Transport, Inc.,* 2014 WL 4243762 (S.D. Ohio 2014). This case concerns the loss of a shipment of pharmaceuticals, and the broker's attempt to recover the full replacement value of the shipment from the carrier, on behalf of, and for the benefit of, the shipper. Plaintiff, Exel, is a 3PL. Non-party Sandoz (the shipper) contracted with Exel to arrange for the transportation of its goods. Exel, separately, contracted with Southern Refrigerated Transport, Inc. ("SRT"), to transport its shipper's goods, including Sandoz's goods. The contract (the "MTSA") between Exel and SRT contained several key provisions, including the following:

1. A provision stating that SRT would be liable to Exel for loss, damage or injury to goods;
2. Bills of lading are subject to and subordinate to the terms of the contract;
3. The measure of damages is replacement value;

4. SRT must carry $100K in insurance for cargo loss or damage;

5. The $100K insurance provision shall not act as a limitation of liability.

A shipment of Sandoz pharmaceuticals was brokered to SRT by Exel and was stolen in transit. Sandoz demanded $8.5mm from Exel. Exel then demanded the same amount from SRT. Exel did not pay Sandoz for the shipment. When SRT denied the claim and offered $56K pursuant to its own bill of lading's released value provision, Exel filed suit on behalf of Sandoz, pursuant to an assignment. Exel's Complaint contained counts for breach of contract, breach of bailment, Carmack and a request for declaratory judgment that the $100K insurance requirement acted as a limitation of liability for the loss.

SRT argued that Carmack and not the MTSA, controlled the claim, and that the bill of lading, with its release valuation, was the only contract of carriage for the shipment. SRT filed a Motion for Judgment on the Pleadings, which resulted in the dismissal of the breach of bailment claim. Summary judgment motions were then filed, where the primary issue was whether the Carmack Amendment preempted Exel's breach of contract claim. The trial court ruled that Carmack did not preempt Exel's breach of contract claim against SRT. In other words, Carmack did not preempt a broker's claim for breach of contract against a carrier. Thus, the motion for summary judgment was denied. Additional discovery took place and another round of summary judgment motions followed.

In the last round of motions, Exel argued that the MTSA is an enforceable contract, that SRT breached the MTSA, and that SRT was required to pay full replacement value for the lost shipment. In response, SRT reiterated that Carmack preempted the breach of contract claim, that the MTSA was not an enforceable contract, that Exel was not the proper party in interest, and that the $100K insurance provision acted as a limitation of liability. Finally, SRT argued that the bill of lading limited its liability to $56K.

RULING: The court rejected SRT's Carmack preemption argument, finding that while there was a split among the Circuits as to whether a broker's contract claim against a carrier is preempted, the trial court's decision in the negative was not a manifest error. The court then rejected SRT's argument that the MTSA was not an enforceable contract. Specifically, SRT argued that the contract was not enforceable because it failed to identify the subject matter of the contract, a quantity term, and a price term, and because it fails to define the measure of damages. The court, as noted, rejected each and every one of those arguments. The court looked to the "plain language of the MTSA" to find that SRT was liable to Exel for the loss. The court found that the MTSA, and not the bill of lading, controlled the rights and remedies of the parties, and that the MTSA clearly required Exel to pay the replacement value of goods tendered to it by Exel. The court also rejected SRT's argument that Exel could not recover money from SRT because Exel had not paid its shipper (Sandoz) and, therefore, had suffered no damages. The court found that Sandoz had, in fact, demanded the money for the loss from Exel, and the fact that Sandoz did not file suit against SRT is immaterial.

Finally, citing the clear language of the MTSA regarding the $100K insurance coverage requirement, and the language stating that the insurance requirement shall not act as a limitation

of liability, the court rejected SRT's request for declaratory judgment. The court ruled that SRT was liable to Exel for $5,890,338.82, plus prejudgment interest and costs.

Presenter: Eric Zalud

13. *Exel, Inc. v. Southern Refrigerated Transport, Inc.,* 2014 U.S. Dist. LEXIS 168762 (S.D. Ohio 2014). This is a continuation of the preceding case, and involves the posting of a supersedeas bond by SRT to cover the judgment in favor of Exel. As noted in the preceding summary, the trial court found in favor of Exel and ordered SRT to pay Exel $5,890,338.82, plus interest and costs. SRT then filed a Motion to Stay Execution of the Judgment and to waive the posting of a supersedeas bond. SRT argued that the Court has discretion to stay execution of the judgment and to waive the posting of a supersedeas bond and that there was no need for SRT to post a supersedeas bond since it had obvious and significant financial resources to cover any judgment should its anticipated appeal ultimately fail. Exel argued that SRT failed to demonstrate the type of "extraordinary circumstances" needed to provide the Court with discretion to waive the bond requirement or to stay execution of the judgment.

The court considered and analyzed Federal Rule 62(d) and noted that its purpose was to ensure that the prevailing party will recover in full if the judgment is affirmed on appeal, and to protect the appellant against the risk that payment cannot be recouped if the trial court's ruling is subsequently reversed on appeal. The court then addressed when the posting of a supersedeas bond may be waived. It noted that the Sixth Circuit had not yet articulated a clear standard for waiver, and that an "extraordinary circumstance" standard had emerged as a standard in the absence of appellate guidance. There was also a dispute about the amount of the bond, particularly the amount of prejudgment interest and the date on which the interest should have started to accrue.

RULING: The court found that SRT failed to satisfy the "extraordinary circumstances" standard for waiver of the bond. The court was not convinced by SRT's unilateral assertions, without further proof, that its parent company, Covenant Transport, would satisfy any judgment. The court also noted that Covenant's earnings had been less than stellar and that its decision to increase its reserves in anticipation of an adverse appellate ruling was, by itself, unpersuasive.

With respect to the amount of the bond, the court noted that the law of the forum state should be applied in diversity cases where the amount of a bond is at issue. The court then calculated an estimate for post-judgment interest, and came up with a bond requirement of $7,212,185.65. The court issued an order directing SRT to post the bond within sixty days. The ruling was issued on December 5, 2014.

Presenter: Eric Zalud

14. De Beers Canada Inc. v. Ootahpan Company Limited et al, 2014 ONCA 723 (CanLII). To quote the factual summary by the first instance "motion judge": "The plan was simple: ship the bulky and expensive transformer by rail to Moosonee and transfer it there by crane and sling apparatus onto a truck for the rest of the trip. The plan failed, however, when the transformer fell from the sling causing hundreds of thousands of dollars of property damage".

De Beers owned the transformer. It retained R.L.P. Machine and Steel Fabrication Inc. ("RLP") and Oohtahpan Company Limited ("Oohtahpan") for different aspects of the carriage from origin to DeBeer's gold mine in Northern Ontario. The shipment was routed through rail yards in Moosonee where Oohtahpan provided logistics and personnel to help off-load the transformer. RLP provided the crane operator. RLP and Oohtahpan were retained separately by De Beers.

De Beer's insurer commenced a subrogation claim against RLP and Ootahpan for the damages sustained. The defendants asserted that pursuant to the terms of their respective contracts with De Beers, as well as pursuant to a certain contract between De Beers and AMEC Americas Limited ("AMEC") that they were entitled to shelter under the De Beer's insurance coverage and that De Beers had waived its right to sue them. In connection with the project De Beers had hired AMEC as its preferred supplier of engineering, consulting and project / construction management services. They entered into a contract to set out a framework for a co-operative business relationship to develop diamond and gold mines. This AMEC agreement made no reference to RLP or Oohtahpan or to the transformer itself. Under the AMEC agreement De Beers undertook to provide and maintain at its expense certain insurance policies including a Course of Construction Property Insurance Policy and an Inland and Marine Cargo Insurance policy. Coverage under the latter was stated to apply to property destined for the completion of a project. The AMEC agreement also provided that all policies of insurance must be endorsed to require insurers to waive any right of subrogation against either party and its contractors and subcontractors.

Under the De Beers - Oohtahpan contract De Beers was required obtain "All Risk Course of Construction Property Insurance, including Risks of Transportation". De Beers was also required to include its contractors and subcontractors as additional named insureds. The DeBeers – RLP contract in turn required De Beers to obtain insurance to protect itself and all contractors and subcontractors against certain perils, including transit risks of property shipped to the mine site. Accordingly De Beers purchased a policy of Marine Cargo Insurance which ultimately responded to this loss and in respect of which insurer now sues in subrogation. This policy anticipated that De Beers might waive the insurer's rights of subrogation with the insurer agreeing to be bound by any such waivers. RLP and Ootahpan brought a motion for summary judgment for the action to be dismissed against them.

The important highlights of the court's analysis (recently affirmed by the Ontario Court of Appeal) ruling in favor of the defendants are as follows: (1) It is now clear in Canadian law that 'third party beneficiaries' that are not privy to a contract may benefit from the same in certain circumstances (i.e. the parties to the contract must have intended the relevant provision to confer a benefit to a third party, expressly or by implication, and the involvement or actions of the third party must be within the scope of the agreement between the initial parties). (2) The court held that on the facts of the case that the services provided by RLP and Ootahpan were, in fact, intrinsic to the mine operation, coming within the contemplation of the AMEC agreement – with such contractors being entitled to the benefit of De Beer's insurance coverage. (3) Alternatively, RLP and Ootahpan enjoyed protection under their own respective contracts with De Beers. Both required De Beers to maintain insurance coverage for its own benefit and for that of its contractors for certain losses including transit risks. As De Beers had indeed purchased such coverage – which indemnified it for the loss – the defendants enjoyed protection there under. In light of the 'covenant to insure' it was viewed as wasteful and unnecessary for the contractors to

purchase their own liability insurance. The court affirmed the principle that an undertaking to provide insurance for the benefit of another in respect of certain risks amounts to a waiver of claims in respect of losses covered by such insurance. (4) By agreeing to maintain coverage for the risk of this loss for the benefit of the contractors, De Beers assumed the risk of this loss and its insurer can have no higher right to pursue recovery from contractors than De Beers had.

Presenter: Gordon Hearn

II. LIMITATIONS AND NOTICE

15. ***Federal Marine Terminals, Inc. v. Dimond Rigging Co., dba Absolute Rigging & Millwrights*****,** 2014 WL 4809427. On September 26, 2014, Judge Donald Nugent of the U.S. District Court for the Northern District of Ohio, Eastern Division, granted Plaintiff/Counter-Defendant Federal Marine Terminals, Inc.'s ("FMT") motion for summary judgment, dismissing with prejudice all claims raised by defendant Dimond Rigging Co., d/b/a Absolute Rigging & Millwrights ("Absolute"). This dispute arises out of the shipment of a dismantled transfer stamping press from a defunct Chrysler plant in Twinsburg, Ohio. The press was to be shipped out of the Port of Cleveland to a port in China. Absolute contracted with FMT to handle the terminal and storage of the various press pieces prior to shipment, and the carrier separately contracted with FMT to handle the loading of the cargo onto the vessel. Due to numerous issues which arose during loading, only about 25% of the cargo was loaded onto the vessel before it set sail, in order to avoid the closing of the St. Lawrence Seaway for the winter. FMT sued Absolute for additional charges relating to the terminal work, and Absolute counter-claimed, seeking monetary damages arising out of the reshipping of the cargo that was left behind.

FMT moved for summary judgment on the counterclaim, asserting that it was entitled to the protections of COGSA as incorporated in the bill of lading, and extended to subcontractors such as itself via the Himalaya clause. As Absolute had failed to bring its claim within one year from the date of delivery, or expected delivery, FMT claimed Absolute's counterclaim was time-barred. Absolute countered that the bill of lading terms and conditions could not apply to the portion of the cargo that was not ultimately loaded onto the vessel, and further claimed that there was an issue of fact regarding whether FMT was acting as the agent of Absolute or the carrier during loading. The court agreed with FMT that the fact that some of the cargo was not actually loaded onto the vessel did not affect the applicability of the bill of lading terms and conditions, where the parties had exchanged a booking note prior to boarding, as well as form terms and conditions, prior to loading. Therefore, Absolute reasonably should have expected that all of the cargo would have been subject to those bill of lading terms and conditions, citing the rule in *Luckenbach S.S. Co., Inc. v. Am. Mills Co.*, 24 F.2d 704 (5th Cir. 1928). Further, the court found no issue of fact regarding FMT's actions as an independent contractor of the carrier, rather than Absolute, during the loading process, falling squarely within the language and protections of the Himalaya clause. The court agreed that Absolute's claims were not filed in accordance with the COGSA one-year statute of limitations, and, therefore, were time-barred. The court further found that each of Absolute's state-law claims (for breach of contract, negligence, negligent misrepresentation, promissory estoppel, and declaratory judgment), were preempted by the application of COGSA.

Presenter: Rob Rothstein

16. ***Sunoco, Inc. (R&M) v. Enbridge Energy, L.P. v. Shell Trading (US) Company and Shell Pipeline Company, L.P.***, 2014 N.Y. Misc. LEXIS 5394, 2014 N.Y. Slip. Op. 33221 (U) (Sup. Ct., N.Y. Co. 2014). Applying Carmack claim requirements and federal common law claim requirements to a pipeline carrier and finding the claims were time barred. Plaintiff, Sunoco, alleges that between December 2000 through October 2001, Defendant, Enbridge, short delivered 27,000 barrels and 58,000 barrels of oil via a pipeline owned and operated by Defendant, Enbridge. The dispute relates to certain "accounting" errors (the "58,000 Barrel Claim") and, also, whether certain quantities of oil were properly converted from barrels to cubic meters (the "27,000 Barrel Claim"). Combined, the damages sought were over $2,500,000.00. The Defendant filed a Third-Party Complaint against Shell for defense and indemnification.

The pipeline shipments were governed by rate tariffs and rules and regulations which are filed with the Federal Energy Regulatory Commission ("FERC"). As per the Interstate Commerce Act and the Carmack Amendment thereto, FERC approves and publishes the tariffs, which tariffs, in turn, govern liability. According to FERC No. 29 and No. 3, Rule and Regulation No. 17, there is a nine month claim period for delay, damage or loss resulting from the transportation of a shipper's crude oil via pipeline and, further, that the shipper's failure to make a timely claim is a waiver of shipper's right to bring suit.

As it relates to the 27,000 Barrel Claim (involving alleged mistakes converting barrels to cubic meters), Defendant moved for summary judgment asserting Plaintiff failed to make a timely claim and that the lawsuit was thus time barred. The Court reviewed the fact that the Plaintiff shipper received a monthly recapitulation and that accordingly, Plaintiff had all of the information it needed to file a claim at the latest in August 2002. The first time the shipper raised a question (let along an actual claim) was not until December 2004 via an e-mail. Moreover, the lawsuit was not filed until 2009 and so the 27,000 Barrel Claim was time barred. In so holding, the Court cites *Mafcote Industries, Inc. v. Milan Exp. Co., Inc.*, 2011 WL 3924188 (D. Conn. 2011)(stating courts have "strictly applied the claim-filing requirements contemplated by the Carmack Amendment . . ..."). Plaintiff countered that the tariff was ambiguous but the Court rejected that argument after applying New York State law on the issue of contract interpretation and concluded that the tariff, as a whole, was not subject to more then one reasonable interpretation. Accordingly, the 27,000 Barrel Claim was time barred.

On the 58,000 Barrel Claim (involving alleged accounting errors), Defendant contended that although a document was sent to the Defendant within nine months, the document did not constitute a "claim" under Federal Common Law and was thus time barred as well. The Court noted that the 49 C.F.R. § 1005.1 claim requirements did not apply to pipeline carriers. Instead, Federal Common Law applied to determine whether a document constituted a claim. The Court then identified case law related to the Federal Common Law on the issue and it appeared the Federal Common Law was similar (but not as specific) to the requirements for the sufficiency of a claim under 49 C.F.R. § 1005.1. Under the Court's review of Federal Common Law, the claim has to "possess characteristics of a demand for compensation or amount to a notice of intention to claim compensation for loss suffered." *Browning, King & Co. v. Davis*, 120 Misc. 520 (Sup. Ct., NY Co. 1923, aff'd, 208 A.D. 780 (1st Dept. 1924), aff'd, 238 N.Y. 607 (1924). Relying on an exchange of e-mails both within and after the nine month claim period, Plaintiff asserted its written e-mails were sufficient to constitute a timely claim. The Court disagreed finding instead that read as a whole, the e-mails were largely Plaintiff's internal investigation of the accounting

discrepancy instead of a claim against Defendant for damages. As such, the Court concluded that the 58,000 Barrel Claim was time barred. Accordingly, Defendant's motions for summary judgment were granted. As a corollary, the Third Party Defendants' motions for summary judgment to dismiss the defense and indemnity claims were granted because the Court already dismissed the Plaintiff's underlying claims and so there was nothing to defend or indemnify.

Presenter: Bill Bierman

III. LIMITATIONS OF LIABILITY

17. ***United Van Lines, LLC v. Lohr Printing.*** 2014 WL 3556483, 2014 U.S. Dist. LEXIS 97557 (D. NJ, July 18, 2014). Lohr shipped a leased printer from Kentucky to New Jersey with United Van Lines. Prior to shipment, United's agent, McCollister's Transportation Services, advised Lohr's representatives that the printer did not need to be packaged for shipment, but rather, needed only to be broken down and shipped in pieces. When a United truck picked up the goods, Lohr signed the bill of lading in two places. The parties disputed whether Lohr signed the bill of lading before or after the printer was loaded on the truck. The cargo was damaged during shipment. United sued Lohr for a declaratory judgment, arguing that the released value of $5.00 per pound governed Lohr's claim for damage to the cargo.

HOLDING: The court held that United complied with the applicable requirements for limiting liability with its bill of lading. United maintained a valid tariff, and Lohr agreed to the terms expressed in the bill of lading by signing it in two places. United's tariff was available for review at all times, and Lohr was free to contact McCollister's or United at any time prior to the transaction or at the time of pickup to review the tariff, or obtain additional time to do so. The court further noted that United was not required to provide the tariff to Lohr but merely to have it available in case he requested to see it. United's liability was limited to $5.00 per pound. Lohr further argued that McCollister's could be held liable, and such liability falls outside the Carmack Amendment's preemption. However, the court determined that the cargo in question fell within the definition of "household goods," McCollister's was clearly acting under United's authority, and McCollister's had no independent liability. The court denied Lohrs' counterclaims against United and McCollister's as being preempted by Carmack

Presenter: George Wright

18. ***H. Kramer & Co. v. CDN Logistics.*** 2014 WL 3397161 (N.D. Illinois E.D., July 11, 2014). Kramer hired CDN Logistics to transport brass ingots from Illinois to Iowa. On their way to Iowa, the ingots were stolen. Kramer sued CDN for loss of the ingots under Carmack. CDN moved to dismiss arguing that the parties agreed CDN would not held liable for losses resulting from criminal acts. The bill of lading stated that it was subject to the classifications and tariffs in effect on the date of issue. CDN's tariff provided that it would not be liable for criminal acts.

HOLDING: The court determined that plaintiff stated a valid claim under Carmack. However, the court held that it could not sustain CDN's motion to dismiss that CDN's liability is limited as a matter of law because whether Kramer had actual notice of the CDN limitation of liability is a

fact-intensive inquiry raising a number of unresolved material factual issues. The motion to dismiss was denied pending further discovery

Presenter: Dennis Minichello

19. ***Sivak v. United Parcel Service.*** 2014 WL 2938088 (E.D. Michigan, July 1, 2014). A class of plaintiffs sued UPS arguing that UPS intentionally overcharges customers who purchase additional liability coverage for packages with a declared value of over $300. UPS moved to dismiss. The court addressed three governing documents for shipments at issue: the UPS tariff/terms and conditions of service; the UPS rate and service guide; and the plaintiffs' source document from the shipment. UPS' terms limit its liability for loss or damage over $100. UPS' terms provide a 180 day notice requirement and define third party retailers for purposes of increasing liability for lost or damaged shipments. Plaintiffs claim that UPS documents falsely state that UPS provides the first $100 of coverage for shipments for free, and plaintiffs seek to halt the practice of defrauding UPS customers. Plaintiffs complained that UPS' conduct constitutes a breach of contract, violation of 49 U.S.C. § 13708 regulating a motor carrier's billing and collection practices, unjust enrichment and violations of the RICO statute.

HOLDING: The court held that the shipping contract made clear that UPS' liability for loss and damage is limited to $100 without a declaration of value. Regarding plaintiffs' Section 13708 claim, the court held that even if plaintiffs had a private right of action under this section, plaintiffs failed to set forth any facts indicating that UPS does not disclose the actual rates, charges or allowances under the statute, and Section 13708 does not support a claim that a common carrier overbilled for shipping services. With respect to plaintiffs' RICO claims, the court held plaintiffs did not identify a misrepresentation sufficient to infer a scheme to defraud as required by the RICO statute. Because the fraudulent activity about which plaintiffs complain is derived solely from the plaintiffs' flawed interpretation of the shipping contract, there is no fraudulent conduct to support any of plaintiffs' claims, and the motion to dismiss was granted.

Presenter: Kathy Garber

20. ***Daniel Young, Inc. v. Seneca Insurance Co.,*** 2014 WL 5480810, 2014 U.S. Dist. LEXIS 153922 (E.D. Penn., October 30, 2014). Ductile iron pipes stored by plaintiff Young, “a full service logistics organization,” were damaged in the process of loading onto a flat bed truck at the commencement of transportation of the pipes from plaintiff’s warehouse in Maryland to Qatar. Upon arrival in Qatar, the consignee rejected the damaged pipes and made a demand upon Young for the replacement cost of the pipes. Plaintiff paid $143,798.79 to resolve the claim and sought reimbursement from its insurer. The insurer, Seneca, paid Young $2,000.00, applying to the four-container load the $500.00 per package limitation set forth in the combined transport bill of lading issued by its ocean carrier subsidiary one week after the pipes were damaged. Plaintiff challenged Seneca’s position, asserting that the limitation provision was inapplicable to its claim for coverage because the damage to the pipes occurred before the bill was issued. In response, Seneca took the position that the bill was effective for “the entire time the goods were in the care, custody and control” of Young. Plaintiff sued Seneca for breach of contract and estoppel. Defendant filed a summary judgment motion, asserting that plaintiff’s claim for replacement value of the pipes fails as a matter of law.

HOLDING: The Court granted defendant's summary judgment motion, limiting the insurer's liability to $2,000.00. In so doing, the Court focused on the unambiguous language in the insurance policy, which provided that coverage extends to loss of or damage to the personal property of others while in the care, custody or control of the insured and that the valuation of such property is governed by any written contract applicable to the insured's liability. With the bill of lading, by it terms, binding on the shipper and all connecting carriers and covering the entire time of possession of the goods, the bill issued by Young's subsidiary extended to Young and extended to the period of possession by Young prior to the ocean transportation. Therefore, defendant had no duty to Young to cover the full replacement cost of the pipes. The $500.00 per package limitation in the bill capped Seneca's liability to its insured.

Presenter: Hillary Booth

21. ***Engineered Arresting Systems Corp. v. M/V Saudi Hofuf,* 2014 WL 4756420 (S.D.N.Y. Sept. 5, 2014).** An interesting case involving an analysis of damage to machinery in six trailers which were loaded onto a RoRo carrier ship which is specifically designed to store cargo (like automobiles) which can be rolled on and rolled off of a ship. The shipment here – "mobile aircraft arresting systems"-was damaged when it was stored on deck rather than below deck and suffered damages caused by exposure to seawater. The ocean carrier filed a motion for summary judgment on the grounds that its liability was limited to $500 per container or $3,000.00. The carrier presented excellent proof by affidavit that it was usual and customary for goods of this nature to be stored on deck rather than below deck. The Court determined that such a practice was not a deviation from the terms of the bill of lading and enforced the COGSA limitation of liability.

Presenter: Richard Furman

22. ***Chartis Seguros Mexico, S.A. de CV v. HLI Rail & Rigging, LLC,* 3 F.Supp.3d 171 (S.D.N.Y. 2014).** Freight owner/insurance subrogee seeks to enforce its claim against a shipper and a rail carrier for over $2 million in damaged transformers caused by the derailment of a train moving from Laredo, Texas to Port Arthur, Texas. The freight moved on a price quote, two bills of lading and "Rules Publication 9012". The carrier moved for summary judgment to enforce its limitation of liability to $25,000 which was found in the price quote and incorporated into the bills of lading. Carrier argued that it provided two levels of protection by offering full Carmack liability as well as the $25,000 limited liability.

HOLDING: The Court denies the motion for summary judgment and refuses to limit the liability of the carrier to $25,000. First, the Court determined that the contract between the parties was not a §10709 contract which simply means that the parties had entered into a contract for rail services to which the Carmack Amendment does *not* apply. In order to constitute a §10709 contract, the Court reviewed the *Sompo v. Norfolk Southern* decision and determined that the parties evidenced an intent to *follow* the requirements of Carmack rather than depart from them. Therefore, the Court held that the contract was not a §10709 contract and Carmack could apply. Second, the Court determined that the fact that the movement originated in Mexico did not affect the application of Carmack because the bills of lading designated the origin and destination as Texas. Furthermore, *intrastate* transportation by rail was covered by Carmack because the freight movement constituted transportation under the STB's jurisdiction because it

was transportation "between a State and a place in the same …State as part of the interstate network." *See* 49 U.S.C. §105012(A).

Having determined that Carmack applied to the movement, the Court addressed the effort to limit the liability of the carrier to $25,000 based upon a price quote incorporated into the bills of lading. The Court denied this effort finding that the carrier did not provide the shipper with alternate levels of liability notwithstanding the argument that the carrier had offered full Carmack protection as one level of liability. The district court engages in an elaborate analysis of limitations of liability in the rail context including constructive notice (based upon the forms on the carrier's website) and incorporation by reference. Finally, the court denied the owner/insurance subrogee's motion for summary judgment on full Carmack liability and determined that genuine issues of material fact as to the delivery of the transformers in good condition prevented the court from granting the motion.

Just for fun, the court provided an advisory opinion that it would enforce *Kirby v. Norfolk Southern Ry. Co.* and stated that it would enforce any limitation of liability that the shipper/logistics coordinator entered into with the owner of the transformers.

Presenter: Paul Keenan

23. Sompo Japan Insurance Company of America v. Norfolk Southern Railway Company, et al.; Nipponkoa Insurance Company v. Norfolk Southern Railway Company, et al., 2014 WL 3844155 (2nd Cir. 2014). These cases arise from the SDNY's rulings arising from a train derailment in the United States and the resulting damage to the train's cargo. The cargo originated in Asia and was destined for various recipients in the United States. Both appeals concerned the interpretation and enforceability of a provision contained in a through bill of lading issued by an upstream ocean carrier that designated the upstream carrier as the sole entity responsible to cargo owners for damage or loss to the cargo, thus relieving the railroads from liability to the cargo owners. In addition, Nippponkoa claimed that the upstream ocean carrier assigned the claim to it and that it was entitled to pursue its claims against the railroads based upon contractual indemnification.

The derailment occurred in 2006 and the original litigation was based upon plaintiffs' Carmack claims. Following the Supreme Court's ruling in *Regal Beloit*, which made it clear that that Carmack does not apply to the shipments at issue, the cases were remanded for the court to consider the remaining state law claims. Specifically, plaintiffs asked the court to decide the provisions in the ocean carriers' bills of lading that purport to designate the ocean carrier as the sole entity responsible to the cargo owners for damage to the cargo. In addition, Nipponkoa's contractual indemnity claim was challenged by the railroads.

When the cases returned to the district court following *Regal Beloit*, the plaintiffs' state law claims, which were no longer preempted by Carmack, were reinstated. For the first time, the railroads argued that the Yang Ming and Nippon Express bills of lading's "Exoneration Clauses" prevented the railroads from being liable to the plaintiffs because those clauses designated the issuing carrier as the sole entity responsible to the cargo owners for loss or damage to the cargo.

Plaintiffs argued that defendants' reliance upon the Exoneration Clauses was untimely and that enforcement of the Clauses would violate public policy and would violate statutory law. Following motions for summary judgment, the trial court found the Yang Ming Exoneration Clause to be enforceable and granted summary judgment to defendants with respect to the shipments covered by the Yang Ming bill of lading. With respect to the shipments covered by both the Yang Ming and Nippon Express bills of lading, however, the court found that the Exoneration Clause in the Nippon Express bill of lading was ambiguous. Following motions for reconsideration, the court ruled that, with the exception of a single shipper's goods under the Nippon bill of lading, the Exoneration Clauses in both bills of lading were, indeed, enforceable. Both sides appealed the ruling to the Second Circuit.

RULING: The Second Circuit affirmed the trial court's rulings in both cases and found that the defendants are entitled to enforce the liability-limiting provision in the upstream carrier's bill of lading against the plaintiffs. However, the judgment in favor of Nipponkoa was sustained because the defendants' challenges to that judgment were waived at the trial court. The court rejected plaintiff's arguments that the defendants' reliance upon the Exoneration Clauses was untimely, citing the "mandate rule." In short, the court found that the Supreme Court merely ordered the case back to trial court for consideration of plaintiff's "further grounds for relief." In doing so, it did not preclude defendants from raising affirmative defenses to the "further grounds." However, as noted, the court ruled that the railroad did, in fact, waive its defenses to Nippon's contractual indemnification claim, and that claim survived summary judgment.

Presenter: Paul Keenan

IV. PREEMPTION

24. ***Certain Underwriters at Interest at Lloyds of London a/s/o First State Depository, LLC, v. UPS of America, Inc.*****, 2014 U.S. App. LEXIS 15419 (3rd Cir. 2014).** This case concerns the "true conversion" exception to Carmack preemption. Specifically, the case addresses the issue of whether a claim for "true conversion" acts as an exception to the preemptive scope of Carmack, or whether it merely serves as a potential defense to a limitation of liability claim asserted by the carrier.

The case concerned the alleged loss of twenty-seven packages of coins and special metals during shipment by UPS. First State Depository, the shipper, claimed that UPS drivers lost or stole the packages over an eight-week period, and claimed $150,000 in damages. Underwriters paid the claim and filed suit against UPS in federal court. Underwriters brought state law claims for breach of contract, negligence, negligent entrustment and "true fraudulent conversion." In their conversion claim, Underwriters alleged that UPS "unlawfully took, carried away, concealed, stole or obtained the shipments by fraud or deception." Underwriters' sued under diversity. No federal question jurisdiction was asserted.

The district court dismissed the Underwriters' claims pursuant to Fed.R.Civ.P. 12(b)(6), finding that Carmack preempted all of the Underwriters' state law claims. The trial court recognized that "some courts" have found that Carmack's liability limitations do not apply when the carrier has committed a true conversion, but held that this exception did not permit an action for true conversion based upon state law. In other words, a "true conversion" claim is a potential defense

to a limitation of liability argument, but it does not mean that Carmack does not apply. A "true conversion" claim does not, the court ruled, affect a preemption attack.

The district court also ruled that Underwriters failed to plead their "true conversion" claim with the particularity demanded by Federal Rule of Civil Procedure 9(b). Underwriters appealed the district court's ruling.

HOLDING: The Court of Appeals for the Third Circuit affirmed the district court's rulings. First, the court held that the Carmack Amendment preempts all state law claims for compensation for the loss of or damage to goods shipped by a ground carrier in interstate commerce. Second, with respect to the "true conversion claim," the court ruled that the "true conversion" exception is an exception to the liability limiting features of the Carmack Amendment, not an exception to its preemptive scope.

Presenter: Wes Chused

25. ***Gamson v. British Airways.*** 2014 U.S. Dist. LEXIS 76591 (DC, June 5, 2014). Plaintiff intended to fly from Washington to Granada, Spain for vacation. Plaintiff booked his trip with British Airways, who issued electronic tickets to the plaintiff for the destination Grenada. The electronic tickets did not have any indication of the county, airport code or flight duration. It was only during the flight that plaintiff realized he was headed for Grenada in the Carribean, rather than Granada, Spain. Plaintiff sued British Airways for breach of contract and negligence seeking to recover the value of his ticket, expenses for the lost vacation in Spain, lost wages and punitive damages. British Airways removed the case and filed a motion to dismiss arguing that the Montreal Convention and the Airline Deregulation Act preempted plaintiff's state law claims.

HOLDING: The court held that the lawsuit was not preempted by the Montreal Convention. Rather, plaintiff's claims arise from British Airways' failures in booking the ticket, not for damage to baggage or physical passenger injury. Errors in booking the ticket are not covered by the Montreal Convention. Further, the booking of the ticket was not part of an international journey, but rather preceded the journey. The court did, however, dismiss plaintiff's claims for punitive damages. Because the Montreal Convention defense was inapplicable, the court ruled that the Airline Deregulation Act did not provide a basis for removal, regardless whether it preempts plaintiff's claims, and the court remanded the case.

Presenter: Mark Andrews

26. ***Shipwash v. United Airlines.*** 2014 U.S. Dist. LEXIS 82623 (E.D. Tenn., June 18, 2014). Plaintiff flew roundtrip on United Airlines from Los Angeles to Hawaii. He was dissatisfied with his travel experience, alleging that the DirectTV did not include television shows, but only movies. Further, his return flight was cancelled due to mechanical reasons, and he was rebooked on a different flight leaving the following day. Plaintiff alleged that United Airlines treated first class passengers better than the plaintiff, gave them more information about accommodations and alternative flights and otherwise provided first class passengers more information than coach passengers. Plaintiff alleged that United's employees were rude to him, offered water to waiting passengers, but only to women and children, and only in very small

cups. Because there were no first class seats available on the rebooked flight, plaintiff had to sit in a coach seat, which caused him to suffer from claustrophobia. After this ordeal, United offered the passenger a $500 voucher and a refund of $25 for the DirectTV costs. Plaintiff was dissatisfied, and he sued United Airlines for negligence, fraudulent misrepresentation, violation of state consumer protection laws, civil conspiracy, breach of contract, conversion, unjust enrichment and negligent hiring. Plaintiff also alleged that United's contract of carriage was void as against public policy, as an adhesion contract, and was unenforceable because passengers had no opportunity to bargain with United.

HOLDING: The court held that plaintiff's claims were preempted by the Airline Deregulation Act and that United's contract of carriage is valid and enforceable. The motion to dismiss was granted and plaintiff was instructed to pursue his claims with the Department of Transportation.

Presenter: Clark Monroe

27. ***Dilts v. Penske Logistics, LLC.*** 2014 WL 3291749 (U.S. App., 9th Cir., July 9, 2014). Plaintiffs sued motor carrier defendants alleging that defendants routinely violate California's meal and rest break laws. The trial court certified a class of 349 drivers who typically work more than ten hours per day. Plaintiffs alleged that defendants program 30 minute meal breaks into employee shifts while failing to ensure that employees actually take those breaks. Plaintiffs further alleged that defendants created a working environment that discouraged employees from taking meal and rest breaks. Defendant removed the case to U.S. District Court and moved for summary judgment claiming preemption under the FAAAA. The trial court determined that California laws dictating breaks and restricting routes were preempted and plaintiffs appealed. Motor carriers argued that the state break laws mandated that no motor carrier service could be provided during certain times. They argued that mandatory breaks require drivers to take longer to drive the same distance, affecting service. Defendants further argued that break laws required carriers to alter the frequency and scheduling of transportation. Finally, the motor carriers argued that the break laws required them to schedule service in accordance with state law, rather than in response to market forces.

HOLDING: Rejecting each of these arguments, the 9th Circuit held that the FAAAA does not preempt California's meal and rest break laws because said laws are not related to the motor carriers' prices, routes or services.

Presenter: Bill Taylor

28. ***Action Towing, Inc. v. The Mint Leasing, Inc.,*** 2014 WL 6462372 (App. Tex., Houston 1st Dist. 2014). The case involves storage charges and allegations of conversion and violation of the Texas Theft Liability Act, FAAAA preemption and the “safety exception” to FAAAA preemption.

In late 2007, Mint, a vehicle leasing company, leased a 2008 Pontiac to Albert and Anita Martinez. They divorced and Anita took the car to El Paso, Texas where it broke down. Albert towed it to Houston. Anita refused to pay for the towing and so Albert then dropped the vehicle at Action Towing’s storage yard in League City, Texas. Action then sent an invoice for $1,735.00 in storage charges to Mint. Mint refused to pay taking the position the Martinez’ had

to pay but demanded return of the vehicle. Action refused and sold the vehicle at auction. Mint sued for conversion and civil theft under the Texas Theft Liability Act. The parties filed cross-motions for summary judgment. Mint argued it never gave permission to Action to store the vehicle and that, as such, Action's garage keeper's lien was invalid and that Action therefore was engaged in a conversion and violation of Texas law. Action countered that Mint's state-created causes of action were barred and preempted by the FAAAA under 49 U.S.C. § 14501 (c). Mint replied that Action bore the burden to prove that Action's actions were not within the "safety exception" to FAAAA preemption. Under the safety exception" to FAAAA, state laws that relate to "safety" and "regulatory authority" of motor vehicles are not preempted. Mint took the position on summary judgment that Action failed to carry its burden to prove that the "safety exception" to FAAAA preemption did not apply. Action countered that conversion and the Texas Theft Liability Act had absolutely nothing to do with the "safety exception" to FAAAA preemption and that, therefore, conversion and the Texas Theft Liability Act were preempted.

On cross-motions for summary judgment, the trial court agreed with Mint, found that Action had not conclusively proven every element of its FAAAA defense and then at a subsequent damages hearing ordered Action to pay $18,496.96 in damages, plus $1,000.00 as per statute, counsel fees and costs, plus interest. On appeal, Action contended it only stored (but did not transport) vehicles carried by others to its facility and that because it *offers* to make arranges with others to tow vehicles from its facility, that Action qualifies as a broker within the meaning of 49 U.S.C. § 13102. Action contended that as a broker, FAAAA preempted Mint's state-created causes of action. The Texas Court of Appeals then reviewed *Dan's City Used Cars, Inc. v. Pelkey*, ___ U.S. ___, 133 S. Ct. 1769, 185 L. Ed. 2d 909 (2013), a case involving storage charges as opposed to freight charges. In that case, the United States Supreme Court found that the state-created causes of action for payment of storage charges were not preempted by FAAAA because they were not "'related to' the service of a motor carrier 'with respect to the transportation of property.'" The Texas Court of Appeals concluded that, as in *Dan's City*, the lawsuit arose out of events occurring after the transportation concluded. Accordingly, the Texas Court of Appeals felt the instant case and the *Dan's City* case both involved storage charges (not freight charges) and that, therefore, there was no "transportation" and thus no FAAAA preemption.

Presenter: Kathleen Jeffries

29. *Mitsui Sumitomo Ins. Co. of America v. Basic Enterprises, Inc.,* 2014 WL 4407645 (N.D. Ind. 2014). Subrogation claim against Basic Enterprises for damages to a shipment of machinery. Basic filed a motion to dismiss the state law claims against it on the grounds that the claims were preempted by the Carmack Amendment. Insurer Mitsui argued that Basic was defending the claims against it on the grounds that it was not a motor carrier but was instead a broker.

HOLDING: Motion to dismiss granted because Mitsui "has not alleged a separate and distinct harm as a result of the alleged state law/common law bailment claim".

Presenter: Colin Bell

30. *Gordon v. United Continental Holdings, Inc.,* Case No. 2:13-cv-05967 (D. N.J., filed Sept, 3, 2014). This is another frequent flyer claim brought under the New Jersey

Consumer Fraud Act, the Truth-In Consumer Contract, Warranty and Notice Act, breach of the covenant of good faith and fair dealing, breach of contract, declaratory relief, unjust enrichment and injunctive relief. Mr. Gordon booked a flight for he and Ms. Chan to Japan. He saw that he did not have enough frequent flyer points to book a hotel room but knew that Ms. Chan did have sufficient point. However, when Ms. Chan attempted to book the hotel room, the number of points required exceeded those available to her. Apparently, Mr. Gordon received special rates because of the amount of time he had been in the frequent flyer program.

HOLDING: Following the decision of the U.S. Supreme Court in *Northwest, Inc. v. Ginsburg* and other decisions, the court granted United's motion to dismiss all of the claims on the preemptive effect of the Airline Deregulation Act with the exception of the breach of contract claim. The court dismissed the contract claim on the grounds that it was not plausible under the plain language of the Program Rules implemented by United.

Presenter: Tom Martin

31. ***Kendrick v. Southern Hills Movers, Inc., Case No. 2:14-cv-00204 (W.D. Pa., filed October 4, 2014).*** Plaintiff Trust entered into an agreement with the defendant household goods carrier to haul certain household goods from Pennsylvania to California. Plaintiff submitted a claim for nearly $12,000 in cost to repair or replace the items that were damaged during transit pursuant to the selection of Option 1 in the transportation contract. Plaintiff sued for violation of Carmack, breach of warranty and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL).

HOLDING: Carrier's partial motion to dismiss granted on the grounds that Carmack preempts breach of warranty and UTPCPL claims notwithstanding the argument of the plaintiff that the warranty was "separate and distinct from the delivery of the goods itself".

Presenter: Jim Wescoe

32. ***Starr Indemnity & Liability Company a/s/o Camper's World Apparel, LLC v. Atlantic Drayage & Transport, Inc. and Port Kearny Security, Inc.***, 2014 U.S. Dist. LEXIS 164070 (D.N.J. 2014). Preemption case where the Court denied the Defendant motor carrier's motion to dismiss the Co-Defendant drop yard's state created cross-claims. This is a subrogated $393,668.12 cargo loss case involving 914 cartons of apparel. Defendant carrier, Atlantic Drayage was to transport 2,440 cartons of apparel from Newark, New Jersey to Hicksville, New York. The carrier contracted with the Co-Defendant drop yard, Port Kearny Security ("PKS") to leave the trailer at PKS' secured lot overnight. Upon delivery of the freight to the consignee the next day, it was noted that 914 cartons were missing. Plaintiff sued Atlantic Drayage pursuant to Carmack and also sued PKS asserting state created causes of action such as negligence and breach of bailment. PKS asserted cross-claims against the carrier, Atlantic Drayage, for breach of fiduciary duty, breach of the covenant of good faith and fair dealing and for indemnity and contribution. Atlantic Drayage moved to dismiss the cross-claims as barred and preempted by Carmack. Among other things, Atlantic Drayage argued the contract with PKS was made pursuant to the interstate transportation and that cross-claims on the contract were made pursuant to Carmack and, accordingly, the state created causes of action in the cross-claim were

preempted. The Court denied the motion choosing instead to look at the cross-claims as stemming from the one page written contract between Atlantic Drayage and PKS.

Presenter: Wes Chused

33. *The People ex rel. Kamala D. Harris v. Pac Anchor Transportation, Inc., et al.* 2014 WL 3702674 (Cal. Sup. Ct. 2014). Defendant, Pac Anchor, is a trucking company based in Long Beach, California. Defendant Barajas is the owner of Pac Anchor. Separately, Barajas owned 75 trucks. Barajas recruits drivers for his company and he enters into lease agreements with Pac Anchor for trucks and drivers. Both Pac Anchor and Barajas classify these drivers as independent contractors. The drivers invest no capital, own no trucks and do not use their own tools or equipment. Drivers can be discharged without cause and have no operational control, and have no other customers. The drivers take all instructions from the defendants and have no separate operating authority or permits to operate independently. The Attorney General of California filed suit against the defendants for unfair competition under California's Business & Professional Code (CPL) based upon their alleged violation of state labor and insurance laws. Specifically, the State filed the action against defendants for misclassifying drivers as independent contractors and, in doing so, illegally lowering their costs by engaging in unfair competition, including failing to pay unemployment insurance, failing to pay unemployment training fund taxes and failing to pay disability taxes, income taxes and worker's compensation taxes, and by failing to pay minimum wages, among other things.

Defendants filed for summary judgment based upon FAAAA preemption, and the trial court granted the motion. The State appealed, and the trial court's ruling was reversed on the grounds that the state's UCL action is not related to defendants' prices, routes or services. Defendants petitioned for review. The issue presented is whether an action under California state law based upon a trucking company's alleged violation of state labor and insurance laws is "related to a price, route or service" of the company and, therefore preempted by 49 U.S.C. 14501(c)(1). Defendants made two preemption arguments. First, they argued that the FAAA facially preempts all claims against motor carriers brought under California's UCL. Second, they argued that the state's particular UCL claims were preempted as applied to the case.

HOLDING: The court found that 49 U.S.C. 14501(c)(1) does not preempt the state's claims against the trucking companies since the UCL is a "law of general application" that does not mention motor carriers or any other industry, for that matter. The court noted that other federal laws, such as the Federal Cigarette Labeling Act, do not preempt state consumer protection laws "of general application." The court noted: "Similarly, here the FAAA embodies Congress's concerns about regulation of motor carriers with respect to the transportation of property; a UCL action that is based upon an alleged general violation of labor and employment laws does not implicate those concerns."

The court also ruled that the State's specific claims under specific sections of the Labor and Insurance Code are not preempted, for the same reasons. The court again noted that the specific provisions make no reference to motor carriers or the transportation of property. As for defendants' argument that the UCL claims will affect the carriers' prices, routes and services, the court disagreed and found that nothing in the UCL prohibits the use of independent contractors.

The court stated that "Defendants are free to use independent contractors so long as they are properly classified."

Presenter: Christina Nugent

34. ***AIG Europe, Limited v. General System, Inc., et al.,*** **2014 WL 3671566 (D. Md. 2014).** This lawsuit concerns the truckload theft of pharmaceuticals in interstate transport. AIG, as the subrogated insurer of the cargo owner, sued motor carrier General System, Inc. General System filed a third-party complaint against broker TBB. At issue in the third-party claim was whether TBB advised General that the value of the load exceeded General's $100K insurance coverage limits and whether TBB should have brokered the load to a carrier with higher insurance limits. Plaintiff filed an amended complaint and sued TBB as a direct defendant. TBB then filed a motion to dismiss the claims. Specifically, TBB moved to dismiss AIG's claim that TBB was negligent. The court ruled that the FAAAA did preempt AIG's claims for negligence. However, the court refused to follow the Fourth Circuit's dicta in 5K Logistics and did not find that Carmack preemption applies to claims against brokers. However, since the court had already found that the FAAAA preempted plaintiff's claims, the issue of Carmack preemption was largely moot.

Presenter: Colin Bell

35. ***Tanus Cabinets Designs v. Cent. Transport,*** **2014 U.S. Dist. LEXIS 103879 (D. Nev. 2014).** Plaintiff hired broker Blue Grace Logistics for the interstate delivery of a cosmetics kiosk. Blue Grace hired carrier Central Transport to transport the kiosk. The kiosk was rejected at its destination in Rhode Island, and by the time it was returned to the shipper it was allegedly destroyed. Plaintiff filed suit in Nevada state court and defendant removed the case. Defendant then moved to dismiss plaintiff's state-law claims for breach of contract, breach of covenant of good faith and fair dealing, negligence and unjust enrichment as being preempted by Carmack.

RULING: Citing the Ninth Circuit's prior rulings in *Hall v. North American Van Lines, Hughes Aircraft v. North American Van Lines* and the Central District of California's ruling in *Coughlin v. United Van Lines,* the court found that all of plaintiff's claims were indeed preempted. The court specifically rejected plaintiff's argument that Carmack did not apply since the bill of lading for the shipment was not signed. The court noted that there is "no case law that supports the proposition that a missing signature and/or initials on a bill of lading constitutes a waiver of the Carmack Amendment." The court added that the bill of lading for the subject shipment "lacks any indication that the both parties agreed to waive their rights and remedies under the Carmack Amendment." After dismissing all of the state law claims, the court granted plaintiff leave to amend to file a proper Carmack claim.

Presenter: Jeff Simmons

V. JURISDICTION, VENUE REMOVAL

36. ***Atlantic Container Line AB v. Volvo Car Corporation,*** **2014 WL 4730152 (S.D.N.Y. Sept. 19, 2014).** This case involves approximately $10 million in damages allegedly

occasioned by an on-board fire started by a load of Volvo automobiles. The court decides the enforceability of a forum selection clause and addresses the proper pleading of a COGSA claim. ACL is the owner of the steamship M/V Atlantic Cartier. Volvo Car Corporation (VCC) is a Swedish corporation and its North American counter-part is VCNA. ACL contracted with VCC to transport the vehicles from Sweden, then to Germany and then to the United States. The parties entered into a Transportation Agreement which contained a compulsory arbitration clause requiring arbitration in Stockholm and a "supersession clause" which named the Transportation Agreement as preeminent over any inconsistencies with other documentation. The cargo was loaded on board the ship via two sea waybills which listed VCC as the shipper, VCNA as the consignee and New York, New York or Baltimore as the Port of Discharge (ACL was not listed on the sea waybill). Importantly, the waybill lists New York as the forum selected by the parties and a Himalaya clause. ACL, as the owner of the ship, filed a complaint in New York under COGSA, against VCC and VCNA on the grounds that the inherent nature of the goods being shipped caused the fire and that ACL did not consent or have knowledge of the dangerous condition of the automobiles.

HOLDING: On motions to dismiss, the Court held that it had personal jurisdiction over VCC (Sweden) because ACL was a party to the sea waybill (even though not named thereon) and could invoke its forum selection clause. Further, the defendants should have known about the forum selection clause invoking the four-part analysis of the Second Circuit in *M/S Bremen v. Zapata Off-Shore Co.* The clause was reasonably communicated to the defendants because it was in the sea waybill itself and not hidden and further, the defendants did not rebut the presumption of the enforceability of the forum selection clause. The Court also determined that the owner of the vessel was not a party to the Transportation Agreement which required arbitration of the dispute in Stockholm. Finally, the Court held that the doctrine of *forum non conveniens* did not apply in the face of an enforceable forum selection clause.

The Court likewise denied the motions of the defendants to dismiss the claims of the ship owner (ACL). The Court held that a COGSA claim did exist against VCC as the shipper but not against VCNA as the consignee on the grounds that consignees are not necessarily deemed to know of the inherent dangers of the goods they have purchased. Likewise, the Court denied the motion to dismiss the negligence claim against VCC but not VCNA. However, the Court denied the breach of contract claims as to both VCC and VCNA.

Presenter: Christina Nugent

37. *M3 Midstream, LLC v. South Jersey Port Corp.,* 1 F.Supp.3d 289 (D.N.J. 2014). A COGSA removal case which seems to have gotten it wrong. A buyer of 79,000 feet of pipe filed suit against the pipe seller, the carrier and the port in a New Jersey state court for damages caused to the pipe allegedly *after* delivery to the port and while it was being loaded for delivery, apparently due to forklift damage. The shipment moved from China, India and Korea to Camden, New Jersey. The freight moved on an ocean bill of lading which listed New Jersey as the destination for delivery with no provision for inland transportation. The bill of lading also contained Paramount and Himalaya clauses. The defendants removed the case to federal court on the grounds of COGSA preemption and the plaintiff moved to remand. Defendants argued that COGSA completely preempted the freight movement and that the buyer/plaintiff was bound by the provisions of the Himalaya clause under *Norfolk Southern Ry. Co. v. Kirby*. Plaintiff

argued that it was not relying upon the bill of lading and that its damages occurred after delivery to the port of New Jersey and that *Kirby* did not apply because the plaintiff did not participate in the negotiation for the terms of the bill of lading.

HOLDING: Motion to remand granted. The complaint does not implicate COGSA as the plaintiff, as master of its complaint, has not alleged a claim for damage that occurred at sea or during unloading. The court specifically stated that "[i]f damage to the pipe occurred during the voyage or offloading at Camden, that damage will not be recoverable herein by Plaintiff." The Court also rejected the argument that the Paramount and Himalaya clauses extended the protections of COGSA to downstream agents. The court reasoned that such clauses, negotiated by shippers and carriers, cannot bind third party buyers and the Court found no case law for such a conclusion. *Kirby* could not be extended to include buyers of goods suing for damages that may have occurred on the inland leg of a shipment.

Presenter: Jeff Cox

38. *Alaa Eladawey v. Federal Railroad Administration,* Case No. 2:13-cv-02976 (D. N.J., filed September 12, 2014). This case involves the failure of a plaintiff to file and serve an administrative claim against the Federal Railroad Administration for personal injuries she sustained while on a train in Hoboken, New Jersey which hit a "bumping post".

HOLDING: Motion to dismiss granted on the grounds that the Court lacks subject matter jurisdiction. A prerequisite to a Federal Tort Claims Act case is that an administrative claim be filed, that the United States be served and that the claimant prove service upon the U.S. The plaintiff could not prove service and the FRA denied receipt of the administrative claim.

Presenter: Tom Martin

39. *Kuehne & Nagel, Inc. v. A.G.R. Eschol Overseas, Ltd.,* 2014 U.S. Dist. LEXIS 113657 (S.D.N.Y., Aug. 14. 2014). Interesting decision under the *forum non conveniens* doctrine. Kuehne & Nagel (KN) facilitates the transport of cargo for its customers through the use of third party carriers. APL hired KN to provide logistics services between Afghanistan and Dubai and the US. HN hired a subcontractor based in Israel to support daily operations in the Middle East. Sub in turn hired another company to provide ground support including weighing the cargo. The latter company submitted invoices for services rendered to subcontractor who in turn billed HN who in turn billed APL for payment. APL noted discrepancies in the weigh tickets and, after an audit, determined that subcontractor had overbilled HN. This caused HN damages in its billings to APL. HN in turn sued subcontractor in New York for unspecified damages arising out of breach of contract, indemnity and fraud. Subcontractor moves to dismiss on the grounds of *forum non conveniens* because the facts giving rise to the dispute occurred in Israel or the Middle East and most all witnesses were located in Israel or the Middle East. Further, the subcontractor was located in Israel.

HOLDING: Motion to dismiss for *forum non conveniens* granted as the court determined that Israel; was a more convenient forum given the facts of the litigation.

Presenter: Fritz Damm

40. ***Keystone Logistics, Inc. v. Struble Trucking, LLC,*** **2014 U.S. Dist. 166006 (N.D. Ind. 2014).** Motion to remand granted on lawsuit brought to enforce an indemnity contract between a broker and a carrier stemming from a cargo damage claim and awarding costs and fees to Plaintiff on the remand motion. Plaintiff, Keystone (a broker), sued Defendant, Struble Trucking (a carrier) in Indiana State Court on a Complaint alleging breach of contract. The Complaint alleged that Struble breached a broker/carrier contract with Keystone when Struble failed to indemnify Keystone on a cargo damage claim of $33,109.82 made against Keystone by Coyote Logistics, LLC (apparently, the shipper) for improper delivery of frozen ice cream by Struble Trucking. Four days after the Complaint was filed, Struble removed the case to the Federal Court and Keystone moved to remand.

The Court reviewed the Carmack Amendment's references to suits based on a "receipt or bill of lading" and concluded that although the underlying events giving rise to the Complaint were based on a bill of lading, the lawsuit was only based on a broker/carrier contract and was not based on a bill of lading. In the instant case, the Plaintiff was seeking indemnity under the contract and was not suing on the bill of lading under 49 U.S.C. § 14706. Plaintiff was not suing as a shipper (or consignee for that matter) for actual cargo loss or damage. The Court also considered the fact Keystone was not a party to the bill of lading and there was no assignment of rights from any party to the bill of lading to Keystone. As such, the Court held there was no preemption under the Carmack Amendment and, accordingly, remanded the case. In so ruling, the Court cites *Transcorr National Logistics, LLC v. Chaler Corp.,* 2008 WL 5272895 (S.D. Ind. 2008), wherein that Court noted that the purpose of Carmack was to "prevent carriers from being placed in the untenable position of having to determine what their liability may be in many different jurisdictions with differing laws."

The Court then awarded fees and costs on the remand based on the "established law that demonstrates the Carmack Amendment is not applicable" and because even Struble Trucking conceded it would be liable for fees and costs in the event of a remand and further based on *Lott v. Pfizer, Inc.,* 492 F.3d 789 (7th Cir. 2007)(holding where there is no basis for removal the court *should* award fees on remand).

Presenter: Chris Merrick

41. ***Hartford Fire Insurance Co. v. Trimac Transportation South, Inc.*** **(E.D. Tex., filed July 30, 2014).** Plaintiff Hartford Insurance Company (HFIC) is the subrogated insurer for Lambent Technologies. Lambent hired motor carrier Heniff to transport liquid chemicals from Illinois to Texas. Prior to loading, Lambent hired defendant Trimac to provide a "kosher wash" of the tank, as opposed to a less-thorough "normal" wash. Predictably, the shipment was rejected at delivery due to contamination. HFIC paid its insured $30,394.00 for the lost load and sued Trimac in Texas state court. Trimac removed the case to federal court under federal question (Carmack) jurisdiction. Plaintiff filed a motion to remand the case. Plaintiff argues that remand is appropriate because Trimac was not acting as a motor carrier when it washed the tank, and the original Complaint did not contain a Carmack count.

RULING: The court rejected plaintiff's arguments and cited the Fifth Circuit's well-established and long-standing jurisprudence regarding the broad scope of Carmack preemption. The court applied the broad definition of "transportation" in 49 U.S.C. 13102(23(B), which

includes "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking and interchange of passengers and property." The court noted that while Trimac did not physically transport the cargo across state lines, the alleged injury to plaintiff "arose from such transport." The court distinguished the case from a case where the damages arise from the mere storage of goods, which would fall outside of Carmack. Rather, the court noted that this is a case "where at some step along in process of transporting the goods from Texas to Illinois contamination occurred, and, ultimately, the entire value of the shipment was lost." Thus, the alleged injury arose out of the transportation of goods in interstate commerce and removal was proper. The motion to remand was denied.

Presenter: Kathy Garber

42. *Wilsonia Smith and Lacey Smith v. Coastal Moving and Storage, Inc., et al.* (W.D. Tenn., filed Aug. 12, 2014). Plaintiffs sued defendants Coastal and Fountain Moving for loss or damage to their household goods in interstate transport. The lawsuit was filed in state court, and defendants removed the case based upon federal question (Carmack) jurisdiction. Plaintiffs filed a Motion to Remand the case. Plaintiffs argued that the Carmack Amendment "is not important to the resolution of the case as the damage to the property at issue was the result of long-term negligence, not necessarily only negligence in transit." Defendants filed a Motion to Dismiss the Complaint based upon Carmack preemption. Plaintiffs, again, argued that they were claiming "negligence in the storage of goods, rather than negligence that occurred during an interstate move."

RULING: The court, citing the extensive Sixth Circuit jurisprudence on the issue, rejected plaintiffs' arguments, stating "the Carmack Amendment applies not only to damages occurring while directly in transit, but also to services related to that movement of property, including storage." Thus, the court denied plaintiffs' Motion to Remand the case. Applying the same logic and jurisprudential authority, the court granted defendants' Motion to Dismiss and granted plaintiffs leave to file an Amended Complaint.

Presenter: Pam Johnston

VI. CARRIER-BROKER-THIRD PARTY

43. *Asarco LLC v. England Logistics Incorporated*, 2014 WL 7339069 (D. Ariz., December 23, 2014). When a shipment of 55 copper anodes went missing in transit between plaintiff Asarco's facilities in Hayden, Arizona and Amarillo, Texas in July 2011, Asarco sued all entities in the transportation chain. Asarco alleged that it had requested that CR England and England Logistics arrange for the transportation; that those entities unilaterally re-brokered and/or re-assigned the shipment to Plumley Trucking, who re-brokered and/or assigned the shipment through Plumley Logistics to non-party Pavlyukh Express, whose driver Andriy Kuba picked up the shipment on July 24, 2011, after which it was never seen again. The Plumley defendants, the England defendants and plaintiff Asarco all filed summary judgment motions.

HOLDING: In their motions, Plumley Logistics asserted that, because it is merely a broker, Carmack does not apply; and Plumley Trucking asserted that it was not the carrier and, in fact,

had nothing to do with the shipment, and therefore cannot be held liable for the loss. Asarco responded – and the Court agreed - that there are factual disputes regarding the Plumley defendants' roles regarding the shipment (with much cross-over in operations between the two Plumley entities), thereby precluding the entry of summary judgment on the Carmack claim. The same uncertainty prevented the Court from ruling in Plumley Trucking's favor on its assertion that timely claim notice to Plumley Logistics did not constitute timely notice to it. Similarly, questions of fact exist on the issue of whether contracts between the Plumley entities and the England entities applied to the shipment and, if so, whether a breach occurred.

Though deferring many of the issues to another day, the Court did rule in all defendants' favor on their FAAAA preemption argument, holding that plaintiff's negligence and negligent hiring, retention or supervision claims against the Plumley and England defendants are preempted. The Court also provided the England defendants some relief on their motion on plaintiff's breach of contract claim, granting the motion on Asarco's allegations that England breached its obligations by dealing with the Plumley defendants and allowing them to select Pavylukh Express to carry the load; and dismissing CR England from the case, finding that it had no involvement with the shipment. However, the Court carved out an exception for the portion of plaintiff's contract claim alleging that the England defendants failed to properly administer the loss claim; and ruled that the breach of contract count is not preempted by FAAAA or Carmack because those defendants served as a broker, not a carrier.

Presenter: Jeff Simmons

44. ***Total Quality Logistics v. Macktoon, Inc.,*** **2014 U.S. Dist. LEXIS 125918 (S.D. Ohio 2014).** Plaintiff Total Quality Logistics sued defendant Macktoon for an award of attorney's fees and costs under a Broker/Carrier Agreement. Under the BCA, the parties agreed that, for disputes under $10,000.00, they would participate in binding arbitration, and for disputes in excess of $10,000.00, the parties would litigate. If a case is litigated, the BCA stated that the carrier (Macktoon) would pay all reasonable expenses, attorney's fees and costs that the broker (Total Quality Logistics) incurs in any such litigation. A dispute arose between the parties under the BCA. The dispute was in excess of $10,000.00. Total Quality Logistics ("Total") sued Macktoon. Despite the provisions of the BCA regarding disputes over $10,000.00, Macktoon moved to stay the case and refer the case to binding arbitration. The court denied the motion. Discovery ensued, and the case was submitted to the court on depositions. The court found in favor of plaintiff for $36,589.08. Plaintiff then moved for attorney's fees and costs pursuant to the BCA. The court analyzed the fee provision in the BCA and noted initially that Carmack preempts and prohibits the award of attorney's fees. The court then asked whether Carmack preempted a voluntary fee-shifting agreement. The court looked to 49 U.S.C. 14101 for guidance, and found that it allows parties to expressly waive any or all rights otherwise provided under Carmack, including, for purposes of this case, the Carmack preclusion against attorney's fees.

RULING: The court found that the attorney fee provision in the BCA was not a "penalty" as argued by the carrier, and found that the attorney fee provision in the BCA was enforceable. The court awarded $33,375.00 in fees (not bad in a $36K case!!), based upon an hourly rate of $250.00, which it found reasonable for the Cincinnati legal market. The court also awarded $2,918.36 in deposition-related costs.

Presenter: Dirk Beckwith

45. ***Haulmark Services, Inc. v. Solid Group Trucking, Inc.***, 2014 WL 5768685 (S.D. Tex., November 5, 2014). Haulmark, a transportation broker, entered into a written agreement with SGT, a carrier, containing an express indemnity provision. Pursuant to the contract, Haulmark assigned a load to SGT, SGT took possession under a bill of lading which contained certain temperature restrictions, the load was rejected as outside of the permitted temperature range and a claim was submitted to Haulmark. Haulmark passed the claim on to SGT and its insurer. SGT did not pay the claim, so Haulmark sued for breach of the indemnity provision in the broker/carrier contract. SGT asserted Carmack preemption. Haulmark opposed, stating that this was not a Carmack case because Haulmark only alleged a claim for indemnification under the contract, not a claim as subrogee of the shipper or owner of the goods.

HOLDING: The Court held that the Carmack Amendment did not preempt the broker's breach of contract cause of action under an indemnity agreement between the broker and the carrier. The Court noted that Carmack protects the rights of shippers suing under a bill of lading; and that there was no showing that Haulmark would have even had standing to sue under Carmack, that is, there was no indication that Haulmark had an assignment from its customer. The case, which had been removed by the carrier, was remanded to proceed strictly under the contract, not under Carmack.

Presenter: Kevin Anderson

46. ***National Bankers Corp. v. Peak Logistics LLC,* 2014 WL 5343639 (W.D. Tenn. 2014).** Factor sought to recover freight charges from broker which were owed to motor carrier which the broker was withholding as an offset to claims involving two loads of stolen shoes. The cargo claim appears to have totaled over $500,000.00. The factor sought to recover $187,600.00 in freight charges. Factor sued broker for the freight charges and broker, in turn, filed a third party complaint against carrier seeking a right to offset based upon its lost profits and for contractual and common law indemnification. Initially, the broker argued that Carmack preempted the claims between the broker and the carrier and the court quickly determined that the lost profits claim was based upon the broker's loss of business which was allegedly occasioned by the cargo damage claim and was based upon the broker-carrier agreement, not Carmack.

HOLDING: On the carrier's motion for summary judgment as to the broker's third party claims for lost profits and indemnification, the court denied the carrier's lost profits motion on the grounds that the broker-carrier agreement specifically allowed for the recovery of lost profits. The court, citing *Hadley v. Baxendale*, determined that the issue boiled down to foreseeability which was a question of fact.

Presenter: Hank Seaton

47. ***Sunteck Transport Co. Inc. v. Baxter Bailey & Associates, Inc.,*** 13-cv-271 (M.D. Tenn. 2014). This is a breach of contract case where Sunteck sued Baxter Bailey for breach of the confidentiality provisions of a contract. Sunteck's motion for partial summary judgment on liability against Baxter Bailey was granted. Sunteck, a transportation and logistics

provider, arranged for transportation of freight with various shippers and carriers and at times used third-party brokers as well to make transportation arrangements. In the normal course, Sunteck would pay the third-party broker the broker fee and the carrier's freight charge upon payment from the customer. The broker would pay the carrier. For its part, Baxter Bailey is a debt collection agency. When Sunteck's third-party brokers failed to pay the carriers, Baxter Bailey took an assignment of the carriers' freight charge claims. In turn, Baxter Bailey would try to recover from Sunteck's third-party brokers. As a part of that process, and after being approached by Baxter Bailey, Sunteck agreed to pay Baxter Bailey $10,000.00 in satisfaction of certain debts owed by Sunteck's third-party brokers. The consideration for the payment included a release and a contract with a confidentiality clause prohibiting Baxter Bailey from disclosing the terms of the agreement, the payment or any of the negotiations to any third-parties.

Within a month after signing the agreement with the confidentiality provisions and accepting payment of $10,000.00, Baxter Bailey began e-mailing Sunteck's customers seeking additional payment of the freight charges. The e-mails named Sunteck and essentially said Sunteck paid in connection with other customers. Sunteck sued for breach of contract, tortuous interference with business relationships, fraudulent misrepresentation and seeking injunctive relief, compensatory and punitive damages.

Sunteck moved for partial summary judgment on liability asserting the existence of a contract and breach of the confidentiality of the contract. The court quickly found the existence of a contract and then reviewed the law on breach. Examining the Baxter Bailey e-mails to Sunteck's customers and applying them to the plain language of the contract, the court found Baxter Bailey committed a breach. The Court further found that despite the confidentiality provisions, Baxter Bailey disclosed the contract terms to Sunteck's customers and referenced the negotiations between Baxter Bailey and Sunteck. Even Baxter Bailey admitted as such in response to a set of demands for admission. Nevertheless, Baxter Bailey then tried to rationalize its actions to the Court and tried to read its e-mails exceedingly narrowly and took the position they did not actually reference the agreement with Sunteck and did not disclose the actual payment terms of the agreement and that, therefore, there was no breach.

Presenter: Eric Zalud

48. ***Midwest Trading Group, Inc. v. Global TranzEnterprises, Inc., American Freight Network, Inc., et al.,* 2014 WL 3672932 (N.D. Ill. 2014).** Midwest Trading Group, Inc. sued GlobalTranz, a broker, for the theft of two shipments of Android tablet computers. Non-party West Coast Imports, acting as Midwest's agent, booked the loads. At issue was the language contained in GlobalTranz's Credit Application, which stated: "BY SIGNING THE APPLICATION, THE APPLICANT CONSENTS TO THE TERMS AND CONDITIONS FOUND ON WWW.CARRIERRATE.COM." Carrierrate.com is GlobalTranz's website, wherein its shipping terms, rates, disclaimers and insurance information is found.

GlobalTranz brokered the loads to American Freight, who then "re-brokered" the loads to V&R Trucking. The loads were stolen while being transported by V&R Trucking. At issue in the lawsuit was whether plaintiffs had actually procured insurance from GlobalTranz. Plaintiff filed suit in Cook County, and defendants removed. The Complaint included claims for fraud,

negligence, breach of contract and unjust enrichment. Defendants moved for summary judgment.

RULING: First, the court rejected defendants' claim that Midwest had no standing to sue, and found that Midwest was the undisclosed principal for West Coast. The key aspect of the ruling, however, concerns defendants' preemption arguments with respect to plaintiff's negligence, fraud and breach of contract claims. The court ruled that plaintiff's negligence claim is preempted, but that the fraud and breach of contract claims are not preempted. The court distinguished the claims by stating that "In short, the focus in determining preemption is on whether the claims relate to the way in which the defendant carried out the "contracted for" services. If they do, the claims will generally be preempted." As for the fraud claim, the court found that plaintiff's claims do not relate to defendant's conduct in brokering the cargo, but, rather, with the claim that plaintiff was fraudulently induced into entering into the contract in the first place. Thus, the court found that the fraud claim was not related to a service provided by defendant. The court applied the same reasoning to its refusal to grant summary judgment on the breach of contract claim based upon preemption. Finally, the court denied summary judgment on the limitation issue, as it found issues of disputed material fact as to whether the parties had conducted business based upon a prior course of dealing or under the defendant's website-based conditions of carriage.

Presenter: Dennis Minichello

49. ***Kavulak v. Juodzevicius A.V., Inc. and Transportation Solutions Group, LLC*****, 994 F.Supp.2d 337 (W.D. N.Y. 2014)**. This case addressed whether the broker who arranged for the transportation of goods to a motor carrier should be liable to the personal injury plaintiff injured when the motor carrier's driver rear-ended the plaintiff's vehicle in a construction zone.

Plaintiff was a New York State Thruway worker seated in a dump truck with a flashing arrow sign attached, which noted the closure of a lane of travel. Defendant Juodzevicius (hereinafter "the truck driver") was hauling a load of plastic yogurt cups from Chicago to Rochester. The shipper, Berry Plastics, hired defendant Transportation Solutions Group ("TSG") to arrange for the delivery of the plastic cups. TSG hired Juodzevicius to transport the shipment. The accident happened near Buffalo, New York, after Juodzevicius had ignored two prior lane closure warnings prior to striking the rear of plaintiff's parked dump truck. Plaintiff initially sued only the truck driver (an owner operator), but then amended his Complaint to add TSG, alleging that TSG was vicariously liable for any negligence of Juodzevicius in his operation of the tractor trailer. TSG filed for summary judgment, arguing that it could not be vicariously liable for the truck driver's negligence because it did not own or operate the tractor trailer involved in the accident, and its only involvement was to arrange for delivery. TSG did not the set the truck driver's schedule or route, never communicated with the driver while he was en route and did not otherwise control or have the right to control the manner in which the driver performed his job.

TSG also moved to strike plaintiff's expert, who issued a report opining that TSG was acting as a motor carrier at the time of the accident. At the same time, Juodzevicius moved for summary judgment on the threshold issue, arguing that plaintiff has failed to demonstrate that he sustained a "serious injury" as defined by New York law.

RULING: The court addressed plaintiff's argument that TSG was acting as a motor carrier, and the cases cited by plaintiff in support thereof. Plaintiff argued that since TSG was acting as a motor carrier, it should be liable for plaintiff's damages. The court soundly rejected this argument. First, the court noted that even if TSG was, indeed, found to be acting as a motor carrier, the plaintiff still failed to articulate why this would have mattered, since it did not own, operate or control the tractor trailer or driver involved in the accident. The court also described plaintiff's arguments about TSG being a motor carrier as a "bit of a red herring," in that all of the cases cited by plaintiff involved Carmack claims for cargo damage. The court efficiently and thoroughly dissected and rejected plaintiff's arguments on this topic. The court noted that the plaintiff did not "fall within the class of persons entitled to bring a Carmack claim." The court also rejected plaintiff's argument for vicarious liability under 49 U.S.C. 14704(a)(2).

In addition, the court rejected plaintiff's assertion that the existence of an unsigned trip lease agreement somehow conferred an agency relationship upon TSG. The court also noted that the trip lease agreement at issue was not signed by TSG, thus rendering plaintiff's arguments on this issue moot as a threshold matter. The court also rejected plaintiff's argument that TSG was vicariously liable for the negligence of Juodzevicius under New York law. The court conducted an exhaustive, fact-intensive analysis of why plaintiff's arguments must fail. The court addressed in great detail how TSG did not control or direct Juodzevicius in any manner with respect to the subject trip. Since the court dismissed plaintiff's claims against TSG, the expert admissibility issue was rendered moot.

With respect to the negligence issue, the court found that the truck driver's written statement, prepared in the presence of, and after discussions with, counsel, wherein he admitted that the accident was solely his fault, was sufficient to overcome any alleged issues of disputed material fact regarding liability. Thus, defendant was precluded from offering any evidence that it was not negligent in causing the accident. Finally, the court found disputed issues of fact as to the threshold issue, and denied plaintiff's motion on this issue, and it granted the truck driver's motion to dismiss plaintiff's punitive damages claim.

Presenter: Bill Bierman

50. ***Shane Meyers v Global Freezer Services Inc*, 2014 HRTO 1743.** Canadian companies that go into the warehousing businesses to service the cross border food industry, should be aware that the nature of the business may change their status and therefore the jurisdiction under which they are governed, from either provincial human rights tribunals or federal human rights tribunals. A very recent decision from the Ontario Human Rights Tribunal used the test set out in *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail),* 2012 SCC 23, to establish that the warehousing company which facilitated common carriers in unloading, storing, packaging and labelling of meat products and the inspection by the Canada Food Inspection Agency (CFIA), as a business model, was a federal undertaking. The applicant brought a case to the Human Rights Tribunal of Ontario alleging discrimination with respect to employment of disability contrary to the *Human Rights Code*, RSO 1990, c H-19. The respondent operates a warehouse near the Windsor/Detroit border and provides services to common carriers that import and export meat to and from the United States. The services include loading, unloading, storing, packaging and labelling of food. They also facilitate the inspection of food by the CFIA the federal regulatory body that determines what food can enter and leave

Canada. The respondent did not address the substance of the allegations relating to the disability of an employee arising from a motor vehicle accident outside of work, and instead argued that the provincial tribunal did not have jurisdiction.

The regulation of the importation and exportation of goods falls under the federal jurisdiction by virtue of the trade and commerce power. As an exception to the broad rule that local works and undertakings are provincial matters, the transportation of goods across provincial boundaries is within federal jurisdiction. Further, in speaking to the allegations in the application, labour relations and human rights issues are presumptively within provincial jurisdiction, however this presumption is ousted either directly or through derivative jurisdiction.

No direct relationship was found and Tribunal determined the CFIA performs the regulatory functions governing the import and export of goods, not the respondent. Providing the facility for inspection and readying the materials were found to be ancillary to the exercise of regulatory power, and to occur intraprovincially. However, the Tribunal accepted the argument of derivative jurisdiction as the *essential operations* of the respondent were integral to both the international common carriers and the CFIA which constitute federal undertakings.

In a second recent development changes to the Small Claims Division of the Court of Quebec which become effective January 1, 2015, increase the cap on small claims actions from $7,000 to $15,000. Not only will this result in an increase in the number of claims filed, predictions by the Minister of Justice, Mrs. Stephanie Vallée suggest up a 10% increase in the incident of filings at this level of court. Cargo lawyers should incorporate these predictions into their legal practice in two ways. Because the cases in the Small Claims Division do not include counsel as representatives, law clerks or other staff members should be adequately trained and supported in order to facilitate this transition. Firms that have equipped and developed their expertise in the area of small claims, will be well suited to take on the bump in this type of legal action within Quebec's provincial jurisdiction. In addition, more cases being heard and more judgments being rendered at the Small Claims Division level, creates the potential for an increase in negative attention for corporations, partnerships and other businesses involved. Where judgments are reported by the media, businesses large or small are open to reputational risks that could be more damaging than settling the claim. The weight of the increase in monetary jurisdiction should be carefully balanced against these other potential risks that could impact business.

Presenter: Heather Devine

VII. FREIGHT CHARGES

51. ***United Van Lines, LLC v. Ponzio.*** Case No. 1:13-cv-00062 (U.S.D.C. S.D. GA, June 23, 2014). Ponzio shipped household goods from Pennsylvania to Georgia. United, via its agent ADSI Moving Systems, loaded and transported the goods. At destination, Ponzio did not have sufficient cash to pay for the transportation. United placed the goods in storage in transit. Ponzio repeatedly failed to pay United's demands for payment of shipping and storage charges. A third party subsequently claimed an ownership interest in the subject goods, and United filed an interpleader action in U.S. District Court claiming a lien on the subject goods and attorneys' fees required in interpleading. United served Ponzio, but she never appeared and was defaulted.

nited sought foreclosure of its lien, judicial authorization to sell the subject goods, and in excess of $75,000 in transportation, storage and legal expenses.

HOLDING: The court determined it had subject matter jurisdiction and personal jurisdiction. The court further determined that United had a lien on the goods shipped under the bill of lading and permitted United to sell the goods.

Presenter: Marian Sauvey

VIII. MISCELLANEOUS

52. ***Sattva Capital Corp. v. Creston Moly Corp***, 2014 SCC 53. As a result of this recent decision of the Supreme Court of Canada ("SCC"), arbitration awards interpreting commercial contracts have now become more difficult to appeal. In light of this decision parties may face an uphill battle in obtaining leave to appeal from arbitral decisions concerning the interpretation of a commercial agreement. In rendering its decision the SCC has also clarified certain key principles to be applied in the interpretation of commercial agreements.

This case involved a contract setting out a finder's fee that was payable as shares. There was a dispute as to the interpretation of the contract and the number of shares to be issued, dependant on which valuation date was to be used for the purpose. The proceedings were costly and took a long time between the initial phase of the arbitrator's decision through to the recent SCC ruling. In deciding this appeal, the SCC reversed a historical approach to contract interpretation. Historically, the legal rights and obligations of the parties under a written contract were considered to be a question of law. As a result of this approach, an appellant could seek to challenge a finding on the basis of an 'error of law'. The SCC however has now held that contractual interpretation involves mixed questions of fact and law rather than pure questions of law. This will naturally now affect the viability of an appeal, given the deference shown by appellate courts to trial courts or courts of first instance on findings of fact 'down below'.

This line of thought is confirmed by the SCC in this decision with its recognition that: *"The shift away from the historical approach appears to be based on two developments. The first is an adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract – often referred to as the factual matrix – when interpreting a written contract. The second is the explanation between the difference between questions of law and questions of mixed fact and law. Regarding the first development, the interpretation of contracts has evolved towards a practical, common sense approach not dominated by technical rules of construction. The overriding concern is to determine the "intent of the parties and the scope of their understanding"... As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law. Questions of law "are questions about what the correct legal test is" yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties – a fact specific goal – through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law*".

Presenter: Gordon Hearn

53. ***Bhasin v. Hrynew*** 2014 SCC 71 (CanLII). The Supreme Court of Canada ("SCC") recently issued this decision that affirms a new duty on parties to perform contractual obligations honestly and in good faith.

The SCC recognized that the common law in Canada (and as augmented by limited certain specific statutory duties of acting in good faith) was both unsettled and "piecemeal" and that matters were at a point where it was time for two incremental steps to be taken to make matters more coherent and "just". The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract that underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty that applies to all contracts to act honestly in the performance of contractual obligations. Taking these two steps will put in place a duty that is just, that accords with the reasonable expectations of the parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

In essence this "organizing principle" is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. The court makes clear that the duty of good faith is not a duty of loyalty or a duty to put the interests of the other contracting party first. It is not intended to significantly displace the freedom of parties to pursue their own economic interests. Nor is it intended to be a basis for a court to scrutinize the motives of contracting parties or to impose its own sense of morality. As noted by the SCC, it is not a fiduciary duty. Rather, what is now being expected, is the general application of that which already exists by way of certain established doctrinal duties to act honestly, reasonably and candidly in contractual performance.

The above said, the court cautions that the development of the principle of good faith in contracts must not veer into a form of *ad hoc* judicial moralism or "palm tree" justice. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. The duty of honesty does not require a party to disclose material information to the other contracting party; however a party cannot actively mislead or deceive the other contracting party in relation to the performance of a contract.

Presenter: Gordon Hearn

54. ***Landstar Global Logistics, Inc. v. LMS Associates Group, Inc. and Shmeil Lunger,*** **(N.Y. Sup. Ct., filed Aug. 22, 2014).** Plaintiff Landstar and defendant LMS Associates Group were parties to an Agency Agreement, which required LMS to obtain credit approval for an account with its customer (Plasticware). Total freight charges on account of Plasticware totaled $172,020.59. Landstar attempted to recover the unpaid freight charges directly from Plasticware. Landstar obtained a judgment against Plasticware, but was unable to collect the judgment. Landstar then went after LMS for the unpaid freight charges, and for its failure to obtain credit approval from Plasticware in accordance with the Agency Agreement.

LMS owner Shmeil Lunger signed a personal guarantee attached to the Agency Agreement, wherein he agreed to be personally liable for any monies owed by LMS to Landstar pursuant to the Agency Agreement. However, Shmeil signed the personal guarantee as "Sam" Lunger, and did not use his "legal" name. LMS's attorney withdrew from the case and LMS did not hire new counsel. Landstar obtained a default judgment against LMS after LMS failed to appear in the case or to respond to Landstar's motion for summary judgment. Thus, Landstar had two uncollectable judgments.

Landstar then went after Shmeil Lunger for the money pursuant to the personal guarantee he signed. Lunger argued that summary judgment was inappropriate because of disputed facts surrounding the personal guarantee. Specifically, he argued that a choice of law provision required the application of Florida law. However, as Barry Gutterman pointed out to the Court on behalf of Landstar, Florida law strongly supported Landstar's arguments. The court wisely agreed with Mr. Gutterman. Second, Lunger argued that the personal guarantee was void because he signed it "Sam" and not "Shmeil." The court rejected this argument summarily. Third, Lunger argued that he did not know or understand that, by signing the personal guarantee, he was obligating himself to be personally liable. The court rejected this argument as well.

RULING: The court, as noted, found that Florida law, if applied, would mandate the same result as would New York law (i.e., judgment in favor of Landstar). The court also, as noted, rejected Lunger's argument that he could not escape responsibility simply because he signed the document as "Sam" instead of "Shmeil." The court also rejected Lunger's argument that the Agreement was ambiguous, or that Lunger was somehow deceived by signing the personal guarantee. The court noted that the personal guarantee was found on a separate sheet of paper attached to the Agency Agreement ,and was not "hidden within" the Agreement. The court also noted that "where a party cannot demonstrate that he/she was prevented from reading the terms or that he/she was induced to sign them without reading them, that party is bound by the contents." The court ordered Lunger to pay Landstar $167,020.59, plus interest.

Presenter: David Schneider

55. ***Maher Terminals, LLC v. Port Authority of New York and New Jersey,*** **2014 WL 3590142 (D.N.J. 2014).** In this case, plaintiff Maher Terminals, LLC, a marine terminal operator, sued the Port Authority of New York and New Jersey (hereinafter "the Port Authority"), challenged the Port Authority's assessment of various fees under a long-term rental agreement as being violative of various federal statutes and the U.S. Constitution. The Port Authority owns airports, marine terminals, ports and bridges, and leases the facilities to private companies pursuant to long-term rental agreements. Maher rented and operated the container terminal at Port Elizabeth, New Jersey pursuant to a thirty-year lease. Under the lease, the Port Authority levies and collects charges and fees for the use of Maher's terminal and seagoing vessel berthing rights. It collects these fees pursuant to a "Basic Rental Agreement" and a "Cargo Throughput Agreement." The "Basic Rental" fee is charged on a per acre basis, and increased by two percent every year. In 2012, this "rental" charge paid by Maher to the Port Authority was $22.4 million. The "Throughput" fee is based upon the number of containers loaded and unloaded at Maher's terminal.

The Port Authority, pursuant to the Water Resources Development Act of 1984 (the WRDA), is required to contribute as a "local sponsor" for various federally funded dredging and channel deepening projects within its jurisdiction. The Port Authority's contributions to date have totaled approximately $400 million, with a total contribution pegged at $1 billion. The WRDA permits non-federal interests (such as the Port Authority) to recover these contributions through port and harbor fees, subject to certain conditions. The WRDA includes a provision allowing a "Local Sponsor" such as the Port Authority to establish a formal "user fee" for the collection of funds under this program. The Port Authority has not yet done this.

Maher sued the Port Authority and averred that the Port Authority, instead of using those "permissible means" set forth in the WRDA to collect its "Local Sponsor" contribution costs, is unlawfully recovering its Local Sponsor fees from marine terminal users (i.e., container vessel owners—i.e., Maher's customers). Maher alleges that the revenue collected by the Port Authority from the use of Maher's terminal exceeds the WRDA Local Sponsor share costs allocated to New Jersey marine container terminals.

Maher first pressed its claim before the FMC, and then filed this lawsuit. In the lawsuit, Maher argued that the Port Authority's actions in levying and collecting the "Throughput" fees violated the Tonnage Clause of the United States Constitution, the WRDA, and the Rivers and Harbors Act. The Tonnage Clause of the U.S. Constitution provides that no state shall lay any "duty of tonnage" upon a vessel for the privilege of entering, trading in, or lying in a port. Maher argued that the Port Authority, by charging its fees, was, in effect, charging vessel owners to enter the Port of Elizabeth.

Similarly, Maher argued that the Port Authority violated the Rivers and Harbor Act, which prohibits a state from collecting tolls or fees from vessels for the privilege of navigating on navigable waters. Maher argued that the fees charged by the Port Authority are not reasonable and violative of the WRDA and impose a burden upon interstate commerce. Maher also argued that the Port Authority's levy and collection of the fees violated the WRDA because the fees are not paid into a specifically designated fund required by the WRDA as required by Section 2236 of the WRDA. Finally, Maher included a negligence claim in its Complaint, wherein it averred that the Port Authority breached a duty to exercise due care and diligence in establishing and collecting charges and fees for the use of marine terminals. Maher argued that the Port Authority's negligence was a substantial factor in causing it millions of dollars in damages.

RULING: The court rejected Maher's Tonnage Clause argument, noting that the Tonnage Clause does not prohibit a state from charging user fees for the use of a state's terminals or ports. The court also noted that the fee is levied upon, and paid by, Maher, which is not a vessel owner. The court rejected Maher's argument that since the fees are passed through to the vessel owners and paid by the vessel owners, the vessel owners are the real aggrieved parties and are, in fact, being charged to enter or lie in a port. The court rejected this argument. The court applied similar reasoning to reject Maher's RHA arguments. It ruled that Maher, and not the vessel owners, actually paid the fees to the Port Authority, and it rejected the "unreasonableness" arguments put forth by Maher regarding the payment of the fees in the context of the RHA. The court also rejected Maher's WRDA claim, and ruled that the Port Authority was not required to specifically establish a separate "user fee" to collect the fees. As for the negligence claim asserted by Maher, the court ruled that this claim is based upon state law and since the court was

dismissing all of the federal question claims, there was no longer jurisdiction over the sole remaining negligence claim. Thus, the Complaint filed by Maher was dismissed in its entirety.

Presenter: Tom Martin

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