CONFERENCE OF FREIGHT COUNSEL
SUMMER 2016 MEETING
THE FAIRMONT ROYAL YORK HOTEL
TORONTO, ONTARIO
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AGENDA OF CASES

I. CARRIER LIABILITY

1. ***Air Liquide Mexico v. Talleres Willie, Inc., et al.***, 2015 W. 8763961 (S.D. Tex. 2015). Plaintiffs sued pilot car defendants for negligence arising from a truck/railroad accident. The court originally dismissed claims against the pilot car based on Carmack preemption. After the Fifth Circuit issued its opinion in *In Re: Wheeler*, (*see* January 2016 Agenda), holding that a pilot car does not constitute a carrier under the Carmack Amendment, the trial court vacated its prior orders dismissing plaintiffs' state law claims against the pilot car defendants. Plaintiffs subsequently amended their complaint to allege claims for violation of statutory duties under the Texas Transportation Code and joint enterprise. Pilot car defendants moved to dismiss the new claims.

Plaintiffs' new claims alleged that the pilot car defendants violated Chapter 545 of the Texas Transportation Code by failing to notify the railroad prior to attempting to cross railroad tracks. Interpreting the statute's definition of "operator" to mean the single operator of each vehicle, the court determined that duties under Chapter 545 applied to the driver of each specific vehicle. Thus, the pilot car drivers were not responsible under the statute for violations arising from operation of the tractor trailer driven by another individual.

With respect to the joint enterprise allegations, the court noted that Texas courts adopt the definition of joint enterprise stated in the Restatement (2d) of Torts, requiring an agreement, a common purpose, a community of interest and an equal right of control. The pilot car defendants challenged plaintiff's allegation that the pilot cars had a community of interest with the motor carrier. The pilot car defendants argued that merely sharing in the monetary benefit from the transportation was insufficient to establish the community of interest element under Texas law. The court held that the community of interest element of joint enterprise requires more than a mere existence of monetary benefits flowing from the enterprise, rather, the benefits must be shared among the members without distinction, and plaintiffs' complaint did not make such allegations. The court granted the motion to dismiss claim under Chapter 545 and under the joint enterprise theories.

Presenter: Dan Fulkerson

2. ***Demilec v. Sun Carriers*****,** Trial Court Cause No. cc-14-02716-D (County Court at Law, Dallas County, Texas April 15, 2016). Defendant Sun Carriers transported 41 drums and 5 pails of cargo within the state of Texas for manufacturer Demilec. Defendant Sun Carriers had a contract with Demilec's broker, Haynes Logistics. Among other provisions of the contract were an indemnity running from Sun Carriers to Haynes, a statement that cargo liability would be governed by 49 USC 14706, and another statement that salvage would be governed by 49 CFR 1005. The drums consisted of three different chemicals Defendant's tractor-trailer carrying the cargo rolled off the highway and fell over onto its side. Three of the Isocyanate drums in the tractor-trailer were punctured and leaking fluid due to the accident. None of the other drums or pails were leaking. Isocyanate from the punctured drums leaked on to the drums that were not punctured. Demilec rejected the cargo because it did not want to sell it to the customer after it had been in a wreck. Demilec inspected the cargo and without testing the contents of the intact barrels, notified Defendant that the cargo should be disposed of. Great West Casualty found no market for the undamaged barrels of isocyanate, and warned Demilec of the consequences of rejecting the shipment, since the shipment was not "totally worthless." Demilec was given time to claim the shipment before disposal. Demilec refused to claim the shipment before disposal, citing the concern that it was "potentially" contaminated. No testing was ever conducted to determine contamination of the 38 unpunctured drums.

Demilec sued Defendant Sun Carriers for the entire load, arguing that the chemical spilled on the exterior of the unpunctured barrels rendered them unmarketable and a total loss. The broker Haynes sued Defendant Sun Carriers for indemnity under the contract.

Holding: Sun Carriers obtained summary judgment on Haynes' claims for indemnity, and Sun Carriers also obtained pretrial rulings that held Demilec could not recover for "potential" damage to the barrels. At trial, Demilec sought to recover for the entire load based on Sun Carrier's alleged failure to salvage the cargo in accordance with 49 CFR 1005. The Court held that plaintiff failed to prove that there was any secondary market for the barrels of isocyanate, and as such could

not prove any damages for wrongfully failing to salvage the cargo. The carrier's expenses in cleaning up and disposing of the undamaged barrels exceeded the cost of the three damaged barrels, and the Court offset salvage costs, resulting in a judgment that the plaintiff take nothing.

Presenter: Vic Henry

3. ***Federated Mutual Ins. Co. v. Con-Way Freight, Inc.,*** 2015 U.S. Dist. LEXIS 61028 (D. Minn. March 11, 2015). Con-Way picked up cargo in Texas to haul it to Minnesota. The cargo was insured by Federated Mutual Insurance Company ("Federated"). The cargo was damaged and Federated paid its insured over $32,000.00. Con-Way and Federated are members of Arbitration Forums, Inc. in which all parties agree to submit disputes to arbitration. Federated initiated an arbitration proceeding against Con-Way, Con-Way did not participate, and the arbitrator entered an award for the full $32,000.00. Federated filed a lawsuit to confirm he award in state court and Con-Way removed the case to federal court on the grounds of Carmack complete preemption. Con-Way then filed a motion to vacate the arbitration award.

Issue: Does the fact that Con-Way entered into an arbitration agreement with Federated, a cargo insurance company, serve as a waiver of the Carmack Amendment thereby allowing Federated to enforce its arbitration award against Con-Way?

Holding: No. Carmack waiver is between a shipper and a carrier, not between an insurance company for a shipper and a carrier especially when the alleged waiver occurred before the insurance company paid the cargo claim to the shipper, its insured. The court granted the motion to vacate the arbitration award on the grounds that the arbitrator lacked the authority to enter the award since the Carmack Amendment applied to the claim.

Presenter: Joe Schlegeter

4. ***Albert v. United Parcel Service of America, Inc.,*** 2016 Ohio App. LEXIS 1436 (Ohio Ct. App, April 14, 2016). Steven Albert of the Albert Law Firm is going to have a tough holiday season after losing this case for an apparent relative, Ms. Hallie Albert. Ms. Albert owned a Dino Rosin glass sculpture. She wanted to ship the sculpture from Ohio to Her San Francisco home. She told her husband to build a crate and encase the sculpture in foam. After dutifully obeying Hallie's instructions, her husband took it to his safe place, mom's house where it stayed for three months. His brother then picked up the crate and hauled it to the UPS store and had it shipped to San Francisco. Neither the brother nor the UPS clerk inspected the sculpture in the crate before shipment. Lo and behold, on delivery the lovely Dino Rosin was shattered glass. After a bench trial, the court entered judgment for UPS. Ms. Albert and her attorney, Steven W. Albert, appealed.

Issue: Did the manifest weight of the evidence support the trial court's finding that Ms. Albert failed to prove that the Dino Rosin glass sculpture was delivered to UPS in good condition?

Holding: No way. Because the testimony revealed that no one examined the sculpture for over two months before shipment, the appellate court agreed with the trial court that Ms. Albert

had not proven that the goods were in good condition before delivery. The court affirmed the trial court's decision in favor of UPS.

Presenter: Marshall Pitchford

5. ***Beardslee v. FedEx***, 2015 N.Y. Misc. LEXIS 3808, 49 Misc. 3d 1210(A) (City Ct. NY – Ithaca 2015). This is a special/consequential delay damage case, where it appears a state court judge got it right. Pro se plaintiff booked a hunting trip and in anticipation of the trip, he purchased a left handed bow and arrow and had it shipped via FedEx from New York to Colorado. The bow and arrow arrived late. Plaintiff sues for the value of the trip. He spent $3,000.00 for a guide, $601.00 for an elk hunting license, $360.00 for airfare and $300.00 on hotels. Five days before the trip, he filled out the FedEx Waybill. He declared a value of $1,500.00 and paid the freight charge of $71.69 and an extra charge for declared values over $100.00.

The left handed bow did not arrive on time and according to plaintiff he was forced to watch other hunters downing elk while he remained left handed bowless. Attempts to get a local left handed bow proved fruitless. Plaintiff returned home and the left handed bow eventually arrived at this home. According to the Judge, FedEx completely "missed the mark." Unbowed, plaintiff sued FedEx.

Issue: Is the pro se plaintiff entitled to recover special or consequential damages?

Holding: Bulls…eye. No. The Court takes note of the reverse side of the Bill of Lading that disclaims all special and consequential damages and limits the liability of the carrier to the declared value and the freight charge. General damages are "those which are the natural and probable consequence of the breach." Special damages are those that are "extraordinary in that they do not flow directly from the breach." Having defined the terms, the Court determines that the state created causes of action and damages are governed exclusively by the Carmack Amendment. Reviewing the limitation in the Bill of Lading and applying Carmack as per Second Circuit case law, the Court applied the $1,500.00 limitation of liability and the $71.69 freight charge and entered judgment accordingly. The court also concluded that amount was fair and reasonable under the circumstances.

Presenter: Richard Furman

6. ***Affiliated FM Insurance v. M/V Maersk Visby, et al.,*** 2016 WL 1660183 (S.D.N.Y., filed April 25, 2016). Plaintiff is the subrogated insurer to The Children's Place which shipped two containers from South Africa to Huntsville, Alabama. Both shipments delivered short. Plaintiff alleged that both containers were transported from Durban, South Africa to Lesotho for stuffing, then returned to Durban for transportation to the ocean carrier and ultimately to the Port of Charleston. Once at the port, the containers were transported by surface transportation to a rail carrier to Huntsville and then by truck to The Children's Place. Regarding both containers, plaintiff alleges that Maersk took possession of each container filled and sealed and delivered each

container with a different seal and delivered short, all of which plaintiff claims reveals that the containers went missing while in possession of Maersk.

Issue: Has plaintiff alleged a *prima facie* claim under COGSA?

Holding: No. In order to allege a *prima facie* case under COGSA, a plaintiff must allege (1) delivery of goods to the carrier in good condition, and (2) outturn by the carrier in damaged condition. Although plaintiff argued that defendant presented a clean bill of lading, the defendant here argued that a clean bill of lading in a sealed container case is not sufficient to establish a *prima facie* case of delivery of the cargo in good condition when the contents are not visible. The court here side-stepped the false seal allegations and determined that plaintiff had not alleged that the goods were delivered to the Port of Charleston in a damaged condition. The second prong of a *prima facie* case under COGSA eliminates the possibility that the loss occurred when the goods were no longer in the possession of the ocean carrier. Here, no one inspected the containers at the Port of Charleston and therefore there could be no allegation of a damaged condition at the outturn.

Presenter: George Wright

II. LIMITATIONS AND NOTICE

7. ***Southern Coal Corp. v. IEG PTY, Ltd, et al*****,** 2015 WL 9948206 (E.D. Va. December 4, 2015). In early 2011, Southern Coal purchased two large electric mining shovels ("the Shovels") that it sought to have shipped by ocean carriage from Australia to the United States. Southern contracted with IEG Pty, Ltd. to arrange for the shipping from Australia to Virginia. IEG executed a Bimco Liner Booking Note with Southern and then another liner booking note with ocean carrier BBC RIO GRANDE operated by Scan Trans Holdings. A bill of lading was issued and the ship commenced its journey in October 2011 but diverted to Korea. The Shovels were placed ashore and were apparently damaged by the weather. After several weeks ashore, the Shovels were loaded upon a new ship operated by BBC Chartering and a second bill of lading was issued which also indicated the poor condition of the Shovels. Importantly, the Shovels were transported above deck for the entire journey. The Shovels arrived in Virginia on January 13, 2012 and Southern filed suit on January 21, 2014.

Issue: Are the claims against BBC Chartering barred by the one-year statute of limitations contained in COGSA which was specifically identified in the second bill of lading despite the fact that the Shovels were stored above deck which would implicate the Harter Act which does not contain a statute of limitations?

Holding: The court granted the motion to dismiss the claim against BBC Chartering as being time-barred under the COGSA provision identified in the second Bill of lading identified to the move from Korea to Virginia. The court reasons that Southern is bound by contacts into which its intermediaries enter, following the holding of *Norfolk Southern Ry. Co. v. Kirby*. Further, the

court rejects the argument that the Harter Act's laches provision overrides a mere contractual incorporation of the COGSA one-year limitations period. Nor was the storage of the Shovels above deck an unreasonable deviation. Because Southern waited for over two years to file suit against BBC Chartering, the claims against the latter were time barred and were dismissed.

Presenter: Bob Rothstein

8. ***Southern Coal Corporation v. IEG Pty, Ltd, et al. (*****PART TWO),** 2016 WL 393954 (E.D. Va. Jan. 29, 2016). Southern Coal's moved for reconsideration of the court's grant of BBC Chartering's motion to dismiss on the basis that the court improperly applied the decision of the United States Supreme Court in *Norfolk Southern Ry. v. Kirby*. Specifically, Southern Coal argued that the intermediary was impermissibly allowed to enter into a contract upon terms with which it (Southern Coal) had nothing to do and by which it is disadvantaged.

Issue: Does the *Kirby* decision allow an intermediary to bind a shipper to a contract which contains a limitations period that is not advantageous to the shipper?

Holding: The court denied the motion for reconsideration. The court determined that the *Kirby* decision applied to the enforcement of the time limitations contained in a contractual COGSA provision in a bill of lading against the shipper of the goods.

Presenter: Bob Rothstein

9. ***AIG Property and Casualty Co. v. Federal Express Corporation,*** 2016 WL 305053 (S.D.N.Y., filed Jan. 25, 2016). Larry and Jane Scheinfeld went to Italy and bought some perfume that they intended to bring home to New York City. Apparently untrusting of traditional airline transportation of their luggage, they shipped three bags of luggage home via Federal Express which cancelled the shipment because of the perfumes. The bags were lost or stolen in the process of shipping them by ground back to the Italian hotel where the Scheinfeld's were vacationing. The luggage and goods were worth in excess of $41,628.00. The Scheinfeld's insurer, AIG, paid the claim and filed a state court suit against Federal Express as their subrogee. Federal Express removed to federal court under the provinces of the Montreal Convention and then moved to dismiss on the grounds that the complaint was outside the two-year statute of limitation contained in the Montreal Convention.

Issue: Does the Montreal Convention apply when items were off of an airplane and moving by ground transportation? Also, does the Montreal Convention require strict compliance in order for carriers to avail themselves of its protections?

Holding: The district court granted Federal Express's motion to dismiss on the grounds that the Montreal Convention applied to the movement of freight while in the custody of an air carrier, whether it was moving by air or by ground. AIG argued that the bags were lost after the air transaction to New York was cancelled and therefore the Montreal Convention did not apply. The court disagreed and further distinguished the prior provisions of the Warsaw

Convention with the 2003 version of the Montreal Convention which did not limit the scope of coverage to the time that a carrier is in possession of the cargo at an airport on in the air. After 2003, the Montreal Convention covers all cargo "whenever and wherever the cargo is in the possession custody or charge of the carrier." Likewise, whereas the Warsaw Convention required strict compliance in issuing air waybills in order to establish the protections of the treaty, the Montreal Convention is not so restrictive. As a result, the Montreal Convention applied, the two-year statute of limitation applied and the court granted the motion to dismiss the claims of AIG.

Presenter: David Popowski

10. ***Indemnity Insurance Company of North America v. Expeditors International of Washington***, 2016 WL 1430066 (W.D. Wash. Apr. 8, 2016). Plaintiff Indemnity Insurance Company of North America, insurer for the owner/shipper, seeks to recover for damage to cargo that defendant Expeditors International allegedly arranged to ship from Japan to China via Korean Air Lines. The cargo arrived at its destination in late December 27, 2013, and is alleged to have suffered extensive damage while en route. In its answer to the complaint, Expeditors International admitted that it booked the shipment and that it issued its house air waybill for the transportation. Counsel for Expeditors International subsequently learned that it was a separate entity, Expeditors Japan, that booked the shipment with KAL and issued the waybill; and therefore moved to amend its answer to deny involvement in the transaction. Plaintiff opposed the motion, asserting that the proposed amendment would not leave it time to amend its complaint to add Expeditors Japan to the case and effect service in Japan before expiration of the two-year statute of limitations of the Montreal Convention; and that Expeditors International's admission of involvement in its original answer constitutes a judicial admission that cannot be withdrawn.

Issues: Does expiration of the applicable statute of limitations following amendment of the answer outweigh the liberally-applied judicial policy favoring amendment of pleadings? Are admissions in a party's initial pleading binding judicial admissions that cannot be modified?

Holding: Nope. You made your bed, plaintiff. Indemnity filed suit just five days before the expiration of the statutory period. By the time Expeditors International timely filed its answer, the two-year statute of limitations had already run. Thus, even if Expeditors International had denied its participation in the subject shipment in its original answer, Indemnity would have faced the same statute of limitations issue. Consequently, Indemnity has not shown undue prejudice based on expiration of the Montreal Convention's limitations period. Where a party promptly, upon learning new facts (especially if before discovery has begun), seeks to amend its pleading, providing an explanation, the court must afford the explanation due weight. Accordingly, the court granted defendant's motion to amend its answer.

Presenter: Steve Block

III. LIMITATIONS OF LIABILITY

11. ***Royal Consumer Products, LLC v. Saia Motor Freight Line, Inc.,*** 2016 Ky. App. LEXIS 21 (Ky. Ct. App., February 26, 2016). The Royal Consumer Product (RCP) saga as to late deliveries and consequential damages in Kentucky continues. RCP contracted with Saia to haul its paper product freight without a written contract. The freight moved on a bill of lading which allowed consequential damages and which stated that the bill of lading superseded any other agreement "and any tariff or service guide issued by the Carrier." Saia had a tariff on its website which stated that Saia would not be liable for any consequential damages or any other liability not contained in the bills of lading. RCP incurred penalties from its customers due to damaged, late or non-conforming shipments. RCP passed those penalties on to Saia by discounting the freight charges. Saia responded by canceling its prior discounts on freight charges. RCP sued Saia for the consequential damages and Saia counterclaimed for the unpaid freight charges. Trial court granted summary judgment to Saia for damages of $37,000.00 and $135,000.00 in attorneys' fees and $15,000.00 in costs.

Issue: Does the Carmack Amendment's provision for limiting a carrier's liability allow Saia to enforce its tariff with regard to consequential damages and discounts?

Holding: The state appellate court first determined that the Carmack Amendment applied because RCP sought consequential damages, in part, for damaged cargo. The court then analyzed the factors in the *Hughes* test to determine whether RCP is bound by the provisions of Saia's tariff. The court concluded that actual notice was not required but that there were issues of material fact in dispute as to whether RCP had constructive notice of the tariff. The court also found genuine issues of material fact in dispute as to the opportunity to choose from different levels of liability as well as RCP's claim for consequential damages. The court also remanded the case to the trial court for a determination of whether Saia could eliminate its discount on its freight charges.

Presenter: Fred Marcinak

12. ***Indemnity Ins. Co. of North Am. v. UPS Ground Freight***, 2016 U.S. Dist. LEXIS 44114 (D.N.J. 2016). This is a subrogated limitation of liability case involving Contact read in para materia with a Bill of Lading. Plaintiff subrogated to the loss of the shipper G.E. Healthcare. The matter involved two separate but factually similar shipments of medical dye contrast from a third-party staging warehouse in Tennessee to the consignee in Minnesota. The first shipment was involved in a rollover accident the second was allegedly double stacked and some boxes were ripped and creased. Both shipments were rejected. Combined, the damage was $1,000,000.00. The shipper G.E. Healthcare had a Master Transportation Agreement calling for a combined $500,000.00 limitation. The Bills of Lading were prepared by the third-party warehouse (i.e., the shipper's agent) with a $2.30/lb. limitation amounting to a combined approximate $15,000.00.

Issue: Is UPS Freight entitled to enforce the $15,000.00 limitation?

Holding: Maybe. The Contract said "except as otherwise provided" the damages "shall not exceed" a combined $500,000.00 as to both shipments. Setting questions of "actual damage" aside for the moment, UPS Freight moved for partial summary judgment to apply the Bill of Lading $15,000.00 combined limitation of liability. UPS Freight argued the Bills of Lading "otherwise provided" for damages that did "not exceed" the Contract combined $500,000.00 and as such the Contract and the Bill of Lading applied with a $15,000.00 limitation. The Court reviewed the law and found that "may be right." Nevertheless, the Judge concluded there were questions of fact and denied the motion.

PS – it is not in the opinion but we filed a rule 60 (b) suggesting the Court overlooked that the parties agreed there were no genuine issues of material fact in dispute. In response, the Court held a conference call with all counsel, confirmed there were no questions of fact and indicated the Court would re-review the motion and would issue a further opinion in due course.

Presenter: Tom Martin

13. ***Solo v. United Parcel Service Co.,*** 2016 WL 1077163 (6th Cir., Dec. 9, 2015). UPS allows shippers "declared value coverage" on shipments valued at over $100.00. Plaintiff filed a class action lawsuit alleging that UPS contractually agreed to assess no charge for the first $100.00. Without a declared value, UPS limited its liability to $100 per shipment. Plaintiff claimed that shipments in excess of $100 were nonetheless charged a fee for the first $100 despite there being no charge for the first $100.00. Plaintiffs originally filed suit in California while a companion case was filed in Michigan. UPS filed an Answer in the Michigan case affirmatively stating that there was no privity between Plaintiffs and UPS. Plaintiffs appealed.

Issue: Was the dismissal of the breach of contract and unjust enrichment claims proper for failure to state a claim? Also, had Plaintiffs stated a claim for causing a motor carrier to submit a false bill under 49 U.S.C. §13708(b)?

Holding: No. The Sixth Circuit determined that reasonable minds could differ as to the proper interpretation of the Service Guide provision which set the guidelines for the Declared Value Coverage. Although the trial court determined that the Service Guide was unambiguous and allowed UPS to include the first $100 in determining the fees for Declared Value Coverage in excess of $100, the appellate court disagreed. Important to the Sixth Circuit were the allegations that UPS recognized that the fees charged were excessive and provided refunds to those who recognized the overcharge. The appellate court likewise determined that the unjust enrichment claim was properly pled especially given the position that UPS had previously taken in the first Michigan case that it lacked privity with the Plaintiffs. Finally, the court affirmed the finding of the district court that Plaintiffs did not state a claim under 49 U.S.C. §13708(b) for a false and misleading billing statement.

Presenter: Dirk Beckwith

14. ***Pelmen Foods Ltd. v. Fast Load Transport Inc.*** 2015 CanLII 85873 (ON SCSM). Pelmen Foods Ltd. ("Pelmen") of Toronto, Ontario sold 180 boxes of perogies to a company based in Memphis. The perogies had a value of US $27,258. Pelmen Foods hired a load broker, ByExpress, to arrange the transportation. ByExpress in turn engaged the defendant trucking company Fast Load Transport Inc. ("Fast Load") to carry the shipment to Memphis. Pelmen prepared a bill of lading for issuance by Fast Load at the point of origin. A value was not declared on that bill of lading. ByExpress also prepared a separate bill of lading – it too not featuring a declaration of a value. Pelmen Foods also prepared a customs invoice setting out the value of the goods, which was given to the driver to facilitate border clearance into the United States. The Fast Load driver signed both bills of lading, and also put his signature on the customs invoice at the point of loading, also endorsing thereon a number pertaining to one of the bills of lading.

Upon arrival at destination it was determined that the perogies had defrosted and were ruined. The consignee rejected the shipment. The plaintiff sued both ByExpress and Fast Load. ByExpress in turn filed a claim for contribution and indemnity against Fast Load, who did not defend either claim.

Issues: (1) Was ByExpress liable to the plaintiff as a principal to a contract of carriage or was it acting only as a broker agent? (2) As against the carrier Fast Load, was the plaintiff's recovery limited to the standard carrier limitation of liability of $2 per pound?

Decision: The court found that ByExpress did not hold itself out as a carrier to Pelmen Foods. Accordingly, the case was dismissed as against ByExpress. As concerned the case against Fast Load, the court had to determine the damages that the plaintiff was entitled to judgment for. The court found that the plaintiff's damages recovery was not limited to $2 per pound (which would have totaled a liability of $15,000). Notwithstanding the lack of a declared value on either bill of lading, the court found that a valuation of the cargo *had* been incorporated into the contract of carriage by virtue of the fact that the driver Fast Load had signed a copy of the customs invoice and referenced one of the bills of lading thereon.

Presenter: Gordon Hearn

15. ***J.D. Irving, Limited v. Siemens Canada Limited***, 2016 FC 69, supplemental reasons at 2016 FC 287. This recent case has clarified the law on whether independent contractors are entitled to limit their liability, as persons for whose acts, neglect or default a ship-owner is responsible, where a cargo loss results from a vessel's potential unseaworthiness. The answer is "no".

Following an incident on October 15, 2008 where two turbine rotors fell into Saint John harbour while being loaded onto a barge, J.D. Irving, Limited ("JDI") faced an action by the cargo owner for $45 million in damages. JDI commenced its own action, seeking a declaration that it was entitled to limit its liability to $500,000.00 pursuant to the limitation of liability provisions in the *Marine Liability Act* ("MLA"). The purchase order initially issued to its naval architects by JDI was in the amount of $1,000.00, and did not contain an indemnity or hold harmless clause. The

naval architects sought the same declaratory relief as JDI to limit their exposure. The naval architects were able to negotiate an undertaking from the cargo owner not to enforce any judgment which may be obtained against the architects. Under the security of this undertaking, the naval architects asked the court to determine the threshold issue of whether they were a class of persons entitled to seek such limitation – a "novel argument" on which there was no jurisprudence, Canadian or international, that addressed the issue. This is the first case, worldwide, of judicial consideration of this issue.

Issues: (1) Did JDI, a "ship-owner" as defined by the MLA, forfeit its right of limitation by engaging in conduct barring limitation? (2) With respect to the naval architects, are they entitled to limit their liability pursuant to Article 1(4), as persons for whose acts, neglect or default JDI is responsible, and, if so, is that entitlement barred by conduct?

Decision: (1) To succeed in breaking limitation, the cargo owner was required to prove that the loss resulted from the personal act or omission of JDI and/or the naval architects, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This is a heavy burden that will be met only in exceptional cases. The suitability and stability of the barge were established by the naval architect's calculations. Neither JDI nor the naval architects knew about the combination of factors that would cause the loss of the cargo.

The Court refused to draw an adverse inference as to recklessness and knowledge on the basis that the risk was obvious. JDI and associated personnel were on the barge working in proximity to the cargo. If they had known that the loss was probable, they would not have put themselves in harm's way.

(2) Notwithstanding that JDI contracted with the naval architects to provide naval architecture services which were integral to the subject cargo move (which particular expertise JDI did not have in-house), this was not enough to make the naval architects persons for whose act, neglect or default JDI, as the ship-owner, was "responsible" which would entitle them to avail of limitation under Article 1(4). The category does not extend to include independent contractors, as the ship-owner is not vicariously liable for actions of independent contractors. The takeway from this groundbreaking decision is that it is now all the more important, from the perspective of an independent contractor engaged to help a ship-owner, that purchase orders or contracts contain an indemnification or hold harmless clause. Without it, an independent contractor will be left out in the cold by the provisions of the *MLA*, without the same ability to limit as ship-owners. To truly drive the point home, the naval architects could be on the hook for $44.5 million where the ship owner's maximum exposure is $500,000, all on the basis of a $1,000 purchase order.

Presenter: Heather Devine

16. ***National Refrigerator & Air Conditioning Canada Corp. v. Celadon Group Inc.,*** 2016 ONCA 339. Plaintiff shipper asked Celadon Group Inc. ("Celadon") to carry two shipments

of copper tubing from Mexico to Canada. Both shipments were hijacked and never recovered. The plaintiff submitted a claim for US $220,000. Celadon denied the claims, relying on an exclusion of liability contained in its Rules and Regulations and posted on its website. Plaintiff commenced a court action. At trial the judge found that Celadon could not rely on its exclusionary terms on account of it not having sufficiently notified the plaintiff of their application. The judge also found the terms to have been unconscionable in any event. The judge also found that the value of the goods had been declared on the contract of carriage by way of the inclusion of a commercial customs invoice in the shipping documents provided the driver at origin. Consequently, Celadon could not rely on the statutory road carrier limitation of liability in Ontario of $2 per pound. The judge further found that Celadon acted negligently independent of the carriage agreement: having had knowledge of the enhanced risk of cargo hijacking in Mexico, Celadon had failed to warn the plaintiff of such increased danger. Celadon appealed on both counts.

Issues: (1) Could Celadon rely on its own contractual exclusion of liability as having been incorporated into the contract of carriage? (2) Alternatively, there having been no 'declared value' on the contract of carriage, could Celadon limit its liability under Ontario law to $2 per pound? (3) Was Celadon liable in tort independent of the contract of carriage?

Decision: (1) The court upheld the trial judge's finding concerning the inapplicability of the exclusion clause. Celadon could not establish that sufficient notice of the particular term in question had been given to the plaintiff. (2) The court however found that the trial judge erred in finding that the commercial invoice formed a part of the contract of carriage, so as to amount to a 'declared valuation'. The court noted the regulatory requirement that the shipper must actually declare the value on the "face of the contract of carriage". The court also noted that the relevant regulation specifies what a contract of carriage must contain, including "a space to show the declared valuation of the shipment, if any". The court noted that the commercial invoice "had nothing to do with the contract of carriage and providing a copy of the invoice to the carrier was not a declaration of value". As the bill of lading contained the prescribed space for a declaration of value, the same being left blank, Celadon's liability was accordingly limited to $2 per pound, being the amount of $110,830. The court did not address the unconscionability issue, the limitation of liability defence being established by regulation. (3) The court also found that the trial judge erred by holding that Celadon was liable to the plaintiff in tort: any failure or neglect on the part of Celadon with regard to the shipments arose directly out of the duties associated with the performance of the contract of carriage and did not give rise to an independent duty in tort.

Presenter: Gordon Hearn

IV. PREEMPTION

17. ***Mlinar v. United Parcel Service, Inc.***, – So. 3d –, No. SC14-54, 2016 WL 825261 (Fla. March 3, 2016). Plaintiff, Ivana Mlinar ("Mlinar"), created two valuable oil paintings, which were shipped via United Parcel Service, Inc. ("UPS") to New York. During transport the paintings were removed and the package arrived in New York empty. UPS later sold the paintings to Cargo

Largo, UPS's lost goods contractor, and after approximately two years, Cargo Largo auctioned such paintings. Thereafter, Mlinar received a phone call from Aaron Anderson ("Anderson"), an individual who purchased the paintings at auction. Anderson informed Mlinar that he acquired the paintings, and later placed a listing online without Mlinar's consent in which he offered to sell the paintings and to introduce the buyer to Mlinar.

Procedural History: Mlinar filed suit against UPS, Pak Mail (the third-party retailer), Cargo Largo, and Anderson, asserting four Florida state law and/or common law claims. The trial court dismissed Mlinar's claims, reasoning that the claims were preempted by the Carmack Amendment. The appellate court affirmed, holding that the claims did not involve "conduct separate and distinct from the delivery, loss of, or damage to goods." However, the appellate court certified a conflict with a decision by another Florida appellate court in *Braid Sales & Marketing, Inc. v. R & L Carriers, Inc*., 838 So. 2d 590 (Fla. 5th DCA 2003). The Florida Supreme Court granted review.

Holding: The Florida Supreme Court acknowledged the purpose of the Carmack Amendment was "to achieve uniformity in rules governing liability arising from interstate shipment contracts," and pursuant to this goal, courts generally find the statute "broadly preempts state law claims arising from failures in the transportation and delivery of goods." However, not every state or common law claim is necessarily preempted, and "courts have not settled on a single test to determine whether such claims escape the amendment's preemptive ambit." In *Braid Sales*, the owner of machinery sued the carrier for breach of an oral contract in which the carrier agreed to pay the full cost of repair, and the court found that the breach was "a separate harm which is independent from the loss or damage to goods." Conversely, in this case the appellate court found that the removal of the paintings constituted "separate and distinct conduct, rather than injury," and noted that this was a more appropriate test.

The Florida Supreme Court compared these two tests, and opted to apply a single test that incorporates both separate conduct **or** harm in the preemption analysis. The Court concluded that "a state or common law claim will be preempted by the statute unless the claim alleges conduct or harm that is separate and distinct from the loss or damage to the transported goods." Applying this test, the Court concluded that the unscrupulous practices by UPS constituted independent conduct or harm that had nothing to do with the shipping process and undermined the protections afforded by the statute. The Court found Mlinar's state law claims were not preempted, and stated: "Neither the Carmack Amendment nor public policy supports UPS's attempt to evade liability arising not from the loss of property, but from its intentional misconduct."

Presenter: Beata Shapiro

18. ***Scott Saccoccio and April Moore v. Allied Van Lines, Inc., Berger Transfer & Storage, Rogovin Moving & Storage Company, Inc., et al,*** In the United States District Court for the Eastern District of Tennessee, filed April 14, 2016. This is the case of the nineteen (19) boxes.

Plaintiff and his girlfriend lived in Connecticut when in 2015 he was transferred by his employer to Tennessee. Plaintiff's employer recommended Berger Transfer to Plaintiffs' household goods and promised to pay the expenses. Berger is an agent for Allied Van Lines, Inc. The originating agent for the move was Rogovin Moving and Storage. Plaintiff's employer hired Berger to move the household goods. Five packers led by a man named Syl from Berger began packing Plaintiffs' property on April 15, 2015. Plaintiff Saccoccio told the packers not to pack anything in the garage because the garage contained 19 packed boxes of valuables which Plaintiffs intended to transport themselves. He also told the packers not to pack anything in the bedrooms. Plaintiffs complained to Berger that the packers had arrived late. The next day, the packers arrived again to pack Plaintiffs' items and Saccoccio again instructed them not to pack the 19 boxes. He provided them with a descriptive list of the contents of the 19 boxes with a listed fair market value of $238,000.00. Plaintiffs rented an SUV to transport these items. Plaintiff Moore received a call from "Jose" with Allied who did not know the Berger packers. In the garage, Saccoccio found a bottle of whiskey where the packers had worked the previous day,

The next day, only two packers showed up and they presented Saccoccio with a document to sign. Upon entering the house, Saccoccio noticed that a basement window was open. Plaintiffs reviewed the storage unit and determined that all of their items had not been packed and that the remaining items had been rummaged through. They also found that all of the items in their bedroom dresser drawers had been removed as well as the 19 boxes in the garage. Some of the 19 boxes were found emptied. Jose told Saccoccio that the items had most likely been re-packaged.

Upon delivery, all 19 boxes were missing and some items were damaged.

Plaintiffs filed a claim with Allied which denied the claim for the missing items. Plaintiffs filed suit in state court alleging negligence, conversion and breach of contract. Plaintiffs later amended the complaint to allege a Carmack claim. Allied removed the case to federal court and moved to dismiss. Plaintiffs moved to remand.

Issue: Are the missing 19 boxes which were never intended to be included in the move governed by the Carmack Amendment?

Holding: No. The court easily denied Plaintiffs' motion to remand although recognizing that the Sixth Circuit has never recognized complete preemption of state law claims for cargo damage. The court denied the Defendants' motion to dismiss on the grounds that Carmack preempted all state law claims, including conversion. Relying heavily upon the federal court decision in Texas styled *Mayflower Transit v. Weil, Gotshal & Manges, LLP,* the court determined that because the 19 boxes were never intended to be shipped, claims associated with those items were not preempted by the Carmack Amendment. The court rejected the argument of the Defendants that the broad definition of "transportation" in 49 U.S.C. §13102(23)(B) would include 19 boxes that, although not designated for the move, were actually moved.

Presenter: Ken Bryant

19. ***Houston Professional Towing Association v. City of Houston***, 812 F.3d 443 (5th Cir., filed Feb. 3, 2016). The City of Houston enacted an ordinance in 2004 which created a freeway towing program called SafeClear to address safety and congestion issues. The City contracted with 11 towing companies to tow away disabled and wrecked vehicles in Houston. Members of the Houston Professional Towing Association (HPTA) were not included in the chosen eleven. HPTA filed suit alleging FAAAA preemption and the district court held that the portion of the SafeClear that regulated consent tows (tows requested by the owner) was preempted. In 2006, the City amended SafeClear again, HPTA filed suit and this time, the district court held that the ordinance was *not* preempted by FAAAA. The City made a minor amendment in 2009 and another amendment in 2011 which required vehicle owners to pay $50.00 for the tows of their vehicles from the highways. HPTA filed suit again but this time the City alleged that the action was barred by the doctrine of *res judicata*. The trial court agreed. HPTA appealed to the Fifth Circuit.

Issue: Were the 2011 amendments to the SafeClear ordinance "significant" enough to avoid the bar of *res judicata* from the refusal of the trial court to preempt the ordinance in 2006?

Holding: No. The Fifth Circuit affirmed the trial court grant of summary judgment to the City of Houston. The court first examines FAAAA and specifically the "safety exception" as it applies to the ordinance and its amendments. And then the court determines that the goal of both the 2006 and the 2011 amendments was to "promote safety by expeditiously clearing stalled and wrecked vehicles." And HPTA was not able to demonstrate that there had been a significant change in the facts underlying the recent amendment to the ordinance. And importantly, FAAAA has a specific exemption from preemption for towing regulations which transportation without the owner's consent. The trial court in the 2006 decision addressed this issue as well which is absolutely *res judicata* to raising it again in the 2011 litigation notwithstanding the safety exception analysis.

Presenter: Eric Benton

20. ***Costello v. BeavEx, Inc.,*** 810 F.3d 1045 (7th Cir., filed Jan. 19, 2016). This is a great primer on FAAAA preemption and specifically the scope of preemption in employment cases. BeavEx is a same day delivery service that retains couriers to deliver customer orders in Illinois. Its couriers are classified as independent contractors rather than employees thereby allowing it to avoid the application of the Illinois Wage Payment and Collection Act (IWPCA) which prohibits an employer from taking deductions from a worker's wages without consent. Plaintiffs are individual couriers who seek to certify a class on the grounds that they are employees under IWPCA and BeavEx illegally took deductions from their paychecks. BeavEx argued that the definition of "employee" in the IWPCA was preempted by the FAAAA because it "related to" a price, route or service. Plaintiffs filed a motion for class certification and a motion for partial

summary judgment to determine that the couriers were employees within the meaning of the IWPCA. The trial court denied BeavEx's motion as to FAAAA preemption, denied the class certification motion but ruled that the couriers were employees under the IWCPA. The parties appealed.

Issue: Will the IWPCA have a significant impact upon the prices, routes, and services that BeavEx offers to its customers so as to claim the protection of FAAAA preemption?

Holding: After an extensive review of the decisions of the U.S. Supreme Court and several federal circuit court opinions, the court determined that the definition of "employee" in the IWPCA, specifically the second prong which requires that the contractor perform work outside the employer's usual course of business, was not preempted by the FAAAA. Reviewing circuit court decisions, the Seventh Circuit stated that "the effect of labor law, which regulates the motor carrier *as an employer*, is often too `remote' to warrant FAAAA preemption." The appellate court seems to give a brighter line distinction by stating the following prescription: Laws that affect the way a carrier interacts with its customers fall squarely within the scope of FAAAA preemption. Laws that merely govern a carrier's relationship with its workforce, however, are often too tenuously connected to the carrier's relationship *with its consumers* to warrant preemption. The court also reversed the trial court's denial of class certification and remanded for further consideration.

Presenter: Mark Andrews

21. ***Soares v. Bekins Van Lines, Co.***, 2016 WL 797046 (D.N.J. 2016). Motion to dismiss for failure to state a claim granted in part and denied in part. This case involves damage to household goods transported in interstate commerce. Plaintiff alleges 11 items were lost in transit and not delivered and that 12 more items arrived but were damaged. Plaintiff sues for $18,575.99 for the lost freight plus $6,413.98 for the damaged goods. Plaintiff filed a two count complaint. Count One alleged "breach of contract, negligence, misrepresentation, tortious and malicious" that was "contrary to United States Department of Transportation regulations on interstate commerce, Title 49 (49 U.S.C.) Count Two alleged "loss and damage to household goods and personal belongings." Defendant carrier moved to dismiss under Rule 12(b)(6) asserting Plaintiff alleged only state-created causes of action. The court afforded great indulgence to the pro se plaintiff's complaint and finds the Plaintiff plead sufficient facts to be construed as a Carmack cause of action. In furtherance of that conclusion, the Court took note that the Plaintiff cited the relevant law, Title 49, although imprecisely. The Court then dismissed Count Two and any state law claims Plaintiff may have had with prejudice.

Presenter: Vic Henry

22. ***Skanes v. FedEx and FedEx Ground Package System, Inc.,*** 2016 WL 399658 (M.D. Ala. Filed Jan. 12, 2016). Ms. Skanes knows her constitutional rights but she is not familiar with the Carmack Amendment. Ms. Skanes desperately needed to get a brief to the Clerk of the

United States Supreme Court in order to seek justice from the unholy federal district court, truly the Court of Last Resort. Alas, Ms. Skanes relied upon Federal Express Ground Package System to get her brief to SCOTUS because it "absolutely, positively" had to be filed in a timely fashion. The package did not arrive in two days as promised by FedEx. Not only were Ms. Skanes constitutional rights violated (still), the late delivery caused her to suffer "financially, mentally and emotionally" for which $100,000 in compensatory damages and $100,000 in punitives would provide an immediate cure. FedEx removed her cause to federal court and moved for summary judgment on the grounds of Carmack preemption and seeking to enforce its limitation of liability of $100.

Issue: Who will Ms. Skanes vote for now that Ted Cruz is no longer a presidential candidate? Are her claims of late delivery preempted by the Carmack Amendment? Can FedEx file the applicable tariff with the court so as to enforce its limitation of liability? And who will pay for the Wall?

Holding: The court referred the motions to the magistrate judge who recommended that the motion as to Carmack preemption be granted. The magistrate judge determined that the "preemptive effect of the Carmack Amendment extends to claims arising from a delay in delivery." However, FedEx filed the wrong tariff with its motion for summary judgment and therefore the magistrate judge could not enforce the $100 limitation of liability. As a result, the magistrate judge left the case open leaving open the opportunity of FedEx to file the applicable tariff. Ms. Skanes most likely claims that the system is rigged.

Presenter: George Wright

23. ***Compania Chilena De Navegacion Interoceanica, S.A. v. D.H.C. Trucking, Inc. and Safe Cargo Forwarders, Inc.,*** 2016 WL 1722425 (S.D. Fla., filed April 29, 2016). This case involves several indemnification issues that arose out of the movement of freight from the U.S. to Peru. Ocean freight forwarder, Safe Cargo hired an ocean carrier, Compania Chilena De Navegacion Interoceanica, S.A. (CCNI), to carry two containers of printer accessories from Port Everglades to Callao, Peru, on behalf of Safe Cargo's customer, Compudiskett. DHC hauled the sealed containers from Safe Cargo to CCNI but never opened nor inspected the containers. The shipment arrived in Peru at which point Compudiskett realized that a majority of the cargo was missing. CCNI indemnified the cargo insurer for Compudiskett for the $130,000.00 it paid its insured for the first container. The second container suffered the same fate and Compudiskett filed suit in New York against CCNI which case is pending. CCNI sued DHC and Safe Cargo on the grounds of common law indemnity against Safe Cargo and DHC, and contractual indemnity against Safe Cargo under COGSA. Safe Cargo moved to dismiss all claims against it.

Issues: (1) Is CCNI's common law indemnity claim preempted by COGSA? (2) Has CCNI stated a claim for common law indemnity under federal maritime law against Safe Cargo? and (3) Should more facts be developed in order for the Court to properly adjudicate the

contractual indemnity claim against Safe Cargo under COGSA?

Decision: (1) The court granted the motion to dismiss the common law indemnity claim *to the extent that* it alleges loss or damage to the cargo while the cargo was in the possession of either Safe Cargo or DHC, e.g., en route to the Port of the Everglades and after discharge in Peru and delivery to Compudiskett. CCNI's claims within those time periods are preempted by COGSA. Although COGSA allows the parties to contract for extended liability before and after the ocean portion of the movement, the parties in this case did not so agree. (2) Although Safe Cargo moved to dismiss the common law indemnity claim under Florida law, the court determined that federal maritime law should apply because the contract was maritime and the dispute "is not inherently local", following the lead of the U.S. Supreme Court in *Kirby v. Norfolk Southern R.R.* which adopted the holding of *Kossick v. United Fruit Co.* Under federal maritime law, a "vicariously liable or non-negligent tortfeasor" is entitled to common-law indemnity "from a co-debtor guilty of actual fault." CCNI paid the insurer for Compudiskett and therefore was entitled to allege its entitlement to recovery from the entity guilty of actual fault. (3) The issue of contractual indemnity required a determination of facts as to the loading and unloading of the cargo and was premature at the motion to dismiss stage.

Presenter: Dennis Minichello

24. ***Alpine Fresh, Inc. v. Jala Trucking Corp. and Super Logistics, L.C.C.,*** 2:15-cv-3663 (D.N.J. 2016). This is an ICCTA and FAAAA preemption case as applied to a freight broker. According to the Judge, this case "involves the noble vegetable asparagus . . .." Plaintiff was the owner of a truckload of asparagus being transported from Texas where approximately half of the truckload was to be delivered to Maryland and the second half to New Jersey. At destination in Maryland, it was asserted the asparagus had wilted as a result of certain freeing and then thawing. The Bill of Lading included a temperature range for the shipment. The shipper's temperature recorder was capable of remote reading and the shipper alerted the broker, and only the broker, that the temperature was out of range while in transit. The broker tried to reach the carrier to no avail. The whole truckload was rejected and dumped at that Maryland and Plaintiff sued the motor carrier, Jala Trucking and the broker, Super Logistics in Federal Court in New Jersey.

The Complaint asserted various state-created causes of action including breach of contract, negligence, negligence of a carrier, conversion and breach of bailment. The carrier did not answer and default was entered, but the Court denied Plaintiff's motion to enter default judgment ruling that the preference in the Third Circuit was to conclude all issues as to all parties at one time.

For its part, the broker, Super Logistics, answered the breach of contract count and moved to dismiss all of the other causes of action such as negligence, breach of bailment and conversion as barred and preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 14501 (b) ("ICCTA") and the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501 (c) ("FAAAA). Because the Complaint also alleged Super was a carrier, Super also moved

to dismiss pursuant to the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706 ("Carmack").

The Court declined to dismiss on the basis of Carmack because of the agricultural commodities exception of Carmack. 49 U.S.C. § 13506. Nevertheless, the Court grated the motion on the basis of ICCTA and FAAAA preemption. The Court specifically referenced the preclusive effect of state law, regulation, etc. as applied to "brokers" or "freight forwarders." Based on the plain language of ICCTA and FAAAA, the Court applied the express prohibition of such state-created causes of action against brokers such as Super. Accordingly, the Court granted the motion and dismissed the negligence, breach of bailment and conversion causes of action leaving only the breach of contract cause of action.

PS – it was later determined Plaintiff was suing on an oral contract with the broker. The case settled.

Presenter: Hank Seaton

25. ***Hughes v. United Airlines, Inc.*****,** 2016 IL A (1st) 140747-U; 2016 Ill. App. Unpub. LEXIS 155 (Ill.App.Ct., 1st Dist., filed Feb. 1, 2016). Plaintiff filed an Illinois workers' compensation claim against United Airlines. She was given a 3-year medical leave from her job while the workers compensation claim proceeded. At the end of her 3-year leave, United Airlines told her that she had to complete return-to-work documents and return to work. She completed the return-to-work documents but did not work a flight that United Airlines claimed was required as a condition to returning to work. United Airlines fired her. Plaintiff filed a claim for retaliatory discharge, arguing that because United Airlines' termination in reliance on the unwritten return-to-work-flight policy was in retaliation for her filing her workers' compensation claim.

Issues: Whether state workers' compensation laws concerning retaliatory discharge are preempted by federal law.

Holding: The Illinois state appellate court held that the retaliatory discharge claim was preempted by the Railway Labor Act. Under the Railway Labor Act, there are two types of disputes: major (involving collective bargaining contract formation) and minor (involving interpretation of collective bargaining agreements and disputes under those agreements). The Illinois court found that the plaintiff's claim should be considered a minor dispute under The Railway Labor Act and, therefore, that her retaliatory discharge claim could not stand under state law. United argued that termination of employees was governed by a section of its collective bargaining agreement that covered medical leaves of absence. The court stated that to avoid preemption, the claim must be independent of the collective bargaining agreement, meaning that the state law claim can be resolved without interpreting the agreement itself.

As a matter of general principle, the elements of retaliatory discharge are factual questions that pertain to the conduct of the employee and the conduct and motivation of the employer. In

general, neither the elements of the claim nor the employer's defenses require a court to interpret a collective bargaining agreement. However, in this case, the plaintiff's specific claim required interpretation of a collective bargaining agreement because the defendant had relied on an unwritten rule that had become part of the collective bargaining agreement. Although the collective bargaining agreement itself did not include the pre-return-to-work-flight requirement, the parties had incorporated that requirement into their arrangement over the years, and the requirement had been made a part of the agreement, even though it was never written down. Because the state court would have had to rely on the collective bargaining agreement to determine whether defendant had a retaliatory motive in dismissing plaintiff, the plaintiff's claim was preempted by the federal Railway Labor Act.

Presenter: Kurt Vragel

V. JURISDICTION, VENUE, REMOVAL

26. ***Matrix Chemical LLC v. FedEx Freight, Inc.*****,** 2016 WL 260948 (E.D. Tex. 2016). Matrix Chemical purchased chemical products from a supplier. The supplier's product was stored at a third party warehouse operated by Linden. Under its terms of purchase, Matrix was solely responsible to arrange shipping and delivery of the chemical products to its customer. Apparently without the knowledge or authorization of Matrix, someone at the Linden storage facility contacted FedEx and arranged for FedEx to pick up the product and bill Matrix for the shipping charges. The warehouse did not advise FedEx that delivery of the product was required by a certain date, and that the product needed to be protected from cold temperatures. Upon learning of the shipment, Matrix instructed FedEx to return the product, but FedEx refused to do so without written authorization and payment of freight. Matrix was forced to purchase replacement goods and eventually lost all future business from its customer. Matrix sued FedEx in Texas state court for conversion, for a declaration that it did not owe FedEx's charges, and for interest and attorneys' fees.

FedEx removed the case to federal court. Matrix moved to remand, arguing that a preemption defense was insufficient to invoke federal jurisdiction, that an exemption to preemption applies to conversion claims and that because Matrix was not a customer of FedEx, Carmack jurisdiction does not apply. FedEx responded that Carmack conferred subject matter jurisdiction on the federal courts as the exclusive remedy against an interstate carrier. FedEx also argued that state court claims of conversion are federally preempted, and the rare exception to Carmack jurisdiction for conversion claims applies only where the carrier has intentionally converted goods for its own use. In its reply, Matrix argued that it instructed FedEx to return the product, but FedEx refused to return or release the product, and as such, Matrix's conversion claims address costs incurred in purchasing replacement goods, not loss or damage to the product.

The court, ignoring most of the arguments raised by the parties, determined that the amount

in controversy exceeded the $10,000 threshold required by 28 U.S.C. § 1337, and held that the plaintiff's claims were completely preempted. While not specifically addressing conversion claims, the court held that all state law claims against the common carrier were preempted, and removal was proper. The motion to remand was denied.

Presenter: Kathy Garber

27. ***Siemens Energy, Inc. v. CSX Transportation, Inc.,*** United States District Court for the District of Maryland, 2016 WL 1059261 (D.Md. March 17, 2016). Siemens sold two electrical transformers to a Kentucky company. The transformers were to be transported from Germany to the Port of Baltimore for ultimate delivery to Kentucky. Both transformers were allegedly delivered in a damaged condition. Siemens sought to recover over $1.5 million for the loss to the two transformers. The broker for the move, Progressive, was first to file suit against CSX in Kentucky under the Carmack Amendment. Another party to the transaction filed another suit in Kentucky. Both cases were assigned to the same federal judge. Siemens filed suit in Maryland, the U.S. point of delivery of the transformers before their eventual delivery to Kentucky. The defendant field a motion to dismiss for improper venue under 28 U.S.C. §1404(a).

Issue: Was Maryland the proper venue under the Carmack Amendment and 28 U.S.C. §1404(a) when the destination of the movement was Kentucky?

Holding: No. Motion to transfer was granted. The court initially determined that the case could have been brought in Kentucky because the courts of that state had personal jurisdiction over CSX. In addition, Carmack's venue provision allows that a claim may be asserted against a delivering carrier in the district in which the point of destination is located, i.e., Kentucky. Although the court determined that the Defendant had not convinced the court that there was an issue as to the convenience for witnesses and the parties, the court did grant the motion to transfer on the grounds that Maryland had little to do with the movement of the freight and that the interests of justice required transfer of the suit to Kentucky, especially given the first-filed cases in Kentucky.

Presenter: John Fiorilla

28. ***Idaho Pacific Corp. v. Binex Line Corp.,*** 2016 WL 843254, United States District Court for the District of Idaho (filed March 1, 2016). Idaho Pacific is a potato dehydrator and sells potato flour. It sold flour to Orion Corporation in Korea. Orion selected Binex Line to arrange the transportation of the potato flour. Idaho Pacific did not participate in the execution of the bill of lading. Upon delivery of the flour to Korea, Orion rejected a portion of the load. Idaho Pacific agreed to the return of the rejected portion and offered to arrange for the return. Orion once again insisted upon hiring Binex Line. Again, on the return trip, Idaho Pacific did not participate in the negotiations for the return of the flour. The flour was sent to a storage facility in California in order to allow the FDA to inspect it. The flour was stored for almost a month. Thereafter, Binex began shipping the flour from California to Idaho. In Salt Lake City, Binex demanded payment for the freight charges and the storage ($20,799.078). Idaho Pacific refused to pay the full amount but

did offer to pay the standard freight charges. Binex Line refused to deliver the potato flour. Idaho Pacific filed a declaratory judgment action in Idaho against Binex Line and a claim for conversion. Binex Line removed the case to federal court and moved to transfer it to California based upon the forum selection clause in the bill of lading.

Issue: Does the fact that Idaho Pacific was not involved in hiring Binex Line or in reviewing and accepting the bills of lading (which contain a California forum selection clause) constitute "exceptional circumstances" thereby rendering the forum selection clause "inoperable" and keeping the case in Idaho?

Holding: Yes. After analyzing evidentiary issues in the declarations supporting the motion to transfer, the court addressed the issue of whether it should transfer the case to California pursuant to the forum selection clause in the bill of lading. Of import is the language of the bill of lading which references COGSA and recognizes that COGSA will apply throughout the movement of the freight. Neither party addressed the differences between COGSA and Carmack in their treatment of forum selection clauses: specifically, COGSA allows the parties to freely contract whereas Carmack does as well as long as the parties waive the venue provisions of the Carmack Amendment. Here, the court determined that COGSA applied and that the forum selection was not enforceable given the lack of bargaining power of Idaho Pacific.

Presenter: **Hillary Booth**

29. ***Smith v. Coastal Moving and Storage, Inc.,*** United States District Court for the Western District of Tennessee, Case No. 14-cv-2390 (filed Jan. 25, 2016). An interesting follow up to our discussion of this case on the Captiva Agenda in which the court denied the plaintiffs' motion to remand. Mrs. Smith is a civilian employee of the Navy. She was relocated from Memphis to Italy. The Navy then hired the Defendants to move and store Mrs. Smith's household goods until she and her husband returned to the U.S. The property was first stored at Coastal Moving in Georgia and then moved to OK Moving in Memphis where the Smiths picked up their property. Plaintiffs filed a claim with the Defendants alleging loss or damage to a substantial amount of their property. Defendants sent inspectors to examine the property, returned some of the goods to the warehouse and hired mold remediation specialists who determined that the property could be cleaned. Plaintiffs refused to allow the inspectors to see the property and declined to have the property cleaned as recommended. The Navy advised the Smiths as to the consequences of their actions and explained that they could submit their claims to the Military Claims Office (MCO) which they did. The MCO authorized a payment of $20,000.00 to the Smiths. The Smiths appealed to the Claims and Tort Litigation Division of the Navy which affirmed the prior decision. The Smiths then filed this lawsuit.

Issue: Does the Military Personnel and Civilian Employees' Claims Act (MPCECA) provide the exclusive remedy for the Smiths (rather than the Carmack Amendment) and also deprive the court of subject matter jurisdiction?

Holding: Yes. The MPCECA sets forth an administrative claims process that provides the

exclusive remedy against the government for loss or property incident to military service. By regulation (Defense Transportation Regulation or DTR), the claims process is explained and even expressly invokes a Carmack analysis "unless a different rule or procedure" applies. The court held that the DTR provided a detailed regulatory scheme. The $20,000.00 offered to the Smiths was the culmination of their administrative remedy for which there is no judicial review.

Presenter: Marian Sauvey

30. ***Singh v. Diesel Transport LLC***, 2016 U.S. Dist. LEXIS 30256 (D.N.J. 2016). This is a jurisdiction case in which the court dismissed a personal injury case for lack of subject matter jurisdiction. Plaintiff alleges negligence and respondeat superior and seeks damages as a result of an accident occurring in Nebraska. Plaintiff sued in New Jersey alleging diversity jurisdiction. Nevertheless, plaintiff alleged that he and at least one of the other defendants were residents of the State of New Jersey. Reviewing two hundred years of federal case law, the Court concludes there is no federal subject matter jurisdiction. The Court then considered and granted the Defendant motor carrier's application for sanctions and fees and costs pursuant to Rule 11.

Presenter: Dennis Kusturiss

31. ***Portillo v. National Freight, Inc.,*** 2016 WL 1029854 (D. N.J., filed March 15, 2016). This case addresses removal under the Class Action Fairness Act (CAFA) and the timeliness of removal under CAFA. Under CAFA, a class action is removable to federal court with minimal diversity (the citizenship of one class member differs from that of any defendant), an amount-in-controversy in excess of $5,000,000.00 and more than 100 members. The plaintiffs here performed deliveries for Trader Joe stores in Massachusetts and claim that they were misclassified as independent contractors rather than employees. Plaintiffs filed suit in state court in New Jersey and Defendants filed a motion to dismiss on the grounds of FAAAA preemption. After almost 130 days expired from the date of service of the complaint, Defendants examined their internal documentation and determined that had a basis upon which to remove the case under CAFA. As a result, they removed the case to federal court and Plaintiffs moved to remand on the grounds of timeliness and failure to meet the amount in controversy.

Issue: Is the 30-day removal deadline under 28 U.S.C. §1446(b) apply limited to a review of the allegations of the Plaintiffs' complaint or other document filed with the complaint? If so, may Defendants remove based upon facts gleaned from their own internal investigation without awaiting receipt of any amended pleading or "paper" as required in 28 U.S.C. §1446(b)(3)?

Holding: The Defendants were timely here in removing this case to federal court even though they were beyond the initial 30-day deadline which applies only to a review of the complaint and any documents initially filed. Here, the court determined that no such basis for removal existed after a review of the complaint. The court further determined that the 30-day window is not the exclusive time period for removal and that the statute allows a defendant to remove "once they determine, based upon a review of their own records, that the action meets the requirements of CAFA."

Presenter: David Sauvey

32. ***Zurich American Ins. Co. v. Team Tankers A.S***., 2016 U.S. App. LEXIS 1390 (2d Cir. 2016). This case involves an arbitration clause in a transportation contract. In June 2008, Plaintiff, Shipper, Vinmar, chartered from Defendant, Team Tankers a ship called the M/T Siteam to transport a large quantity of a chemical from Texas to South Korea. The chemical in its most valuable form is colorless. Nevertheless, when contaminated with other substances, the chemical can "yellow" and become less valuable. At destination, the chemical was unloaded from the vessel within specification and was then transferred to an on-shore storage facility. Six weeks later, the chemical was tested in storage and it had "yellowed." Portions of the chemical still on the vessel and which had never been unloaded were also tested and were found to have "yellowed." Samples at origin in Texas were tested and remained clear.

Under the charter agreement contract between Team Tankers and Vinmar, Vinmar initiated arbitration before the Society of Maritime Arbitrators, Inc. By August 2013, applying COGSA, the Arbitration Panel found in favor of the Defendant, Team Tankers. Specifically, the Panel found Vinmar (the shipper) failed to prove the chemical was damaged while on board the vessel, that Team Tankers acted reasonably even if Vinmar could prove the damage occurred on the vessel and that Vinmar failed to prove damages. The Plaintiff, Shipper, Vinmar, then filed an action in the United States District Court for the Southern District of New York to vacate the arbitration award in favor of Defendant, Carrier, Team Tankers. Plaintiff asserted the Arbitration Panel engaged in a manifest disregard of the law, namely, COGSA.

In an unusual argument, Vinmar also alleged that the failure of one of the members of the panel to disclose that he had a brain tumor (which took his life shortly after the Panel's Award), constituted "corruption" or "misbehavior" of the Panel under the Federal Arbitration Act.

The District Court rejected all of the Plaintiff/Shipper's challenges and affirmed the Award in favor of the Defendant. The Charter Agreement also stated that "[d]amages for breach of this Charter shall include all provable damages, and all costs of suit and attorney's fees incurred in any action hereunder." Interpreting that provision, the District Court awarded the Defendant/Carrier reimbursement of its fees and costs in defense of the District Court action.

On Appeal to the United States Court of Appeals for the Second Circuit, the Second Circuit affirmed the District Court's Judgment confirming the arbitration award but also reversed the award of counsel fees and costs. In so ruling, the Second Circuit found the Arbitration Panel did not engage in a "manifest" disregard of the law. Specifically, according to the Second Circuit, the Panel applied COGSA's burden shifting regime but merely concluded that Plaintiff's proofs were not sufficient to prove a prima facie case. The Court noted the Panel could have easily concluded in Plaintiff's favor but it was up to the Panel to make that determination and the Court of Appeals was not going to second-guess that decision. On the "corruption" or "mischief" issue, the Court pointed out that the arbitration rules required the arbitrators to disclose an illness. Nevertheless, the Court found that parties may not by contract expand the FAA limited grounds to vacate and

arbitration award. Accordingly, the Court found that a failure to comply with the arbitration rules, without more, cannot be used to expand the FAA's limited reasons to vacate and arbitration award.

As to the award of fees and costs, the Second Circuit reversed the District Court and fund that because there was no finding by the District Court of a breach of the Charter Agreement, there could not have been an award of counsel fees and costs. The Defendant argued Plaintiff's lawsuit to vacate the Arbitration Award was itself a breach of the Charter Agreement. The Second Circuit disagreed and found instead that both parties have the right under federal law as per the FAA to seek to vacate or for that matter to confirm the Arbitration Award.

Presenter: Ken Hoffman

33. ***Blackwell v. Across U.S.A., Inc.*****,** No. 3:14-CV-3912-L, 2015 WL 1879754 (N.D. Tex. Apr. 23, 2015). Plaintiff Timothy Blackwell ("Blackwell") originally filed this action against Defendant Across USA, Inc. ("Across USA"), in County Court in Dallas County, and Across USA removed it to the Northern District of Texas based on diversity. There is no explanation why the defendant did not remove based on federal question and no explanation why the defendant did not assert complete preemption under the *Hoskins* decision. Blackwell asserted claims for violations of the Texas Deceptive Trade Practices Act, fraudulent inducement, negligent misrepresentation and gross negligence, and argued that Across USA conducted a "bait and switch" scheme with respect to the contract between the parties to move household goods from Texas to North Carolina.

The forum-selection clause stated:

> If a lawsuit becomes necessary to resolve any dispute between the carrier and shipper, said suit shall and must only be brought in circuit or county court in and for Dallas County, Texas. Suits involving disputed [sic] over interstate shipments must be limited to the governing federal law. Both parties agree to submit themselves to the jurisdiction of the Texas Courts and agree given the relationship to the state, such exercise is reasonable and lawful.

Holding: After considering the arguments, the Court held that the forum-selection clause mandated remand because Across USA, the party who drafted the contract in question, waived its right to remove in the forum-selection clause. Noting that, "[a] party may waive its rights [to remove] by explicitly stating that it is doing so, by allowing the other party to choose venue, or by establishing an exclusive venue within the contract," the Court determined that the forum-selection provision's clear and unequivocal language required that any lawsuit be brought in the "circuit or county court in and for Dallas County, Texas." The Court found that it was not a "Texas court" (but rather a United States court sitting in Texas) and that Across USA failed to meet its "heavy burden" to demonstrate that the clause resulted from overreaching, violated a strong public policy, or that enforcement of the clause deprived Across USA of its day in court. Accordingly, the Court remanded the case to Dallas, County. In addition, the Court awarded

Blackwell attorney's fees and costs incurred in obtaining remand because Across USA lacked objectively reasonable grounds to believe that removal was legally proper.

Contrasted with *Ledlet v. Across USA Moving, Inc*., 2015 WL 3649144 (S.D. Tex. June 11, 2015) from January 2016 agenda**:** *Ledlet* involved an identical forum-selection provision drafted by Across USA, but instead of being removed to federal court, the case was initially filed in the Southern District of Texas. Across USA moved to dismiss for *forum non conveniens*. This procedural posture is slightly different than *Blackwell*, because the Court's inquiry here is focused on "where trial will best serve the convenience of the parties and the ends of justice." The Court considered the application of the Carmack Amendment's venue provision, which allows suit to be brought against a delivering carrier in a district court of the United States through which the carrier operates or in a judicial district in which the loss is alleged to have occurred. Ultimately the Court found that the Carmack Amendment's forum provision overrides the contract's forum-selection clause, making venue in the federal court proper.

Presenter: Vic Henry

VI. CARRIER-BROKER-THIRD PARTY

34. ***Traffic Tech, Inc. v. Arts Transp., Inc***., 2016 WL 1270496 (N.D. Ill. Apr. 1, 2016). PepsiCo. hired Traffic to arrange for the transportation of a load of dehydrated apple slices from Washington to a Quaker Oats facility in Iowa in May of 2015. Traffic then hired Arts to perform the transportation services. Traffic and Arts entered into a Broker-Carrier Transportation Agreement regarding the transportation services. Sviderschi is the President and sole officer of Arts. According to Traffic, Arts improperly allowed the Slices to be packed in a truck trailer along with two tires. When the Trailer arrived in Iowa, the load was rejected due to the presence of the tires, which allegedly violated food safety laws. Pepsi contacted Traffic to inform Traffic of the food safety violations and told Traffic to await further instructions. Traffic then forwarded the information to Arts and told Arts to await further instructions. Arts then decided to dispose the Slices resulting in a total loss of the Slices. Traffic subsequently paid Pepsi $136,110.62 in damages for the failure to deliver the Slices.

Traffic sued Arts for breach of contract and under the Carmack Amendment, as well as claims for breach of 49 C.F.R. § 370.11. Defendants filed a counterclaim, contending that when Arts picked up the Slices, Arts was instructed by Pepsi's representatives to move the tires into the Trailer with the Slices. When Arts delivered the Slices to Iowa, Quaker Oats rejected the Slices based solely on the presence of the two tires and made no effort to inspect the Slices. Defendants contended that the rejection was not justifiable and that Traffic refused to provide any meaningful guidance for the handling of the Slices in a timely manner.

Defendants moved to dismiss the complaint, and Traffic seeks to dismiss the counterclaim. As an initial matter, the court held that Traffic did not plead sufficient facts to support a piercing of the corporate veil theory to hold Sviderschi individually liable under Illinois law. Then the court

held that Carmack does not apply to brokers, and accordingly, Traffic was not entitled to bring a claim against Arts under the Carmack Amendment. However, the court allowed Traffic to pursue a claim for breach of contract against Arts, even though the claim was for damage to the shipment. With the failure of Traffic's Carmack claim, the court also dismissed the claim under 49 CFR 370.11. Finally, the court denied the motion to dismiss the counterclaim, finding that while summary judgment might be appropriate at some point, the defendant raised sufficient allegations in its counterclaim to survive the 12(b)(6) standard.

Presenter: Jason Orleans

35. ***Sompo Japan Ins. Co. of America v. B&H Freight, Inc., et al.,*** 2016 WL 1392339 (N.D. Ill. April 8, 2016). Although the facts are a bit unclear, it is apparent that a load of Canon Rebel camera kits were lost and Sompo paid its insured for the loss and filed a claim against either B&H the carrier or B&H the broker. B&H the broker filed a motion to dismiss the count of the complaint which alleged that it improperly hired an unreliable carrier. The motion to dismiss is actually based upon a hyper-technical argument that the allegations of the count of the complaint alleging that B&H was a carrier were the same as those contained in count alleging it was a broker.

Issue: Does the Carmack Amendment preempt claims of shippers against brokers?

Holding: No. Notwithstanding Judge Shadur's statement that there were no controlling appellate court cases on the issue, he rightly determined that that Carmack Amendment does not apply to claims against brokers.

Presenter: Bill Bierman

36. ***National Union Fire Insurance Company of Pittsburgh v. All American Freight, Inc., et al.***, 2016 WL 633710 (S.D. Fla. Feb. 17, 2016). Plaintiff filed a Carmack suit against a licensed transportation broker (Hartley Transport), a related licensed carrier (Hartley Freight) and the carrier retained by Hartley Transport (All American Freight) for loss of 320 bags of green coffee en route from Miami to Houston. All American's role with respect to the shipment was clear: the carrier picked up the shipment and lost it. The roles of the two Hartley defendants, however, were at issue in their respective summary judgment motions. The shipper, Coex, had hired Hartley Transport to perform the transportation. Hartley Transport then subcontracted the load to All American. Hartley Freight was named as a defendant on the theory that the two Hartley entities "acted in concert and in a singularly capacity with respect to the carriage of goods."

Issues: Can a company licensed only as a transportation broker avoid Carmack liability through summary judgment in the face of the shipper's belief that the company was a carrier? Can a related carrier be straddled with liability for the broker's actions merely by virtue of certain links between the companies?

Holding: It was clear that carrier Hartley Freight played no role with respect to the shipment and therefore was dismissed from the case. Plaintiff had no evidence to show that

Hartley Freight was involved in any way with the shipment, but sought to hold it jointly liable with Hartley Transport based upon the companies' common address, website, telephone number, email address and employees. The shipper, however, admitted that it believed it was dealing with Hartley Transport and was not even aware of the existence of Hartley Freight. There was therefore no factual or legal basis for imposing liability on Hartley Freight for Hartley Transport's involvement with the shipment.

The broker's role, however, was another story. Though licensed only as a broker, evidence was presented by plaintiff that the shipper believed, through Hartley Transport's representations to Coex and the public, that Hartley Transport was a carrier. Hence, too many factual issues existed on Hartley Transport's status under Carmack to justify entry of summary judgment in its favor.

Just two months after the court ruled on the summary judgment motions, the case was tried to a jury. Judgment was entered in favor of plaintiffs and against both Hartley Transport, who was found to be a carrier of the cargo, and All American. Liability was allocated 15% to Hartley Transport and 85% to All American.

Presenter: Kathleen Jeffries

37. ***Dragna v. KLLM Transport Services*****,** 2016 WL 197194 (5th Cir. Jan. 15, 2016). This is a follow-up to a district court decision covered at the summer 2015 meeting. Larry Dragna suffered injuries in a motor vehicle accident with a tractor-trailer operated by carrier A&Z Transportation. Mr. Dragna and his wife sued KLLM Transport Services, whose broker division, KLLM Logistics, hired A&Z to transport the load, under theories of joint venture, vicarious liability and negligent hiring of an independent contractor. The district court entered summary judgment for KLLM Transport on all claims. The Dragnas timely appealed.

Prior to selecting A&Z to perform transportation services in November 2011, broker KLLM Logistics had used A&Z twice without incident and had followed its selection policy by reviewing A&Z on Carrier411. The Carrier411 report showed that A&Z was "unrated" for safety and had three BASIC scores above the threshold that indicated problems in a category. KLLM Logistics' selection policy allowed for the use of carriers with "satisfactory" safety ratings or "unrated;" and with three or fewer troublesome BASIC scores.

Issue: Was summary judgment in favor of KLLM Transport on plaintiffs' theories of joint venture, vicarious liability and negligent hiring proper?

Holding: Yes. Judgment affirmed. (1) Joint venture: carrier A&Z, who alone determined how to move the load, who bore the risk of loss for the load and who did not share profits with broker KLLM Logistics, was a subcontractor in relation to the broker and not part of a joint venture for purposes of liability. (2) Vicarious liability: the broker's right to check the progress of the load, with A&Z selecting its own driver and determining the driver's routes and

drive times, did not rise to the level of operational control required to impose vicarious liability on a principal for its contractor's actions. (3) Negligent hiring: because the Dragnas could not show that KLLM Logistics knew or should have known of any disqualifying safety problems for A&Z, the broker bore no liability under a negligent hiring theory. The Carrier411 report for A&Z gave no indication of how to use BASIC scores; and plaintiffs were unable to establish any requirement that, with three high scores, a broker must further investigate the carrier before selecting it to perform transportation services.

Presenter: Pam Johnston

38. ***Conti 11. Container Schiffahrts-GmbH v. New Orleans Terminal***, 2016 WL 409610 (E.D. La. Feb. 3, 2016). In the continuing saga of the July 2012 explosion and fire aboard the M.S. MSC Flaminia (which was the subject of a New York action covered on the January 2016 agenda), resulting in three deaths, multiple injuries and damage to the vessel and cargo, a federal judge in Louisiana was called upon to determine the liability of a stevedore for cargo damage under COGSA and tort claims. New Orleans Terminal ("NOT") received, handled, stored and loaded onto the ship certain explosive and combustible chemical cargo. Plaintiffs assert that NOT's improper storage and handling of the chemicals caused the explosion. NOT filed a motion to dismiss plaintiffs' strict liability and tort claims, stating five grounds for dismissal. Plaintiffs responded in part with the filing of an amended complaint eliminating the COGSA strict liability count.

Issues: Is a stevedore subject to liability under COGSA? Alternatively, can a stevedore be held liable for personal injuries and cargo damage under state tort theories?

Holding: NOT is *not* getting out of the case. Yes, NOT was correct in asserting that COGSA applies only to carriers and shippers of cargo and that the Fifth Circuit no longer permits a cause of action against a stevedore for breach of implied warranty of workmanlike performance. But its success ended there. Plaintiffs' remaining claims were not barred by the equitable doctrine of laches because the complaint was filed within one-year (the state's statute of limitations for tort claims) of plaintiffs learning of NOT's role in the accident through discovery in the New York action. Viewing the allegations in the complaint liberally, the court further held that plaintiffs have sufficiently alleged the existence and breach of NOT's duties to warn of the dangerous nature of the cargo and to properly store and handle the cargo; and a right to indemnity and contribution based on NOT's breach of its duty to exercise reasonable care.

Presenter: Colin Bell

39. ***LIG Insurance Company v. ZP Transport, Inc***., 2015 U. S. Dist. LEXIS 102142 (N.D. Ill., 2015) and Opinion and Order (N.D. Ill., filed Feb. 25, 2016). Plaintiff LG Electronics shipped cellular telephone parts from Seoul, Korea, by air, on an air waybill. Those parts were ultimately destined to Tiera Del Fuego, Argentina. The initial leg of the shipment was by air from

Seoul to O'Hare Airport, Chicago, Illinois. Once landed in Illinois, a broker arranged for truck transportation to the Miami, Florida, airport. In Miami, the shipment was to be transferred back to an air carrier for final delivery to Tierra Del Fuego. The forwarder prepared a separate straight bill of lading covering the move from Chicago to Miami, which the motor carrier's driver signed. The shipment was picked up by the motor carrier but was stolen between Chicago and Miami. The shipper sued the forwarder, the broker and the motor carrier for more than $700,000.00.

The air waybill contained three clauses covering limitation of liability:

> SUBJECT TO THE CONDITIONS OF CONTRACT ON THE REVERSE HEREOF, ALL GOODS MAY BE CARRIED BY ANY OTHER MEANS INCLUDING ROAD OR ANY OTHER CARRIER UNLESS SPECIFIC CONTRARY INSTRUCTIONS ARE GIVEN HEREON BY THE SHIPPER, AND SHIPPER AGREES THAT THE SHIPMENT MAY BE CARRIED VIA INTERMEDIATE STOPPING PLACES WHICH THE CARRIER DEEMS APPROPRIATE. THE SHIPPER'S ATTENTION IS DRAWN TO THE NOTICE CONCERNING CARRIERS' LIMITATION OF LIABILITY. Shipper may increase such Limitation of liability by declaring a higher value for carriage and paying a supplemental charge if required.
>
> Except as otherwise provided in carriers tariffs or conditions of carriage, in carriage to which the Warsaw Convention does not apply carriers liability shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damage or delayed, unless a higher value is declared by the shipper and a supplementary charge paid.
>
> Any exclusion or limitation of liability applicable to carrier shall apply to and be for the benefit of carriers agents, servants and representatives and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.
>
> For purpose of this provision carrier acts here in as agent for all such persons.

Decision: The broker argued that the shipment was a through international air shipment, that the limitations of liability applied to it because it was an agent, servant or representative of the shipper under the air waybill, and that the provisions in the air bill should limit its liability to approximately $94,000.00. In its first opinion, the district court rejected the broker's arguments and, instead, found that the straight bill of lading (rather than the air waybill) covered the movement between Chicago and Miami, and, therefore, that the Carmack Amendment applied to the shipment. The court rejected all of the broker's arguments that international through shipment cases such as *Kirby* should apply.

Following the first opinion, the broker filed a second motion for summary judgment. This time, the broker argued that because the Carmack Amendment applied to the case, the shipper had no standing to sue under the straight bill of lading. The district court found language in *Kirby* that supported its finding that the forwarder was not an agent of the shipper, because the forwarder could only be a limited agent for purposes of agreeing to limitations of liability. The forwarder was not the agent of the shipper for purposes of arranging for ground transportation, and, in fact, the court found no evidence that the shipper was even aware of the forwarder's handling of the ground shipment. Because the shipper had no standing to sue under the bill of lading, the shipper could not raise Carmack Amendment claims. All of the federal law claims against the broker were dismissed. However, the court further found that because the Carmack Amendment did not apply to the shipper's claim, the shipper's state-law claims could stand.

Presenter: Kevin Anderson

VII. FREIGHT CHARGES

40. ***Western Home Transport, Inc. v. Hexco, LLC,*** In the United States District Court for the District of North Dakota, 28 F.Supp.3d 959 (D. N.D. filed June 27, 2014). An oldie but goodie for a recitation of the laws of freight charge collection. Hexco purchased six modular homes from Stone Creek Homes, Inc. Western Home Transport specialized in over-the-road transport of manufactured homes. Western transported the homes on various dates to a Hexco project site in North Dakota. When Western wasn't paid, it sued the consignee, Hexco. The freight moved on bills of lading which were apparently unclear on whether they were marked "Collect" or "Prepaid". Section 7 of the bills of lading was not signed.

Issue: Is a consignee always liable for freight charges when it accepts the freight as a matter of federal common law?

Holding: No. The facts are a bit confusing and for this reason (and others) the court denies Western's motion for summary judgment as well as Hexco's motion to dismiss for failure to add Stone Creek as a party. After a lengthy and in-depth analysis of the history of federal law on the obligation to pay freight charges, the court determines that there are genuine issues of material fact. But the court misses a few facts that were undisputed, namely the blank Section 7: "Arguably, this could be viewed as suggesting that Western had agreed to seek payment for the freight charges only from the Stone Creek." The court also gets into the "double payment" argument and cases that establish consignee liability but refuses to make a decision based upon the facts before it. In all, a good analysis of federal freight charge collection law, but "arguably" a bad decision

Presenter: **Fritz Damm**

41. ***Atlas Van Lines, Inc. v. Dinosaur Museum***, 2016 Utah App. LXIS 37 (Utah Ct. App., Feb. 19, 2016). The Museum owns and displays dinosaur fossils and related materials. S&E Strategies, LLC ("S&E") contracted with the Museum to display the exhibits in New Jersey. S&E

hired Atlas to transport the exhibits from Utah to New Jersey and back. Through a number of emails, the Museum sought to make certain that it would not be paying the freight charges. Atlas confirmed that S&E was paying the freight charges. When S&E did not pay the freight charges, Atlas sued the Museum. Both sides filed motions for summary judgment.

Issue: Is Atlas equitably estopped from its efforts to collect the freight charges from the Museum when it specifically stated that S&E would be responsible for paying the freight charges?

Holding: Yes. Under Utah law, equitable estoppel required (1) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted, (2) reasonable action taken by the other party on the basis of the first party's statement, and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act or failure to act. Atlas challenged the trial court's ruling in favor of the Museum on the first and second elements of equitable estoppel. Atlas attempted to recharacterize the emails as establishing S&E's primary liability for the freight charges but never eliminating the secondary liability of the Museum. The appellate court affirmed the trial court's finding that Atlas's efforts to collect the charges from the Museum were inconsistent with its previous statements that S&E was liable for the charges. Further, the Museum's actions were reasonable under the circumstances notwithstanding the fact that the Museum agreed to the shipment of the exhibits before the emails began.

Presenter: Todd Suter

42. ***Kennedy Tank & Mfg Co. v. Emmert Indus. Corp.,*** 2016 Ind. App. LEXIS 120 (Ind. Ct. App., filed April 22, 2016). An application of the 18-month statute of limitation for collection of freight charges under 49 U.S.C. §14705. In 2011, Kennedy Tank hired Emmert to haul a piece of commercial equipment from Indiana to Tennessee for a freight charge of about $200,000.00. Due to unforeseeable circumstances and delays, Emmert incurred additional expenses of $700,000.00. In 2013, the parties discussed submitting the dispute to arbitration but the parties did not follow up until Emmert sued Kennedy in 2015 in state court. Kennedy filed a motion to dismiss the complaint on the grounds that it was time-barred under 49 U.S.C. §14705. Emmert defended claiming that the 10 year Indiana statute of limitation applied even if §14705 applied because Kennedy was equitably estopped from relying upon the federal statute. The trial court denied the motion to dismiss and Kennedy filed this appeal.

Issue: Does 49 U.S.C. §14705 preempt state statutes of limitation that are of longer duration that the 18-month limitation of the federal statute?

Holding: Yes. Although there is no Indiana law on point, the appellate court looked to other federal and states cases which generally held that the federal statute of limitations for freight charge collection preempted state laws of lesser duration. This is ironically true even though recent case law has held that the federal courts do not have subject matter jurisdiction to adjudicate freight

charge disputes (*Transit Homes v. Homes of Legend, Inc.,* 173 F.2d 1185 (N.D.Ala. 2001)), the federal statute of limitation remains.

Presenter: Mike Tauscher

43. ***In Re: World Imports, Ltd. v. OEC Group, NY***, 2016 U.S. App. LEXIS 7118 (3rd Cir., filed April 20, 2016). World Imports sells furniture wholesale to retail distributors. It contracted with OEC Group to serve as a NVOCC (non-vessel operating common carrier) and arrange for the transportation of the World Imports freight from countries of origin to World Imports warehouses or to other U.S. destinations. In its Credit Application with World Imports, OEC sought to effect a lien on all shipments for any current and future indebtedness of World Imports to OEC. Each invoice for each container shipped contained terms and conditions which also attempted to create a lien on all of the property of World Imports to pay for any and all shipments. World Imports sought the protection of Title 11 of the U.S. Bankruptcy Code. OEC filed a motion for relief from the automatic stay arguing that it was a secured creditor with regard to good in its possession and was entitled to refuse to release such goods until it was paid $1,453,000.00. OEC estimated the value of the goods it held to exceed the amount owed. World Imports filed an adversary proceeding for turn over. World Imports stated its willingness to pay for post-petition orders but not pre-petition orders. The Bankruptcy Court ruled in favor of World Imports and OEC did not seek a stay of the order but simply appealed to the district court which affirmed the bankruptcy court ordering the delivery of goods held in OEC's possession and that OEC did not hold a valid maritime lien on pre-petition goods because the contractually created liens were unenforceable. OEC appealed.

Issue: Did the lower courts err in holding that the contract provisions at issue which purported to give OEC maritime liens on goods in its possession both for freight charges on those goods and for unpaid charges on prior shipments were unenforceable?

Holding: Yes. The Third Circuit reversed the bankruptcy court and the district court: OEC was entitled to a lien for past due freight charges against the freight it held post-petition because of the contract with World Imports. As we know, a lien for unpaid freight "arises from the right of the ship-owner to retain possession of the goods until the freight is paid" and is lost upon "*unconditional* delivery to the consignee." However, the Third Circuit noted the presumption against waiver of the cargo lien including whether there was an understanding between the parties with regard to retention of the lien. It found error in the holding of both courts that OEC delivered the freight unconditionally while the evidence was to the contrary given the express language in the credit application and the tariff. The Third Circuit analyzed the decision of the Supreme Court in *Bird of Paradise,* 72 U.S. (5 Wall.) 545 (1866) in determining that the parties could indeed extend the contractual extension of maritime liens, here from the pre-petition goods to those in the possession of OEC. The appellate court also addressed the argument of World Imports that holding the cargo subject to pre-petition liens is unfair to third parties: among other things, the contractual liens facilitate the continuous movement of freight when the carrier knows payment is secured by the freight it may hold at the time of demand for payment.

Presenter: **Steve Dennis**

44. ***Norfolk Southern R.R. Co. v. The Baltimore and Annapolis R.R. Co.,*** 2016 WL 702977 (D.S.C. filed April 25, 2016). This is a straightforward collection case that, over the course of nearly three years of litigation, was anything but straightforward. At issue were "car hire charges" that the defendant railroad, Baltimore and Annapolis Railroad ("B&A") accrued but failed to pay to the plaintiff railroad Norfolk Southern Railway Company ("Norfolk Southern"). The charges accrued because B&A took delivery of Norfolk Southern's railcars, and transported them 50 miles over seven bridges to a customer in Myrtle Beach. While the Norfolk Southern railcars were being unloaded by B&A's customer at destination, B&A elected to take it bridges out of service to avoid having to comply with new Federal Railroad Administration ("FRA") bridge-safety regulations. This caused Norfolk Southern's railcars to become stranded in Myrtle Beach because there was no way to return the cars by rail without travelling over the bridges. B&A claimed to be working to obtain an exemption from the FRA which would allow B&A to return the railcars over the bridges, and to be investigating the possibility of returning the railcars by flatbed truck, but it never did so. As a result B&A accrued car hire charges between the time the railcars became stranded, and the date (almost 5 years later) that B&A eventually purchased the railcars after being held in contempt of court.

Issue: At the summary judgment phase, B&A was found liable for car-hire and for the car hire damages that would accrue until the point that B&A either returned Norfolk Southern's railcars or paid Norfolk Southern for their value. Without knowing when the cars would be returned at the time of the earlier ruling, the court could not specify a dollar amount of damages. All that remained to litigate at trial was B&A's defense that Norfolk Southern should have mitigated its damages by affirmatively retrieving the railcars from where B&A stranded them in Myrtle Beach. Because return by rail was agreed to be impossible without spending far more than the cars were worth to fix the non-compliant bridges, B&A's argument was that Norfolk Southern should have mitigated its damages by arranging for the return of the railcars by truck.

Holding: Summary judgment granted for Norfolk Southern during a pretrial hearing the morning of trial, as the Court's rulings on Norfolk Southern's motions *in limine* rendered B&A unable to meet its burden on the mitigation defense. Car hire damages are a mathematical calculation pursuant to a formula established by the AAR. B&A was unable to produce any evidence of Norfolk Southern's making a mathematical error in this industry-standard calculation, so the Court found that Norfolk Southern was entitled to judgment as a matter of law on the amount of its car hire damages. The Court then found the remainder of the evidence B&A sought to introduce in support of its mitigation defense was inadmissible hearsay. Accordingly, the Court found that trial was unnecessary because B&A could not meet its burden of proof on its affirmative defense of mitigation and entered summary judgment for Norfolk Southern.

Presenter: **Chris Merrick**

VIII. MISCELLANEOUS

45. ***American Transport Group, LLC v. California Cartage Co., LLC and Pacorini Metals USA, LLC,*** 2016 WL 890699 (N.D. Ill., field March 9, 2016). American Transport Group (ATG) is a broker that arranged for the transportation of two shipments of copper cathodes which were valued at $282,000.00. ATG hired ACH Express, Inc. (ACH) to pick up the shipments at the warehouse of California Cartage Company (CCC) which was storing the cargo for Pacorini. Someone picked up the loads but they were never delivered. ATG paid its customer who in turn assigned its claim to ATG. ATG sued ACH on the allegations that ATG tendered two truckloads to ACH which issued bills of lading but did not deliver the goods (the ACH Litigation). Thereafter, ATG sued CCC and Pacorini for negligence in storage of the copper cathodes (the CCC Litigation). Three months after filing the CCC Litigation, ATG sought and obtained a default judgment against ACH in the ACH Litigation supported by an affidavit of an ATG employee who testified that ACH acknowledged receipt but failed to deliver the shipments. Undaunted, ATG continued prosecuting the CCC Litigation after it obtained a default judgment against ACH. CCC and Pacorini moved for summary judgment (after denial of a previous motion to dismiss on other grounds) on the grounds of judicial estoppel. In response, ATG's employee submitted a second affidavit retracting his affidavit in the ACH Litigation and stating that his previous testimony was the result of misrepresentations received from CCC/Pacorini. ATG did not withdraw the previous affidavit nor did it vacate the default judgment.

Issue: Does the default judgment against ACH serve to judicially estop ATG from asserting its inconsistent claims against CCC and Pacorini?

Holding: Yes indeed. The court applied three factors comprising the doctrine of judicial estoppel: (1) whether the party's later position is inconsistent with its earlier position, (2) whether the party against whom estoppel is asserted in a later proceeding has succeeded in persuading the court in the earlier proceeding, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage on the opposing party if not estopped. The court finds for the defendants on all three factors. The court determined that ATG's position in the ACH Litigation is inconsistent with its position in the CCC Litigation, namely whether ACH on the one hand or CCC/Pacorini on the other hand picked up the cargo and lost or stole it. Second, ATG won the first case based upon the inconsistent position. This is where the court gets severely perturbed: rather than await discovery in the CCC Litigation to find out the truth of exactly who picked up the two loads of freight, it went forward with a default judgment against ACH *with the knowledge that ACH did not pick up the loads*. And finally, ATG would gain an unfair advantage in asserting its claims in the CCC Litigation when it already had a judgment for the full amount owed. And then the court ordered ATG to show cause why the ACH judgment should not be vacated upon the court's own order "for fraud upon the Court" and ATG's counsel to show cause why they should not be sanctioned.

Presenter: Eric Zalud

46. ***Mark IV Transp. & Logistics v. Great Lakes Reinsurance,*** 2016 N.J. Super. LEXIS 1049, filed May 9, 2016. Plaintiff Mark IV Transportation and Logistics Inc. appealed from an order granting summary judgment in favor of defendant Great Lakes Reinsurance. On July 2, 2013, a 2006 Freightliner tractor operated by Mark IV was involved in an accident. The tractor was covered under an insurance policy that Great Lakes issued to Mark IV, which provided automobile physical damage insurance. The policy covered a fleet of vehicles that Mark IV owned or leased, which were specifically identified in a schedule included in the policy. In granting summary judgment to defendant on the parties' claim dispute, the judge found that the relevant provisions of the policy were unambiguous, and limited the insurer's liability to the lesser of the actual cash value of the vehicle at the time of the loss or the limit on liability set forth in the policy's schedule of insured vehicles. The judge noted that the policy indicated that the limit of liability for the damaged tractor was $18,000. The judge also noted that even if Mark IV was entitled to the actual cash value of the tractor, less the deductible of $5,000, it had not presented any evidence to dispute Great Lakes' valuation of the tractor at $18,000. In addition, the judge noted that Mark IV had submitted to Great Lakes the sworn statement agreeing to accept $13,000 in full satisfaction of its claim.

On appeal, Mark IV argued that the valuation of loss for the damaged vehicle should be based on actual cash value rather than the stated limit of liability in the policy addendum, and any ambiguity in the policy language should be construed in favor of the insured non-drafting party. Because the relevant provisions of the policy were clear and unambiguous, the appellate panel affirmed, finding the motion judge correctly interpreted the policy in accordance with its plain language.

Presenter: Hank Seaton

47. ***Progressive Mountain Insurance Company v. Madd Transportation, LLC***, 633 Fed. Appx. 744; 2015 U.S.App. LEXIS 21191 (11th Cir., filed Dec. 8, 2015). Independent contractor driver was injured while securing a load of pipe. Driver's guardian sued the pipe company which, in turn, sued the trucking company for negligent training and supervision of the driver. Trucking company's insurance carrier contended it had no duty to defend or indemnify the trucking company under its policy. The policy itself did not define the term "employee." Insurance carrier argued that court should look to federal regulations to determine the meaning of "employee."

Issue: Whether the insurance policy's "employee exclusion" applied to independent contractor drivers.

Holding: The insurance policy had no definition of the term "employee." Because the trucking company was an interstate motor carrier, the court looked to federal law and regulations for guidance. The appellate court affirmed the district court's determination that federal regulations should be used to determine the meaning of "employee" under the policy.

Under the Federal Motor Carrier Safety Regulations, particularly 49 C.F.R. § 390.5, the term "employee" specifically includes "an independent contractor in the course of operating a commercial motor vehicle." The court pointed out that federal law bars a motor carrier from operating in interstate commerce without insurance and that the insurance policy in question includes the federally-mandated MCS-90 endorsement. The court construed the policy's terms and conditions as amplified, extended or modified by that endorsement. The MCS-90 endorsement provides that the policy's insurance does not apply to injury to or death of the insured's employees while engaged in the court of their employment.

Not only did the definition of "employee" modify the policy's employee exclusion, but there was also no indication that the term "employee" was used differently in the endorsement than in the policy's employee exclusion. Because the federal regulation's definition of "employee" includes drivers for independent contractors, that definition was used for purposes of construing the insurance policy. Independent contractor drivers were excluded from the policy, and the insurance company had no duty to defend or indemnify the trucking company.

Presenter: Scott McMahon

48. ***Artisan and Truckers Casualty Co. v. Hanover Insurance Co.*****,** 126 F. Supp. 3d 998 (N.D. Ill., Eastern Division, 2015). This case addresses the questions of whether there is coverage under a commercial general liability policy for theft of cargo and whether the "Damage to Your Work" ("DTYW") exclusion or the "Damage to Impaired Property or Property Not Physically Injured" ("NPI") exclusion precludes coverage for the loss.

In this case, Access America Transport contracted with Star Way, Corp. for Star Way to transport two backhoes from Iowa to Illinois. The backhoes were stolen from Star Way's premises. The Hanover Insurance Co., as insurer for Access America Transport, paid for the loss of the backhoes and subrogated against Star Way, which then sought a defense from its insurer, Artisan, under its commercial general liability policy. Artisan filed a declaratory judgment action against Hanover, seeking a judgment that it owed no defense or indemnity, asserting that the theft of cargo is not "property damage" covered by the policy, and that the DTYW exclusion and the NPI exclusion also precluded coverage.

The court first considered the definition of "property damage" in the CGL policy, which was defined as "physical injury to property, including all resulting loss of use of that property or loss of use of tangible property that is not physically injured," and determined that damages caused by theft were not property damages under the policy. The court next considered the DTYW exclusion, which precluded coverage for property damage to "your work" arising out of it or any part of it. The court found that "work" in the exclusion included delivering the backhoes to the consignee. The court determined that the DTYW exclusion applied to the incident. Finally, the court considered the NPI exclusion, which provided that the CGL endorsement did not cover "property damage to impaired property or property that has not been physically insured arising out

of a defect . . . in your product or your work; or 2)[a] delay or failure by you or anyone acting on your behalf to perform a contractor agreement in accordance with its terms." The court also found that the NPI exclusion barred coverage for the claimed loss because the complaint did not allege that the backhoes were physically injured, but only that the consignee had been deprived of them—thus, the damage to property not physically injured arose out of Star Way's failure to perform in accordance with the terms of the broker-carrier agreement—and found the NPI exclusion to be applicable.

Presenter: Dennis Minichello