CONFERENCE OF FREIGHT COUNSEL
WINTER 2016 MEETING
THE OMNI NASHVILLE HOTEL
NASHVILLE, TENNESSEE
JANUARY 9-11, 2016

AGENDA OF CASES

I. CARRIER LIABILITY

1. **G & P Trucking Co. v. Zurich Am. Ins. Co.,** 2015 WL 5008734 (D.S.C. Aug. 19, 2015) and 2015 WL 7783553 (D.S.C. Dec. 3, 2015). Carrier G & P filed this action to determine whether it had any liability for goods that were allegedly damaged in transit from Spain to Tennessee during a trucking accident on the Savannah, Georgia to Crossville, Tennessee leg, and, if so, what amount it owed in damages to the purchaser, SFK, or SFK's insurer, Zurich.

G & P moved for summary judgment, asking the court to find that it had no liability under the "Ocean or Combined Transport Waybill," or, alternatively, that its liability was limited to $50.00 by the terms of the Delivery Order or $500.00 by COGSA. Defendants SKF and Zurich also moved for summary judgment on the issue of liability, asking the court to hold that the Carmack Amendment applied instead of COGSA and that G & P had not presented evidence of a viable limitation of liability. Following a ruling in G & P's favor on the cross-motions, defendants moved for reconsideration.

Issue: At issue in the first of these two decisions were whether the bill of lading issued by the ocean carrier in Spain was a through bill such that COGSA governs G & P's liability; and whether G & P's liability was limited by the terms of the bill of lading.

At issue in the second of the decisions was whether the court clearly erred or caused manifest injustice in ruling as it did on the summary judgment motions.

Decision: Determining whether a shipment is governed by a through bill of lading is a question of fact determinable by the court with reference to various factors, including whether the

bill indicates the final destination of the goods, whether the freight charges for the entire shipment were prepaid and whether a separate domestic bill of lading ever issued. Reviewing all of the facts presented, including deposition testimony, the court found that the facts on each of the factors favor a finding that the bill was a through bill. Therefore, the bill of lading and COGSA, incorporated into the bill by its terms, apply to the domestic leg of the transportation.

While COGSA does not provide any limitation of liability in favor of parties other than the ocean carrier, COGSA's limitation provisions can be extended to third parties through the terms of the bill. The court found that the terms of the ocean bill in this case do extend COGSA to the domestic inland portion of the shipment through a clear Himalaya Clause providing that all agents and subcontractors shall have the benefit of the rights and defenses in the bill and that no claim shall be made against any person other than the carrier issuing the bill.

With defendant G & P found to be a subcontractor of Panalpina, the carrier that issued the bill, and therefore entitled to the benefits of the bill's terms, plaintiffs' sole recourse is against Panalpina. The court therefore granted G & P's summary judgment motion and denied defendants' motion. In response to a motion for reconsideration filed by the defendants, the court stood by its ruling, stating that it had evaluated an abundance of evidence, addressed the issues thoroughly and decided the issues appropriately. "In sum, in the absence of proof that there has been a clear error of law or a manifest injustice, the court cannot amend its conclusion."

Presenter: **Fred Marcinak**

2. Moroccanoil, Inc. v. JMG Freight Group LLC, 2015 WL 6673839 (D.N.J. Oct. 29, 2015). Moroccanoil, Inc. sued Peru Transport Services LLC in federal court in New Jersey for $165,578.47 for the loss of a shipment of hair and skin products en route from New Jersey to Pennsylvania. The defendant carrier failed to respond, so plaintiff filed a motion for default judgment. Again the defendant failed to respond.

Issue: Whether a default judgment against a motor carrier under the Carmack Amendment was appropriate based upon the plaintiff's pleading.

Decision: The court engaged in a thorough, albeit brief, analysis of the requirements for obtaining a default judgment in federal court, finding that, "although entry of default judgments is disfavored as decisions on the merits are preferred," plaintiff's motion was amply supported. Under the four-pronged standard enunciated by the court, a default judgment in the amount requested was entered based on findings that: (1) the court had jurisdiction over both the subject matter and the parties; (2) the defendant had been properly served; (3) the complaint pled facts which, taken as true, established defendant's liability for breach of duties as a common carrier under the Carmack Amendment; and (4) by sworn affidavit, plaintiff established the value of the lost products justifying the amount of damages sought.

Presenter: Clark Monroe

3. AGC, LLC v. Centurion Air Cargo, Inc., 2015 WL 5610855 (S.D.Fla. Sept. 23, 2015). Plaintiff entered into an agreement with Defendant for the air transportation of machinery from Brazil to Miami for which they were paid. After being transported from Brazil to Miami, the machinery was to be transloaded from the Defendant's aircraft onto the aircraft of another air

freight company and then flown to St. Johns, Newfoundland. The agreement stated that "no time was fixed for the completion of the shipment" and that the Defendant "did not undertake to commence or complete transportation or effect delivery of cargo in any particular time."

The cargo was tentatively scheduled to depart from Rio de Janeiro, Brazil, on February 10, 2014 at 16:30 GMT, and arrive in Miami on February 11, 2014 at 00:30 GMT. On February 10, 2014, the tentative schedule was disrupted, after the cargo was loaded on the Defendant's aircraft in Rio de Janeiro, when a tow tug being operated by the Defendant's local airport ground handlers collided with the aircraft's No. 3 engine, causing extensive damage and placing the aircraft out of service. At 9:38 p.m. EST on February 10, 2014, the Defendant notified the Plaintiff that it was sending an aircraft to Rio de Janeiro to "rescue [the] charter flight" because the "handling company hit one of [the] engines." The rescue aircraft delivered the cargo to Miami on February 13, 2014.

Plaintiff sought damages in the total amount of $245,200, comprising "demurrage exposure [42 hours] at $5,000 per hour" in the amount of $210,000 and "out of pocket payment" in the amount of $35,200. However, the Plaintiff did not actually incur the damages it seeks as demurrage "exposure." Plaintiff also made a payment of $32,000 for demurrage charges to the air freight company that was scheduled to fly the machinery from Miami, Florida to St. Johns, Newfoundland.

Defendant sought summary judgment on the basis that there was no delay in the delivery of the machinery pursuant to the Agreement because the Agreement explicitly stated that the Defendant did not undertake to deliver the machinery within any prescribed time. In response, the Plaintiff argued that the Court should infer that time was of the essence due to the nature of the contract. The Plaintiff also offered the deposition testimony of its president which state, in part, that "that's the purpose of the entire contract, time being of the essence, chartering an airplane. You do not charter an airplane unless time is of the essence. You just don't do it. It's not done. Period."

Issue: Whether the Defendant was liable for the alleged damages that were incurred from a two day deviation in a tentative shipping schedule when the contract explicitly stated that time was not of the essence but the Plaintiff introduced evidence that they believed it was?

Decision: No. The Montreal Convention has complete preemptive effect over all claims within its scope, and provides that "[i]n the carriage of passengers, baggage and cargo, any action for damages however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention." However, as the Montreal Convention provided no set criteria for establishing a prima facie case for delay damages, the Court looked to Florida contract law to determine whether the two-day deviation from the tentative schedule which occurred in the instant matter can form the basis of a claim for damages.

Quoting Florida case law, it was found that, "the parties' intent must be gleaned from the four corners of the document, and in such a situation, the language itself is the best evidence of the parties' intent, and its plain meaning controls." The court found that "In the face of the clear and unambiguous language to the effect that time was *not* of the essence in the execution of the Agreement," Plaintiff's president's deposition testimony, which sought to circumvent or contradict the provisions of the contract, was insufficient to create a genuine dispute of a material fact.

Presenter: **Heidi Roth**

4. **Complete Distribution Services, Inc., v. All States Transport, LLC,** 2015 WL 5764421 (D. Or. Sept. 30, 2015)) and 2015 WL 6739125 (D. Or. Nov. 2, 2015)**.** Freight broker Complete Distribution Services, Inc. ("CDS") contracted with Pacific Nutritional, Inc. ("PNI") to arrange for two shipments of vitamins and nutritional supplements. CDS hired motor carrier All States Transport, LLC ("AST") to transport the shipments. AST picked up the shipments in two separate trucks and then, without notifying CDS or PNI, combined the shipments onto one truck for transport. After combining the loads, the AST truck carrying PNI's shipments crashed. PNI claimed the crash resulted in $169,844.47 in damages. Freight Broker CDS voluntarily paid shipper PNI the full of amount of PNI's claims in return for a full release and assignment of claims. CDS then forwarded the assigned claims to carrier AST's insurance company. The insurance company agreed to pay CDS $88,392.50 of the $100,000 policy limit. CDS accepted the payment and released the insurance company but retained all rights and claims for the remaining balance of what it already paid PNI. CDS then filed suit against AST, seeking the remaining balance of the PNI claims. The suit brought a claim under the Carmack Amendment, a breach of contract claim and an offset claim. CDS moved for summary judgment on its three claims.

Issue: Determination of the actual value of the cargo; indemnification provision, setoff for freight charges for prior shipments.

Decision: The Court denied CDS's motion for summary judgment on the Carmack Claim. CDS could not establish a prima facie case because there was a genuine dispute about the amount of damages. Liability under the Carmack Amendment extends to actual loss or injury to the property and the 9th Circuit has found that expected profits qualify as actual losses. The general rule for determining the amount of damages is the difference between the market value of the property in the condition in which it should have arrived at its destination and its market value in the condition in which it did arrive. However, the Court noted that measuring a party's damages under Carmack is an imprecise science and the appropriate measure of damages is thus often dependent on the special circumstances of an individual case. CDS argued that the full invoiced price reflected the proper measure of damages because this reflects the destination market value. AST pointed out that the invoices offer a discount to buyers who pay within one month of billing. The Court found that if customers routinely receive a discount, an amount other that the full invoice price may fully compensate CDS. The Court therefore declined to follow the often used destination market value measure of damages and declined the summary judgment motion because the true amount of damages remained in controversy.

The Court also denied CDS's summary judgment motion relating to the state law breach of contract claims. Among the breach of contract claims, CDS argued that AST was in breach for refusing to indemnify and hold CDS harmless. PNI never filed any claims against CDS and CDS voluntarily paid PNI. AST therefore argued that it was not required to defend CDS when a third party never filed an action. AST further asserted that in so far as CDS sought indemnification for its own costs and attorney's fees incurred due to AST's alleged contract breach, indemnity provisions do not apply to claims between indemnitor and indemnitee. The court found that the contract language on these issues was ambiguous and did not support summary judgment. Finally, the Court denied CDS's motion seeking a declaration that CDS had a right to withhold payments to AST for prior shipments. The Court found that the language in the load confirmations was ambiguous as to whether offset applied only to amounts owed for indemnification or for amounts

owed pursuant to a Carmack Amendment claim.

And in a subsequent decision, the Court denied CDS's motion for reconsideration,

Presenter: Kevin Anderson

5. In re Wheeler: Pal-Con, Ltd. v. Bert Wheeler, 612 Fed.Appx. 763 2 (5th Cir. June 22, 2015). Pal-Con makes large regenerators for gas turbine engines. It sold a regenerator to Spectra and manufactured it in halves. Pal-Con hired a trucking company which in turn hired Brantley Transportation to move the regenerator halves. Brantley hired pilot car company, Wheeler, to make certain the height of the modules did not strike a highway overpass. While traveling in Ohio, Brantley's driver got lost and the module hit an overpass Pal-Con made a temporary and then permanent replacement module for Spectra. It sold the temporary replacement module to another client thereby recouping all the costs associated with the temporary unit. A jury found Wheeler 35% responsible for the damages to Pal-Con. Wheeler appealed.

Issue: Is the negligence suit barred by the Economic Loss Doctrine and if not, was there sufficient evidence to support the damages award of lost profits?

Decision: The Economic Loss Doctrine does not bar any recovery to Pal-Con because the appellate court determined that the pilot car company owed Pal-Con a duty "independent of his subcontract with Brantley to protect the regenerator module from physical damage" based upon a Texas Supreme Court decision on a similar case. Further, the Fifth Circuit held that there was sufficient evidence to support a finding that Wheeler owed a common law duty to Pal-Con and that it is foreseeable that a pilot car driver's negligence extends to the owners of the damaged cargo. Finally, the appellate court affirmed the findings of the jury that the evidence supported damages for lost profits in taking time out of the manufacturing process to build the temporary and permanent modules and damages for the permanent replacement module. However, the court did find that the evidence *did not* support an award of damages for the temporary replacement unit because it was sold for a profit so the court reversed on this one issue.

Presenter: Kathy Garber

6. Annett Holding, Inc. v. A1 Trucking Service, LLC, 2015 WL 5037214 (D.S.C. Aug. 24, 2015). Plaintiff, TMC Logistics, "a transportation logistics company," arranged with defendant motor carrier to transport 21 reels of cable from South Carolina to North Carolina in December 2013 for the shipper, Okanite Company. The parties signed a Contract Carrier Agreement and a rate confirmation sheet. A1, the carrier, picked up the freight from Okanite and transported the shipment to A1's trucking yard so that repairs could be performed on the tractor. While at the unlocked yard, the trailer and the reels were stolen.

Okanite demanded payment for the stolen reels from TMC and TMC responded, paying over $110,000.00. TMC then requested reimbursement from carrier A1. A1 refused. TMC therefore filed suit alleging claims under the Carmack Amendment and state law theories; and filed a summary judgment motion for resolution of the liability issue.

Issue: To resolve the summary judgment motion, the court was called upon to decide whether defendant A1's claims had any merit: that the Carmack Amendment does not apply to

claims for theft of goods and that, because it was not negligent in handling the shipment, A1 cannot be held liable under Carmack.

Decision: The decision provides a nice brief review of Carmack liability analysis, including its preemptive effect, the elements of the prima facie case and the defendant's available defenses. The court easily found that the Carmack governed all of plaintiff's claims and that plaintiff had established a prima facie case of liability. It then proceeded to dispose of the defendant carrier's meritless defense arguments. The clear language of Carmack indicates that it is intended to impose liability for "the actual loss or injury to the property caused by" the carrier. Theft of goods is an "actual loss" of the most severe variety. Furthermore, application of Carmack to claims for stolen goods is widely accepted by the courts. Therefore, Carmack does apply to the claim at issue in this case, not just to damage claims.

A carrier may be relieved of liability under Carmack where it meets its burden of showing that one of the statutory exemptions applies *and* that its negligence did not cause the loss of the goods. Defendant A1 merely raised an absence of negligence, arguing that such issue is one for a jury and not for summary judgment. However, finding no mention by or evidence from defendant of a statutory exemption, the court rejected A1's argument and granted plaintiff's summary judgment motion, holding A1 liable for the loss.

Presenter: Rob Moseley

7. Lord & Taylor LLC v. Zim Integrated Shipping Services, Ltd., 2015 WL 3630443 (S.D.N.Y June 8, 2015). As a result of flooding at the New York Container Terminal on Staten Island when Hurricane Sandy made landfall in late October 2012, 211 cartons of Lord & Taylor sweaters with a retail value of $206,972 were ruined by wetting damage.

Plaintiff Lord & Taylor had contracted with Zim Integrated Shipping Services, a licensed ocean liner carrier, to transport the sweaters from Hong Kong to New York. The ship carrying the sweaters arrived in New York on Saturday, October 27, and was unloaded by early the next morning. As usual, the terminal was closed to truck pick-up activity on the weekend; and, because of the hurricane warnings, was closed on Monday, October 29. The terminal suffered flooding damage as a result of a storm surge. The damage to plaintiff's sweaters was discovered a week later when its truckers picked up the goods from the terminal and delivered them to plaintiff. Lord & Taylor's insurer compensated plaintiff for the loss and then sought reimbursement from Zim.

Issue: Was Hurricane Sandy legally an Act of God that absolves the defendant carrier from liability for damage to its customer's goods?

Decision: The parties had agreed that the damage to plaintiff's goods was directly attributable to wetting damage associated with Hurricane Sandy and that, pursuant to the package limitation provisions of COGSA, plaintiff's damages were capped at $105,500. The parties were not in agreement, however, on Zim's defense position that it was relieved of liability altogether through three COGSA exceptions: Act of God, Perils of the Sea and Clause Q.

The court, through an extensive analysis, found that the Act of God defense applied to relieve Zim of liability and therefore did not reach Zim's remaining defenses.

To prevail on an Act of God defense under COGSA, a carrier must show that the damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier. Hurricanes are considered in law, said the court, to be an Act of God. However, the mere existence of a hurricane does not entitle a defendant to rely on the Act of God defense. The defendant must also show that the event was not reasonably foreseeable and that no reasonable precautions were available to prevent the damage at issue.

That New York Harbor was potentially in the path of the storm was apparent by Tuesday, October 23. However, as the week progressed, there was a great deal of uncertainty about the potential severity of Hurricane Sandy as well as the location and timing of Sandy's projected landfall. Yet, by the weekend, enough information was known that Zim should have foreseen that Sandy's storm surge might breach the terminal's bulkhead, flood the terminal and cause damage to the cargo.

The court then turned to what options were available to prevent damage to plaintiff's merchandise. Plaintiff presented the court with five options. Zim asserted that none was practical or possible and, in any event, none would have prevented the damage. Reviewing the options one by one, the court agreed with Zim. Though the burden is on the defendant to prove that there were no reasonable precautions available, the weaknesses present in all of plaintiff's proposed options showed how severe and sudden Hurricane Sandy was and how it could not have been planned or prepared for.

In summary, the court concluded that the severity of the storm and, in particular, the storm surge were not reasonably foreseeable (the evidence indicates that Sandy was unprecedented and exceeded worst-case scenario expectations) and that no exercise of reasonable care could have prevented the loss. Judgment was therefore entered in favor of Zim and the case was closed.

Presenter: John Husk

II. LIMITATIONS OF LIABILITY

8. Choi v. ABF Freight System, Inc., 2015 WL 5335686 (D.N.J. Sept. 14, 2015), 2015 WL 6523473 (D.N.J. Oct. 28, 2015) and 2015 WL 8758846 (D.N.J. Dec. 14, 2015). There are three decisions here: a motion for summary judgment, a motion to reconsider and a motion for attorneys' fees. This case involved a Plaintiff who contracted with a Defendant to have their household goods transported from Texas to New Jersey. During this transportation, the Defendant's truck was involved in an accident which destroyed the shipper's goods. The shipper made claims under the Carmack Amendment for $61,088.29 as all goods were lost. Prior to shipping the goods the shipper and carrier entered into an agreement that limited the carrier's liability to $7,500. The agreement also allowed the shipper to choose between various levels of liability. However, only one of these levels covered "catastrophic loss." The Plaintiff argued that the Defendant only offered one level of liability for catastrophic loss, even though there were a number of liability options for other types of loss.

Issue #1: Did the Defendant's Bill of Lading properly limit its liability under the Carmack Amendment by offering the choice of multiple levels of liability but only offering one choice for "catastrophic loss."

Decision #1: Yes. The court ruled that more than one option was enough to properly limit liability and that the carrier did not need to offer different levels of liability for different types of loss.

Issue and Decision #2: Should the court reconsider its previous decision? No.

Issue and Decision #3: Was plaintiff's motion for reconsideration frivolous enough to warrant an assessment of attorneys' fees under Rule 11? No.

Presenter: Barry Gutterman

9. Royal & Sun Alliance Insurance, PLC v. ECM Transport, Inc., 2015 WL 509819, 2015 U.S. Dist. LEXIS 116104 (S.D.N.Y. 2015). Ingram Micro and ECM Transport signed a 2007 Service Agreement that included general security guidelines, a $250,000 cargo limitation of liability and a full replacement value cargo liability in the event of a "breach of security." During 2007-2011, the parties signed subsequent one-page agreements, each with a merger clause reciting that it "supersedes any previous agreements." Before the subject cargo theft, the parties signed successive 3-page contracts in 2012 and 2013, each with a merger clause and a $100,000 "Released Value" covering all cargo losses without any reference to the 2007 Agreement. During temporary storage-in-transit at Ingram's request, a trailer load of computer parts was stolen from ECM's facility in rural western PA where ECM had never experienced any cargo loss in 25 years. The thieves entered an open gate during working hours and used a duplicate key to start the tractor used to pick up the shipment and hooked it up to the loaded trailer, which was found empty in Miami.

Issues: (1) Did the 2007 and/or 2013 contracts apply to the loss and was ECM entitled to limit its liability under either contract? (2) Did "material deviation" void ECM's limitation of liability? (3) Was there a "breach of security" under the 2007 Agreement?

Decision: The Court granted plaintiffs summary judgment for replacement value of $565,285.43. The Court reasoned that the merger clauses in the 2007-2013 contracts did not supersede the original 2007 Agreement. The Court held the "material deviation" doctrine voided ECM's $100,000 limitation of liability even though (1) Ingram did not pay ECM extra charges for security and (2) ECM did not violate a specific security guideline in the 2007 Agreement. The Court further held there was a "breach of security" within the meaning of the 2007 Agreement because ECM's gate was open when the theft occurred. The 2007 Agreement required ECM to use "generally accepted practices" and "reasonable precautions," but the Court held "secure" means "free of risk" and "free of danger." The decision was settled on appeal.

Presenter: Tom Kuzmanovic

10. Exel, Inc. v. Southern Refrigerated Transport, Inc., 2015 WL 6743551 (6th Cir. Nov. 5, 2015). This case involves the loss of a load of pharmaceuticals and the appeal by the carrier, SRT, from a judgment in favor of the broker, Exel, in the amount of $5,890.338.82. The broker entered into a Master Transportation Services Agreement with the carrier in which the parties agreed that the carrier would be liable to the broker for any "loss" to the goods shipped. Exel arranged for the shipment of the pharmaceuticals of Sandoz from Pennsylvania to Tennessee on five bills of lading which designated the freight as "60000 Class 85, RVNX $2.40", an undefined term in the bills of lading. After the loss of the load, Exel submitted a written claim to

SRT pursuant to the MTSA demanding full replacement value of $8,583,631.10. SRT denied the claim based upon the $2.40 limitation of liability, reducing the claim to $56,766.36. On cross-motions for summary judgment, the trial court entered judgment in favor of Exel on the grounds that it had standing to pursue a breach of contract claim under the MTSA against SRT and because it held that the Carmack Amendment did not preempt claims between a broker and a carrier. The carrier appeals.

Issues: (1) Does Exel, a broker, have standing to bring a claim against a carrier when it has not paid the claim of the shipper? and (2) does the Carmack Amendment govern the rights of the parties and, eventually, limit the liability of the carrier pursuant to the provisions of the bills of lading?

Decision: On appeal, the Sixth Circuit held that the breach of contract claim as to Exel and SRT did not survive because the Carmack Amendment governed the rights of the parties. The court reversed the trial court and determined that Exel could not assert a breach of contract claim against SRT because it had suffered no loss notwithstanding the language of the MTSA. Specifically, "Exel has no obligation to pay Sandoz any damages for the lost cargo. Therefore, Exel does not have standing to sue for breach of contract damages under the MTSA."

Although the Sixth Circuit determined that Exel, as a broker, could not assert a direct Carmack claim against SRT, a motor carrier, it did find that Exel, as assignee of the rights of the shipper, Sandoz, could assert a Carmack claim but found a genuine issue of material fact as to whether the parties had effectively limited the liability of SRT by way of the release rate designated in the bills of lading.

Presenter: Wes Chused

11. Hisense USA Corp. v. Central Transport, LLC, 2015 WL 4692460 (N.D. Ill., Aug. 6, 2015). Hisense manufactures electronic equipment for sale to Walmart and arranged for four pallets of computer tablets to be delivered to a Walmart facility. When Walmart discovered that the tablets were defective, Hisense agreed that Central should pick up the tablets and return them to Hisense. The freight moved on a bill of lading which reflected that the shipment was released to "the value at which the lowest freight charges apply" and a PRO sticker stating that the goods were received subject to Central's rules tariff. Walmart signed the bill of lading with the PRO sticker on it. On delivery, one pallet was missing.

Issue: on summary judgment, has Central established that there is no genuine issue of material fact as to the agreement of Hisense to the enforcement of the limitation of liability contained in its rules tariff and incorporated into the bill of lading by way of the PRO sticker?

Holding: No, motion for summary judgment denied. The court reviews the 2000 7th Circuit decision in *Tempel Steel* and determines that a shipper must have actual notice of a carrier's limitation of liability. Although the court determined that Central's rules tariff was incorporated into the bill of lading, it held that the mere reference to the tariff was not enough to limit liability. Specifically, the bill of lading made no reference to a limitation of liability and did not contain a inadvertence blank. The court held that Central had not presented sufficient undisputed evidence that Hisense had notice of and consented to the liability limitation.

Presenter: Gene Zipperle

III. PREEMPTION

12. Koch v. McConnell Transport Ltd., 2015 WL 3470182 (E.D.N.Y. May 29, 2015). Christmas can be a dangerous business. Grandma got run over by a reindeer; and George Mains got crushed by a snow-laden Christmas tree. Defendant McConnell Transport, a motor carrier, dropped one of its trailers at the facility of defendant Snokist, a Christmas tree seller, for loading. Once loaded and sealed, McConnell picked up the trailer and drove it to a Home Depot store. Snokist arranged for the trailer to be unloaded at Home Depot by a third party vendor. When that vendor did not arrive on time, the Home Depot employees began unloading the trees from McConnell's trailer. One of the employees, Mr. Main, climbed into the trailer, wet with snow and ice, and began to unload trees. He fell while pulling a tree out of the trailer, hit his head on the pavement and died of his injuries within 24 hours. The administratrix of Mr. Mains' estate sued McConnell and Snokist, claiming their negligence caused the injury and death of Mr. Mains. Defendant McConnell moved for summary judgment to exonerate itself of liability for the death of Mr. Mains.

Issue: Two issues were addressed by the court on the carrier's summary judgment motion. The second-addressed issue is the one most relevant to our organization: whether the Carmack Amendment preempts negligence claims for the death of one involved in unloading freight. The first-addressed issue is whether the carrier owed a duty of care to the decedent/unloader.

Decision: Citing numerous cases limiting the scope of Carmack preemption to loss and damage and related claims, the court rejected defendant McConnell's preemption argument. Plaintiff's claims that the carrier defendant negligently caused the decedent's death through the packing and unloading of Christmas trees are separate and distinct from the loss of or damage to goods addressed by the Carmack Amendment. The court was not persuaded by McConnell's argument that Carmack preemption extends to the claims because the trees were damaged by snow and ice and that it was those damaged trees that caused the death. Nevertheless, the court also stated that the theory raises a question of fact to be determined by a jury, therefore precluding entry of summary judgment in favor of the defendant carrier but presumably leaving the argument open.

Similarly, the court found an issue of fact on the question of whether the defendant carrier's involvement in the unloading of the trees created a duty to the decedent that may not have otherwise existed through the parties' contractual relationships. The question for later determination is whether the McConnell driver became so involved in the unloading of the trees as to create a duty of care to the decedent. The record, said the court, is insufficient to answer that question. For these reasons, the Court denied the motion for summary judgment.

Presenter: Beata Shapiro

13. Cal. Tow Truck Ass'n v. City & Cnty. of San Francisco, 797 F.3d 733 (9th Cir. Aug. 13, 2015)**.** The City and County of San Francisco ("Defendant") enacted two ordinances which regulated the towing industry within the city and provide a number of conditions and requirements concerning the towing permits. These ordinances required tow truck drivers and towing firms to obtain permits to operate and conduct business within San Francisco. The California Tow Truck Association ("Plaintiff") challenged the Permit Scheme, contending that it is

preempted by the Federal Aviation Administration Authorization Act of 1994.

Issue: Whether the City of San Francisco's ability to enact legislation to regulate the towing industry within the city and provide a number of conditions and requirements concerning the towing permits was preempted by Federal Aviation Administration Authorization Act of 1994

Decision: Yes and No. The City of San Francisco had the ability to generally require tow truck drivers and towing firms to obtain permits to operate and conduct business within the city under the FAAAA's express preemption clause, *49 U.S.C. § 14501(c)(1)*. The city also had the ability to mandate that drivers display a permit at all times and have a permit in their possession while working. Furthermore, the City had the ability to 1) require tow car operators and tow car firm applicants to submit identification information as part of their applications, 2) obtain a fee when tow car operators and tow car firm applicants filed for a permit, and 3) collect a penalty when tow car operators and tow car firm applicants did not have the required permits, 4) require tow car firms to have acceptable systems for handling customer complaints, 5) require record keeping, and 6) require tow firm operators to display brochures containing a concise summary of California towing law "in a conspicuous place in the location where a vehicle owner must come to reclaim their towed vehicle," as these fall within the FAAAA's "safety exception," *§ 14501(c)(2)(A)*. However, to obtain a tow car firm permit, applicants were required to include in their application "[a] description of the applicant's business plan. The court found that this did not the "safety exception" did not allow the City to obtain a description of the applicant's business plan.

Presenter: Bill Taylor

14. Massachusetts Delivery Association v. Healey, 2015 WL 4111413 (D. Mass. 2015). This is a good FAAAA preemption case applied to a state independent contractor law. "[W]e are following Congress' directive to immunize motor carriers from state regulations that threaten to unravel Congress' purposeful deregulation in this area." Mass. Delivery Ass'n. v. Coakley, 769 F.3d 11 (1st Cir. 2014) ("MDA II"). Plaintiff, a trade organization representing entities engaged in the business of same-day delivery service filed a lawsuit against the Attorney General of the Commonwealth of Massachusetts for a declaration that "Prong B" of the Massachusetts Independent Contractor Law is preempted by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501 (the "FAAAA"). Most of Plaintiff's members have independent contract couriers to provide same-day delivery services. As an example of its membership, Plaintiff pointed to X Pressman Trucking & Courier, Inc. ("XPressman").

XPressman has approximately 100 scheduled routes handled by 46 couriers and also has "on-demand" services, which are variable. XPressman has 12 contract couriers willing to provide "on-demand" services. Those couriers contact XPressman daily as to their availability, if any. XPressman then matches an available courier with an "on-demand" service request. Couriers are free to accept or reject an offered "on-demand" service request. Of the 12 couriers, only 7 make 20 or more "on-demand" delivers on an average day. XPressman has 6 full time and 2 part-time employees performing administrative and warehouse duties on a salary or hourly basis with health insurance and 401(k) plans, workers compensation, payroll taxes and unemployment insurance. The independent contractors are paid by route and do not receive health insurance or 401(k) benefits; no workers compensation, no payroll taxes and no unemployment insurance.

When the suit was initially filed, the Court applied Younger abstention and dismissed the

case. Younger v. Harris, 401 U.S. 37 (1971)(declining to decide an issue where the Federal Court feels the State Judiciary is capable of deciding an issue of unique State Law). The United States Court of Appeals for the First Circuit reversed and remanded. Mass. Delivery Ass'n. v. Coakley, 671 F.3d 33 (1st Cir. 2012) ("MDA I"). On remand, the District Court then denied Plaintiff's motion for summary judgment and granted the Defendant's motion for summary judgment ruling the Massachusetts Independent Contractor Law was not preempted by the FAAAA. On appeal of that ruling, the United States Court of Appeals for the First Circuit again reversed and remanded. Mass. Delivery Ass'n. v. Coakley, 769 F.3d 11 (1st Cir. 2014) ("MDA II").

On this second remand, Plaintiff renews its motion for summary judgment. The Court notes that in MDA II, the First Circuit applied the FAAAA and concluded that the Massachusetts Independent Contractor Law "clearly concerns a motor carrier's 'transportation of property'" and that the State Law "potentially impacts the services the delivery company provides, the prices charged for the delivery of property and the routes taken during this delivery. MDA II, 769 F.3d at 23. The remand instruction from the First Circuit was weather "this effect on delivery companies' prices, routes and services rises to the requisite level for FAAAA preemption." Id. The MDA II remand instructions also included an instruction to frame the issue for the District Court to consider the "logical effect that a particular scheme has on the delivery of services or setting of rates [] even if indirect" and that "empirical evidence" was not necessary." MDA II at 21. The FAAAA says a "State . . . may not enact or enforce a law . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Massachusetts Independent Contractor Law provides a three-pronged test to determine employee or independent contractor status, as follows:

1. must be free from control and direction both in performance of the service and in fact;
2. the service must be outside of the usual course of business of the employer; and
3. the person must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Massachusetts Independent Contractor Law, Mass. Gen. L. c. 419, § 148B.

The Court reviewed the FAAAA and the case law on the "broad," "expansive" and "sweeping" preemptive effect of the "related to" language of the FAAAA. The District Court in the instant case sought to "'drawn the line' between an impact that is 'significant' as opposed to 'tenuous, remote or peripheral.'" Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). Holding the State Law was preempted by the FAAAA, the Court found that to apply the State Law would affect routes and pricing by requiring carriers to buy, service and maintain a fleet of vehicles. Further, the "meal break" and "Sundays off" provisions of the State Law would similarly have increased prices and would have affected the availability of service. Moreover, the State Law would require "on-call" drivers to be paid while waiting for an "on-demand" service call. In addition, the Court found the impact of the State Law would require, as an economic reality, that the "on-demand" service calls would effectively end. Also, converting the independent contractor couriers to employees would affect pricing because the employees would require payment of workers compensation, payroll taxes and unemployment insurance, plus overtime pay and likely health insurance under the Affordable Care Act. "A delivery company cannot be forced to conduct its business in reliance upon finding workers willing

to waive their statutorily provided entitlements."

Presenter: Richard Furman

15. Mitsui Sumitomo Insurance Co., Ltd. v. Daily Express, Inc., 2015 WL 6506546 (S.D. Ohio 2015). This is an uncomplicated cargo damage case brought against an open deck specialized carrier following claimed damage to a VC roll, a rolling mill used to shape steel, aluminum, and copper. The VC roll landed in Savannah after refurbishing in Japan, was transported to Chesterton, IN, and then traveled on a separate bill of lading to Middletown, OH, during which segment damage allegedly occurred. Plaintiff filed a state court action alleging negligence and breach of contract. After Defendant removed to federal court, plaintiff amended its complaint to add a Carmack cause of action. Defendant then filed a 12(b)(6) motion to dismiss the negligence and breach of contract claims, as well as the Carmack allegation.

Issue: Has the plaintiff made sufficient allegations to withstand a Rule 12(b)(6) motion?

Decision: The court rejected plaintiff's argument that it must assert a specific breach of duty in order to plead its Carmack action, and easily found that independently-asserted state law claims are preempted, based upon Sixth Circuit authority in *American Synthetic Rubber Corp. v. Louisville & Nashville Ry. Co*., 422 F. 2d 462 at 466 (6th Cir. 1970), and its own decision in *Excel, Inc., v. Southern Refrigerated Transport, Inc.*, 2012 WL 3064106 (S.D. Ohio, 2012) But in a vindication of notice pleading under FRCP Rule 8, the court found that the Carmack cause of action was sufficiently pleaded to withstand a 12(b)(6) dismissal motion. The court rejected arguments that an allegation that defendant acknowledged receipt of the property did not satisfy plaintiff's obligation to allege delivery to the carrier; and that a bill of lading identifying the property generally as "roll 101", with the weight of the item, is not a sufficiently precise description, even absent a signature on the bill of lading. The court also found that an allegation that Defendant acknowledged receipt of Plaintiff's notice of claim satisfied its obligation to file a timely claim, without requiring the actual claim to be appended to the complaint so the court could independently determine whether the claim satisfied the requirements of 49 CFR Part 370. Defendant's motion to dismiss plaintiff's state law claims was granted, but its motion to dismiss the single Carmack claim was denied.

Presenter: Bob Rothstein

16. AXA Corp. Solutions Assur. v. Great Am. Lines, 2015 U.S. Distr. LEXIS 171369 **(**D.N.J., Dec. 23, 2015). This case is a continuation of the adjudication of the theft of $9 million worth of pharmaceuticals. In this decision, the district court addresses the claims of the subrogated insurance company, AXA Corporate Solutions Assurance (AXA), against the Transporter Defendants (Great American Lines and MVP Leasing, Inc.) and Pilot Travel Centers, the location of the theft.

Issue: Does the Carmack Amendment apply to the claims against the Transporter Defendants and if so, is it waived by operation of the Transportation Contract between the pharmaceutical manufacturer (Sanofi) and Great American Lines? Also, does the Carmack Amendment preempt the state law breach of contract and breach of an implied contract of bailment claims?

Decision: The court rules that the only surviving claim against the Transporter Defendants is a Carmack claim and all state law claims are preempted. Furthermore, the Transportation Contract states that it binds only the signatories, Sanofi and GAL. AXA is the subrogee of McKesson, the distributor of the pharmaceuticals. McKesson assumed liability for the loss due to the FOB Origin terms of the movement from McKesson's distribution facility. Because McKesson is not a party to the Transportation Contract, its provisions do not bind its subrogee, AXA. Finally, the court granted Pilot's motion for summary judgment as to AXA's negligence claim on the grounds that AXA had not met its burden of proof with regard to causation.

Presenter: Chris Merrick

IV. JURISDICTION, VENUE, REMOVAL

17. Landstar Ranger, Inc. v. Global Experience Specialists, Inc., 2015 WL 5714556 (W.D.N.C. Sept. 29, 2015). The Landstar plaintiffs (Landstar Carrier Services, Inc. and Landstar Ranger, Inc.) filed an indemnity suit against GES in federal court in North Carolina to recover $120,000 paid by Landstar in settlement of a previous suit (Saacke North America, LLC v. Landstar Carrier Services, Inc., covered on our June 2013 agenda) for the loss of one of seven pieces of freight shipped by Saacke from a Chicago convention to North Carolina.

The missing piece had actually been lost or stolen while in GES' custody or otherwise not tendered by GES to Landstar for transportation to North Carolina. However, the court in the first action granted summary judgment for Saacke and noted that "to the extent Landstar contends that GES was actually responsible for the loss, Landstar's remedy is to seek indemnification from GES." And so it did, also seeking to recover from GES the attorneys' fees and costs incurred by Landstar in defending the Saacke suit. GES challenged Landstar's choice of venue by moving to transfer the case to Illinois.

Issue: Whether defendant GES was entitled to a change of venue from that chosen by plaintiff Landstar.

Decision: After conducting "a quantitative and qualitative analysis" of the applicable factors, the court found that a change of venue was not appropriate in this case. The court identified 11 factors to be considered in deciding a motion to transfer under 28 U.S.C. § 1404, placing on the defendant/moving party the burden of proving that the factors favor transfer. Through its review of the evidence on all 11 factors, the court kept a score card, placing four of the factors in the evidence-weighs-against-transfer column, seven of the factors in the neutral column and none in the evidence-weighs-in-favor-of-transfer column. Therefore concluding that GES had not met its burden of showing that the factors favor transfer, plaintiff's choice of venue was honored.

Presenter: Hank Seaton

18. Ledet v. Across USA Moving, Inc., 2015 WL 3649144 (S.D. Tex. June 11, 2015). Plaintiffs arranged with defendant Across USA to move their family's belongings from Texas to Maryland. In the process, they signed several documents provided by defendants, including an interstate bill of lading contract and an order for service. Both of those documents contained a

forum selection clause calling for venue in state court in Dallas County, Texas. Plaintiffs filed suit in the Southern District of Texas, asserting, among other claims, Carmack liability for loss of and damage to their goods. Defendant responded with a motion to dismiss for improper venue, asking the court to dismiss the case and transfer it to the district or county court of Dallas County or to the District Court for the Northern District of Texas. Plaintiffs opposed the motion, asserting that, notwithstanding any alleged forum selection clause, venue is proper in the district where the suit was filed pursuant to the venue provisions of the Carmack Amendment, the law on which they base their claims, because the defendant is a delivering carrier operating in the Southern District of Texas.

Issue: Does the venue provision of Carmack trump a forum selection clause in freight documents?

Decision: Yes. Where the Carmack Amendment governs a case, its venue provision overrides a forum selection clause in a bill of lading. Because Carmack provides that a civil action may be brought against a delivering carrier in any district court of the United States through which the carrier operates and defendant Across USA operates in the Southern District of Texas, venue is proper in the forum selected by the plaintiffs. Defendant's motion to dismiss for improper venue was therefore denied.

Presenter: Kathleen Jeffries

19. Ponce de Leon Hospitality Corp. v. Avalon Logistics, Inc., 2015 WL 4620268 (D.P.R. July 8, 2015). When 39 video-gaming or slot machines and parts failed to make it from California to Puerto Rico, the Puerto Rico-based corporate plaintiffs filed a Carmack Amendment action in their home forum against the three carriers involved in different legs of the transportation and the carriers' insurers. Defendant Federal Insurance Company, the insurer for the origin carrier, challenged plaintiff's forum selection through a Motion for Transfer of Venue, seeking transfer to the Central District of California. Both the plaintiffs and one of the carrier defendants opposed the motion. All three carrier defendants operate through Puerto Rico. The machines were allegedly lost or stolen from the origin carrier's California warehouse or while in transit from the warehouse to Jacksonville, Florida, where they were intended to be shipped to Puerto Rico. The actual location of the loss was unknown.

Issue: Does the specific venue provision of Carmack trump the general venue provisions of 28 U.S.C. § 1391(b)?

Decision: Yes. 49 U.S.C. § 14706(d) contains a special venue provision that expressly governs any action brought under Carmack and displaces the general venue provision in 28 U.S.C. § 1391(b). One purpose of Carmack's venue provision is to relieve shippers of the burden of searching out a particularly negligent carrier from among the numerous carriers handling an interstate shipment. The court found that venue is proper in Puerto Rico under 49 U.S.C. § 14706(d)(1) (against the delivering carrier in a district through which the defendant operates) and (d)(2) (against carriers responsible for the loss in the district in which the loss or damage is alleged to have occurred). Where the location of the loss is unknown, a plaintiff may sue in its home district or in the intended destination city. Both scenarios make Puerto Rico an appropriate venue for this case (it is both the plaintiffs' home district and the intended destination city).

Having found Puerto Rico to be an appropriate venue, the court then considered whether transfer pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties or in the interest of justice was warranted. Simply shifting the inconvenience of a particular forum from one party to another is not sufficient justification to overcome the strong presumption in favor of the plaintiff's choice of forum. Balancing the relevant factors, the court found no good reason to transfer the case from Puerto Rico to California. The case therefore remains in Puerto Rico.

Presenter: **Hillary Booth**

20. Seafarers, Inc. v. King Ocean Services Ltd., Inc., 2015 WL 3455331 (S.D. Fla. May 29, 2015). Plaintiff Seafarers, a fish producer and importer, initiated an action against international and domestic carriers in Florida state court for negligence and indemnity to recover attorneys' fees and liquidated damages imposed on Seafarers by U.S. Customs and Border Protection for failure of the carriers to deliver a shipment of snapper fillets for inspection prior to export from Florida to Columbia. The defendants removed the case to federal court on federal question grounds, asserting that the plaintiff's claims were governed by the Harter Act and/or COGSA. Plaintiff moved to remand.

Issue: Does COGSA's scope extend beyond loss and damage claims to preempt plaintiff Seafarers' customs-related claims and therefore serve as the basis for removal?

Decision: Looking to the terms of the applicable bill of lading, the court found that COGSA preempted plaintiff's state law claims. The bill provided that COGSA governed the bill of lading and that it applied from before the goods were loaded to after the goods were discharged from the vessel. Accordingly, COGSA applied to plaintiff's allegations that the defendant carriers breached their duties arising from the bill of lading even in the absence of loss or damage.

The remand motion was therefore denied; and the complaint was dismissed without prejudice, with leave to amend.

Presenter: Steve Block

21. Southeastern Freight Lines, Inc. v. CDCLarue, Inc., 2015 WL 4623756 (N.D. Okla. Aug. 3, 2015). Southeastern Freight Lines filed its freight charge collection action in Oklahoma state court; and the defendant shipper filed, as part of its answer, counterclaims for misdelivery of a shipment. Arguing that the counterclaims should be treated as claims under the Carmack Amendment, SEFL filed a notice of removal. The court sua sponte addressed the propriety of SEFL's removal petition.

Issue: Can a plaintiff remove a case to federal court based on the subject matter of a defendant's counterclaims?

Decision: Pointing to settled U.S. Supreme Court precedent, the court held that a defendant's counterclaims cannot serve as the basis for jurisdiction under the removal statutes. Allowing a counterclaim to serve as the basis for jurisdiction under 28 U.S.C. § 1331 would "radically expand the class of removable cases," contrary to the limited nature of the removal statute. Simply put, a plaintiff, who chose to file its claims in state court cannot remove its case to federal court based on a counterclaim. The case was therefore remanded.

Presenter: Jeff Cox

22. Air Liquide Mexico, et al. v. Hansa Meyer Global Transport USA, LLC, et. al., 2015 WL 4716033 (S.D. Tex. Aug. 7, 2015)**.** This case arises out of a collision between a train and a $1 million piece of refinery equipment en route from India to Mexico by way of Texas. Plaintiffs Air Liquide Mexico S. de R.L. de C.V. and Air Liquide Process and Construction, Inc. contracted with defendant Hansa Meyer Global Transport USA, LLC to coordinate transportation of Plaintiffs' equipment. Hansa Meyer, in turn, contracted with "other parties," including the Contractors Cargo Company, to do the actual transporting. While in-transit, the equipment was struck by a train at a grade crossing. Plaintiffs brought various state-law claims against Hansa Meyer in State Court. Hansa Meyer then filed a third-party petition against Contractors Cargo and eight other third-party defendants, alleging that they were responsible for the damage to Plaintiffs' equipment under the Carmack Amendment. Contractors Cargo also removed the case pursuant to 28 U.S.C. § 1441, invoking this court's jurisdiction over Carmack claims under 28 U.S.C. § 1337. Plaintiffs then filed a Motion to Remand in an attempt to bring the case back to State Court.

The Fifth Circuit had previously been in the minority in recognizing a narrow exception under § 1441(c) when a third-party complaint states a "separate and independent claim."

Issue: Whether Contractors Cargo, as a third-party defendant, had a right to removal under 28 U.S.C. § 1441 and the "separate and independent claim" exception.

Decision: No. Because § 1441(a) limits the right of removal to the "defendant or defendants," and the removal statute is to be strictly construed, third-party defendants have no right of removal under § 1441(a).

The Court found that the "separate and independent claim" exception likely no longer exists because of Congress' 2011 amendment which deleted the "separate and independent claim" language from § 1441(c). However, whether the "separate and independent claim" exception still exists has not been discussed by the Fifth Circuit since this amendment in 2011. Therefore, even if the "separate and independent claim" exception were still found to exist, it was not met in this case because the claim did not involve an obligation distinct from the non-removable claims in the case. Plaintiffs' Motion to Remand was therefore granted and the case was remanded to State Court in Texas. Because of the unsettled nature of the law at issue in this case, the court also concluded that an award of attorney's fees under 28 U.S.C. § 1447(c) was not warranted.

Presenter: Vic Henry

23. Amazon Produce Network v. NYK Line aka Nippon Yusen Kaisha, et. al., 2015 WL 5568386 (E.D. Penn. Sept. 21, 2015). The Plaintiff, Amazon Produce Network, LLC, a fruit importer, alleged that it contracted as consignee for various shipments of mangoes from Nicaragua and Costa Rica. The mangoes were carried aboard the M/V ENA and the M/V HAMMONIA ROMA chartered by defendant NYK Line a/ k/a Nippon Yusen Kaisha a/k/a NYK Line (North America), a Japanese corporation. When the mangoes arrived at the Port of Los Angeles, California, they were damaged. Plaintiff sought to recover for its losses. The Defendant filed a motion to dismiss on the basis of a forum selection clause which provided for dispute resolution in Japanese Court under Japanese law. The terms and conditions governing the shipments of the

mangoes were contained in sea way bills or bills of lading. They all included the same forum selection clause. Defendants therefore argued that because this claim could only be brought in Japanese Court that the case must be dismissed.

Plaintiff contended that the application of Japanese law would contravene COGSA. The Plaintiff, relying on the public interest argument, claimed that the forum selection clause should not be honored because a Japanese court would not fully apply COGSA.

Issue: Whether a Forum Selection Clause providing for dispute resolution in Japanese Court under Japanese law was valid.

Decision: Yes. This clause was found enforceable and the case was dismissed. The court found that under forum non conveniens, the Court must consider only public interest factors in determining whether a forum selection clause in issue is enforceable.

This court cited the United State Supreme Court which declared that "the central guarantee of § 3(8) [of COGSA] is that the terms of a bill of landing [sic] may not relieve the carrier of the obligations or diminish the legal duties specified by the Act." It also found that, COGSA was designed to "correct specific abuses by carriers" which were common in the 19th century. Those abuses included "capping any damage awards per package." However, the forum selection clause in this case did not cap damages below what COGSA allows. Instead, the Forum Selection Clause at issue in this case permitted the owner to obtain **more** than they could have from COGSA. Therefore, the Plaintiff did not meet its "burden of showing that public interest factors overwhelmingly disfavor" dispute resolution in Japan pursuant to Japanese law.

Presenter: Jim Wescoe

24. Companion Trading Co. v. Mega Sec. Corp., 2015 WL 5916748 (E.D.N.Y. Oct. 8, 2015). Defendant was engaged in selling, transporting, delivering, repairing, opening, servicing, and installing high-security safes to store valuables. Plaintiff was a wholesale dealer of rare opals. Plaintiff locked its most valuable opals in a New York safe but could not unlock it. Plaintiff then called Defendant to send a technician to open the safe. The technician, after being unable to open the safe, arranged for its transport to the Defendants' location in New Jersey to unlock the safe. Plaintiff paid Defendants $2,500 for transporting the Safe and as a down payment on Defendants' unlocking services. However, after removal of the Safe to New Jersey, Defendants used one or more blowtorches to open the Safe, substantially damaging or destroying the opals inside.

Plaintiffs attempted to hold Defendants liable under the Carmack Amendment for the purpose of arguing that the court had subject matter jurisdiction. Plaintiffs also argued that the Carmack Amendment applied until the goods arrived at the final point of delivery during an interstate shipment, even if there was a temporary stop along the way, and accordingly, that Defendants' Carmack liability applies until the safe return of the opals to Plaintiff's New York location.

Issue: Whether the Carmack Amendment applied to a case where goods were transported across state lines but there is no proof they were damaged during shipment.

Decision: No. The court found that the Carmack Amendment only applies to liability

for damages incurred during interstate shipment or delivery, while Plaintiff only alleged damages to the opals when Defendants opened the safe in another state. Furthermore, the Plaintiff could not establish it delivered the opals in good condition to Defendants, as nobody could open the safe to inspect the opals until Defendants used the blowtorches.

Presenter: John Lane

25. Dapex, Inc. v. Omaya For Importing Cars, 2015 WL 3505404 (D.N.J. 2015). Plaintiff, an NVOCC, alleges Defendant hired it to transport vehicles to port loading facilities in the United States for transportation by ocean carrier to Yemen. Plaintiff alleges it performed and Defendant failed to pay. Plaintiff seeks damages in the amount of $56,973.30.

Issue: Is there Admiralty Jurisdiction and Supplemental Jurisdiction for certain ocean freight and for separate inland freight charges? HOLDING: Yes.

Decision: Pursuant to the agreement between the parties, Plaintiff was to "arrange for and perform the transportation of certain used vehicles from [the] point of purchase to a designated facility here in the United States and also to prepare and load the subject cargo for the intended overseas transportation . . .." Plaintiff performed but Defendant did not pay on the shipment of 187 vehicles transported between August 2011 and October 2013. Plaintiff sues for $56,973.30, of which $23,585.50 is for ocean freight charges and $33,387.80 is for inland charges. Plaintiff sued under the Court's Admiralty Jurisdiction, 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h) for the $23,585.50 for ocean freight charges and under the Court's Supplemental Jurisdiction, 28 U.S.C. § 1367 for the $33,387.80 for the inland charges.

Defendant failed to Answer or otherwise plead and Plaintiff moved to enter Default Judgment according to the Local Court Rules of the District of New Jersey. Performing an analysis of Admiralty Jurisdiction under 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h), the Court found the ocean freight charges arose from a contract the "primary objective" of which was to "accomplish the transportation of goods by sea." The contract made "reference to maritime service or maritime transactions" and therefore was a contract "maritime in nature." Accordingly, the Court exercised its Admiralty Jurisdiction and entered Judgment in favor of the Plaintiff for the ocean freight charges. The Court also reviewed the requirements to exercise Supplemental Jurisdiction over the inland transportation charges. The Court found the inland charges were "so related to [the] claims in [Admiralty Jurisdiction] they form part of the same case or controversy." 28 U.S.C. § 1367. Finding the inland transportation was only the "first leg" of the intended overseas transport, the Court concluded the inland freight charge claims were part of the "same case or controversy" such that the Court could exercise Supplemental Jurisdiction over the inland freight charges.

Presenter: Dennis Minichello

26. Blinc, Inc. v. AZ Miami Corp., 2015 WL 3988991 (S.D. Fla. 2015). Was delivery complete on a through Ocean Bill of Lading when the shipment was delivered to a warehouse in the city mentioned as the destination in the through Ocean Bill of Lading but before the shipment reached the ultimate consignee?

Holding: Yes, delivery complete at the warehouse in the city mentioned as the destination in the through Ocean Bill of Lading.

On April 5, 2014 a shipment of 67,040 units of mascara and eyeliner manufactured by Plaintiff was transported via ocean carrier from Japan to Boca Raton, Florida aboard the vessel Sea-Land Comet V. 1406 on a FedEx Trade Networks Uniform Straight Bill of Lading. Apparently, a through Ocean Bill of Lading from Panda Logistics USA, Inc. also applied. The shipment arrived at the Port of Los Angeles on April 16, 2014 and was then transported to Defendant's Florida Warehouse, where it arrived in good order and condition without exception on May 2, 2014. Plaintiff alleges the Defendant warehouse released the freight to "criminals" who apparently stole the shipment. Plaintiff sued Defendant in the State Court of Florida, Eleventh Judicial Circuit, Miami-Dade County for negligent bailment and negligence. Defendant removed the case to the Federal Court asserting arising under jurisdiction as per the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706, and the Carriage of Goods By Sea Act, Title 46, United States Code, §§ 1300-1315. Defendant also then moved to dismiss under Carmack and COGSA preemption. For its part, Plaintiff moved to remand.

The parties exchanged some written discovery while the motions were pending. In discovery, Defendant admitted Carmack does not apply. As such, the Court considered the motion to dismiss and the remand motion only under COGSA. The Court reviewed the scope of COGSA and the broad terms of the through Ocean Bill of Lading. The through Ocean Bill of Lading clearly extended the terms of COGSA "beyond the tackles" to the pre-loading and post-discharge periods. Nevertheless, the through Ocean Bill of Lading stated the place of delivery was "Miami CFS." The shipment was stolen on the over-the-road leg from Miami to ultimate destination in Boca Raton (an estimated 45 miles north of Miami). COGSA governed from origin to Miami. The shipment arrived in Miami on a clean delivery receipt. Only after delivery was complete in Miami on the through Ocean Bill of Lading complete, was the freight stolen *en route* from Miami to Boca Raton (which by the way is an intra-state transportation). Thus, based on the somewhat limited record before the Court, the Court could not presume there was Federal Jurisdiction under COGSA. Accordingly, the Judge granted the motion to remand but denied fees and costs to Plaintiff and denied Defendant's motion to Dismiss as moot.

Presenter: Edwina Kessler

27. **Hoffman v. Alitalia-Compagnia**, 2015 WL 1954461 (D.N.J. 2015). Motion to remand granted. Does the Montreal Convention serve as a complete bar to state created causes of action for damages due to a lost piece of luggage?

Holding: No. In a short opinion, the Judge concludes there is "a divergence of opinion as to whether" the Montreal Convention completely preempts state claims and granted the motion to Remand.

Plaintiff, an airline passenger, sued an air carrier, Alitalia, in New Jersey State Court for damages resulting from one piece of lost luggage. The Defendant air carrier removed the case to the Federal Court asserting the entire matter is completely barred and preempted by the Montreal Convention. Although the United States Supreme Court addressed preemption under the Warsaw Convention, which was the predecessor to the Montreal Convention, the Judge in this case concluded that neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit has addressed whether the Montreal Convention completely preempts state law. Citing other cases such as DeJoseph v. Continental Airlines, Inc., 18 F. Supp. 3d 595 (D.N.J. 2014)

and Constantino v. Continental Airlines, Inc., 2014 WL 2587526 (D.N.J. 2014), the Court ruled the Montreal Convention provided only an Federal affirmative defense limiting damages and that the Montreal Convention was not a complete bar to all state law claims.

Presenter: Ken Hoffman

28. CSX Transp., Inc. v. Emjay Environmental Recycling, Ltd., 2015 U.S. App. LEXIS 19195, 2015 WL 6716363 (2nd Cir. Nov. 4, 2015). Appeal of a grant of summary judgment in favor of CSX and against customer under three contracts and a note. Customer, a New York citizen, claims lack of subject matter jurisdiction because the claims of CSX belong to a joint venture between CSX and two other rail carriers, one of whom is a citizen of New York. The district court disregarded the defense on the grounds that the "contract" between CSX and the three rail carriers, under Florida law, did not create a joint venture. Specifically, the agreement allowed the rail carriers to split payments but not profits and furthermore, each party was independent of the other.

The Second Circuit affirmed the grant of summary judgment and further held that the district court did not err in refusing to take into account parol evidence regarding the alleged failure of CSX to provide rail cars "with reasonable dispatch."

Presenter: Kevin Andris

29. Starr Indem. & Liab. Co. v. Rios, 2015 WL 7104413 (D.P.R. Nov. 13, 2015)**.** After paying $72,351.09 to its insured, shipper C.I.C. Associates, for the March 2014 loss of a shipment of hair care products, Starr Indemnity & Liability Co. filed suit in federal court against W.R. Distributors, a warehouse and distribution company, and Tri-Cargo Freight, Inc., a motor carrier, for the amount paid out by Starr plus its insured's $5,000.00 deductible, totaling $77,351.09. Asserting both diversity and federal question jurisdiction, Starr stated claims against both defendants under the Carmack Amendment, COGSA and the Harter Act, as well as under state law theories. Both defendants filed Rule 12(b)(1) motions to dismiss, challenging jurisdiction. Tri-Cargo also moved to dismiss under Rule 12(b)(6) for failing to state a claim.

Issue: Two issues were raised by the defendants' motions: Does the amount in controversy exceed $75,000.00 sufficient to confer diversity jurisdiction over plaintiff's claims? Has plaintiff sufficiently stated claims against the carrier through its complaint?

Decision: The court answered both questions in the affirmative, denying both motions to dismiss. The jurisdiction challenge was addressed first. No question was raised that diversity of citizenship exists. The dispute was whether the damages exceed $75,000.00. A plaintiff's allegation of damages suffices unless questioned by the opposing party or the court. If questioned, the party seeking to invoke jurisdiction has the burden of establishing that the claim does not involve less than the jurisdictional amount. Here, Starr provided the court with a subrogation receipt to support its claim for over $75,000.00. Defendants argued that only the amount paid by Starr constituted the amount in controversy for jurisdiction purposes. But, because the insurer steps into the shoes of its insured, the additional $5,000.00 loss suffered by C.I.C. (the deductible amount not paid out by Starr) is included in the total amount at issue. Accordingly, the court found that the allegation that the amount in controversy exceeds $75,000.00 was made in good faith and that the requirements for diversity jurisdiction have been satisfied. Having found that it has

diversity jurisdiction over Starr's claims, the court did not examine the challenge to federal question jurisdiction.

Turning its attention to the 12(b)(6) motion of Tri-Cargo, the court, viewing the complaint in the light most favorable to the plaintiff, found that the claims in the complaint have "facial plausibility" to survive a motion to dismiss. The question of to what extent the Carmack Amendment, the Harter Act or COGSA apply to the facts remains to be decided as the case plays out.

Presenter: Eric Zalud

V. CARRIER-BROKER-THIRD PARTY

30. Gomes v. Extra Space Storage, Inc, 2015 WL 1472263 (D.N.J. 2015)**.** This is an unusual case of allegations of fraud and consumer fraud in the class action context and is a cautionary tale for warehousemen and self-storage facilities. In 2011, Plaintiff entered into a "Rental Agreement" to rent space at Defendant's self-storage facility based on a certain defined monthly rate, plus tax, plus progressively increasing late charges and, if necessary, a "pre-foreclosure fee" and reimbursement of fees and costs. The Rental Agreement further provided that in the event of a Default, the Defendant warehouse could sell the Plaintiff's stored private property in a "commercially reasonable manner" on notice to Plaintiff. The Rental Agreement also provided a one year contractual period of limitation. Plaintiff also signed an "Insurance Agreement," pursuant to which the Defendant would obtain insurance for Plaintiff at a set additional monthly price. Plaintiff did not pay rent or insurance for December 2011 or January 2012 and he was served with a Lien Notice on January 19, 2012 advising his personal property would be sold at auction on February 16, 2012 unless he paid $299.20 within 15 days of January 19, 2012.

Plaintiff disputed $18.00 of the $299.20 asserting the $18.00 was related to an insurance premium he alleges he was not required to pay. At Plaintiff's request, Defendant allegedly agreed to reschedule the auction to March 15, 2012. In early March, 2012 Plaintiff then went to the storage site to recover his personal property but was advised the property was sold at auction on February 16, 2012. Plaintiff claims he spoke with a manager of the Defendant who admitted a mistake was made. The property was sold at auction for $445.86 and after deducting the amount past due, the Defendant remitted at check to Plaintiff in the amount of $155.04. Plaintiff claims his personal property was worth $8,747.00.

Plaintiff filed a class action alleging a laundry list of common law and state law fraud and consumer fraud allegations. In New Jersey, the Consumer Fraud Act calls for treble damages and counsel fees and costs and has been interpreted liberally by the New Jersey Courts.

Defendant successfully moved to dismiss Plaintiff's claims under the Consumer Fraud Act. Plaintiff merely made unsupported allegations that certain late fees and pre-foreclosure fees charged in the Rental Agreement were "excessive" and, in addition, Plaintiff failed to provide proof that the allegedly "excessive" fees caused him to suffer an "ascertainable loss." As the Court stated, "absent a showing that the fees are excessive, payment is not plausibly an ascertainable loss." On the other hand, the Court denied the motion to dismiss certain New Jersey consumer laws (called the New Jersey Truth-In-Consumer, Contract Warranty and Notice Act) on the basis the Plaintiff plead plausible allegations he suffered a loss. Relevant here, liability under the New

Jersey Truth-In-Consumer, Contract Warranty and Notice Act is established on a showing that a "bailee" contract violates a "clearly established legal right." The Rental Agreement was a form used by Defendant across the country, which included certain provisions governing the sale of personal property. Defendant also moved to dismiss Plaintiff's allegations the lien notice violated State Law. That motion was denied because as the Court viewed it, the Plaintiff made plausible allegations the lien notice violated State Law by allegedly cutting off a class member's right to recover the personal property prior to the sale and by failing to provide a description of the items being auctioned off.

Presenter: Bill Bierman

31. In re M/V MSC Flaminia, 2015 WL 1849714 (S.D.N.Y. Sept. 25, 2015). In the summer of 2012, an explosion and fire aboard the Flamina resulted in three deaths and damage to the vessel and cargo which included a shipment of "divinylbenzene" or DVB manufactured by Deltech. The cargo had been shipped through an agreement between Deltech and Stolt Tank Containers. Stolt in turn entered into a contract with BDP International (BDP) to handle its shipping obligations. The vessel operator sued Deltech and Stolt and Deltech asserted a third party claim against BDP seeking indemnity and contribution from BDP/ BDP moves to dismiss the third party complaint on the grounds that the allegations of the complaint assert that BDP is a mere freight forwarder to which there is no COGSA liability rather than an NVOCC.

Issue: Did the allegations of the third party properly allege that BDP acted as a freight forwarder or an NVOCC so as to properly assert a claim for strict liability under COGSA?

Decision: The court recognized that COGSA only applied to shippers and carriers and did not apply to freight forwarders. COGSA liability does apply to NVOCCs which do more than merely arrange for the transportation of the goods "but takes on responsibility for delivering the goods." The court held that in its "failure to warn" claim, Deltech's complaint failed to properly allege that BDP acted as an NVOCC. In the end, Deltech merely alleged in conclusory fashion that BDP acted "as a freight forwarder and/or shipper." As a result, the court granted the motion to dismiss the COGSA claim against BDP. However, the Court did allow the survival of Deltech's claim against BDP for indemnification and contribution.

Presenter: Colin Bell

32. Mega International Trade Group v. A-Link Freight, Inc., 2015 WL 3823680 (S.D. Fla. June 19, 2015). This case involves a shipment of 888 cartons of Sony camcorders from Florida to the United Arab Emirates. At destination, 667 cartons did not arrive. Shipper Mega International hired A-Link to arrange the movement and A-Link in turn hired Trade & Traffic as its Florida agent. Trade & Traffic hired trucking company Twins Transport Service, Inc. (TTSI) to dray the containers from the warehouse to the Port of Miami. The missing 667 cartons were removed from their containers allegedly by or with the assistance of TTSI employees. Mega sued Trade & Traffic for negligent selection based upon five factual allegations: (1) rumors that the owner of TTSI has previously had theft issues, (2) Trade & Traffic employees thought the TTSI driver was dishonest, (3) TTSI used two drivers to bring goods to and from the TTSI warehouse, (4) safety problems with TTSI, and (5) TTSI only carried $100,000 worth of cargo insurance for a load worth over a million dollars.

Issue: On a motion to dismiss by Trade & Traffic, has Mega properly alleged a claim against Trade & Traffic for negligent selection of the carrier, TTSI?

Decision: No, motion to dismiss granted. Under Florida law, in order to assert a negligent selection claim, a plaintiff must allege three elements: (1) the hired party was incompetent to perform the work, (2) the employer knew or should have known of the incompetence, and (3) the incompetence was the proximate cause of the injury to the plaintiff. Here, plaintiff's allegation that TTSI was unfit was sufficiently alleged. However, Mega did not sufficiently allege that Trade & Traffic had knowledge of the rumors, the trustworthiness of the driver, the two-driver policy, the safety record nor the insurance. Furthermore, Mega did not sufficiently plead that Trade & Traffic knew or should have known of the specific propensity of TTSI to commit theft which was the *proximate cause* of the loss.

Presenter: Jeff Simmons

VI. FREIGHT CHARGES

33. CP Rail v. Leeco Steel, LLC, 2015 U.S. Dist. LEXIS 151417 (N.D. Ill. Nov. 9. 2015). This decision must be wrong because everyone knows the railroad is always right. This is a claim for demurrage charges assessed under a rail tariff against the terminal, a "closed gate" facility which required terminal approval to move railcars to the facility. In addition, the railroad seeks recovery from the steel owner for demurrage charges. The issue is whether the plaintiff has alleged a plausible claim for recovery of demurrage charges in its allegation that the terminal (MBT) is liable by virtue of its being named as the consignee on the bill of lading. MBT argues that there is no allegation that it had notice of or consented to being named consignee.

Motion to dismiss was granted. First, the court holds that the railroad did not allege a plausible claim against the terminal because it did not allege a "meeting of the minds" as to the naming of MBT as the consignee. In addition, the terminal cannot be held liable as a transloading terminal. Second, the court held that a claim had not been alleged as to a "prevailing industry custom" holding MBT liable for demurrage charges. And finally, the court determined that the railroad did not plead an express or implied-in-fact contract.

Presenter: John Fiorilla

34. Bushell Transport Company v. NOV Enerflow, ULC 2015 ABQB 350 (Alberta Court of Queens Bench, June 2, 2015). NOV Enerflow ULC ("NOV") asked a load broker, Orange Delta Transportation Canada Inc. ("Orange") to arrange the carriage of certain equipment from Alberta to Washington state. Orange in turn engaged Bushell Transport Company Ltd. ("Bushell") to carry the load in question. Orange signed a credit agreement with Bushell containing terms of payment for its services. Bushell in turn contacted NOV to make arrangements for the pick up of the cargo. After providing the carriage services Bushell invoiced Orange directly with no mention of NOV on the invoices. NOV paid the freight charges to Orange who failed to pay Bushell. Bushell sued NOV and brought a motion for summary judgment for the unpaid freight charges.

Issues: (i) Was this a matter that should be disposed of by way of a motion for summary judgment? (ii) Was NOV liable for the unpaid freight charges on the basis that Orange was acting

as its agent? (iii) Could NOV have a defence based on the fact that it paid the charges to the load broker?

Decision: The Court rejected Bushell's summary judgment application on the basis of an insufficient evidentiary record. The Court characterized the main issue as being whether Orange was an independent coordinator of freight services as opposed to having acted as NOV's agent. In this regard Bushell failed to lead sufficient facts for an adjudication on the existence of such a principal – agency relationship. The Court also noted that the record was lacking for it to determine the application of a potential defence for NOV based on the decision in *Canadian Pacific Ships v. Industries Lyon Corduroys Ltee.* That decision enumerates certain circumstances where a debt owed to a creditor is discharged by payment by the debtor to a third party. One such situation of relevance to the transportation industry concerns the case where both the creditor and the debtor would normally expect the payment to be made to the third party. The Court noted that the separate freight charge invoicing regime (from Bushell to Orange and in turn from Orange to NOV) might accordingly lead to NOV's exoneration from double payment liability. That matter, as the agency issue, was left to adjudication at trial as requiring a full evidentiary record.

Presenter: Gordon Hearn

VII. MISCELLANEOUS

35. In re Paulsboro Derailment Cases, 2015 WL 4138950 (D.N.J. 2015). This matter arises from numerous lawsuits filed in the wake of a railroad derailment occurring in Paulsboro, New Jersey.

Issue: Are findings in an NTSB "factual accident report" admissible in civil litigation to prove liability or damages?

Holding: No. Defendants Consolidated Rail Corporation, Norfolk Southern Railway Company and CSX Transportation, Inc. moved to strike certain portions of Plaintiff's motion for summary judgment that incorporated certain portions of the NTSB accident investigation report. Congress mandated that "no part" of an NTSB "board accident report" "related to an accident or an investigation of an accident [] may be admitted into evidence or used in a civil action for damages . . .." 49 U.S.C. § 1554(b). On the other hand, Federal regulations differentiate between a "board accident report" and a "factual accident report." A "board accident report" contains NTSB "determinations, including the probable cause of an accident." By contrast, a "factual accident report" contains NTSB "results of the investigator's investigation of the accident." 49 C.F.R. 835.2. Unlike a "board accident report," there is no bar to admission in litigation of a factual accident report." On this basis, Plaintiff argues the "factual accident report" is admissible.

The Court disagreed finding that because 49 U.S.C. § 1554(b) says "no part" of an NTSB "board accident report" is admissible and that a "factual accident report" is "part" of an NTSB "board accident report," the "factual accident report" is not admissible. Accordingly, the Court granted the motion of Consolidated Rail Corporation, Norfolk Southern Railway Company and CSX Transportation, Inc. and struck certain portions of Plaintiff's motion for summary judgment.

Presenter: Tom Martin

36. **Cottingham & Butler, Inc. v. Belu,** 332 Ga. App. 684, 2015 Ga. App. LEXIS 382 (Ga. Ct. App., July 1, 2015). This is an interlocutory appeal from the denial of a motion for summary judgment by an insurance broker on claims of negligence and breach of contract in the procurement of cargo damage insurance. The insured, Express Auto Transport, is owned by Romanian immigrants, Aron and Lidia Belu. Mrs. Belu called the insurance broker and requested complete coverage for the transport company. The broker obtained a cargo policy through Lloyd's which allowed Lloyd's the option of defending its insured. The Belus did not read the policy (or at least didn't remember). When a load of vehicles caught fire, Lloyd's paid a certain amount of the claim but refused to assume the cost of defense of the litigation brought by the vehicle owners. Lloyd's filed a declaratory judgment action and the federal court determined that it had no duty to defend the Belus. The Belus, in turn, sued the insurance broker and the broker moved for summary judgment.

Holding: The appellate court upheld the decision of the trial court in denying the agent's motion for summary judgment. As a general rule, an insurance agent is not liable for failing to obtain all requested coverage if the insured does not read the policy. The exception is when the agent holds itself out as an expert and the insured has reasonably relied upon the agent's expertise, unless an examination of the policy "would have made it readily apparent that the coverage requested was not issued." The appellate court agreed that there were genuine issues of material fact as to whether the agency offered expert advice and whether the Belus reasonably relied upon that advice.

Presenter: Mike Tauscher

37. **The Custom Companies, Inc.v Azera, LLC,** 2015 WL 4467020 (N.D. Ill. July 21, 2015). A suit to assess personal liability for a cargo claim against the sole member of an LLC created under Texas law. The Texas Tax Code allows personal liability for LLC members when an LLC fails or refuses to pay its debts. The LLC was liable for over $100,000.00 cargo damage claim. The issue was whether the LLC successfully incorporated in Georgia so as to avoid the Texas Tax Code which imposed personal liability upon the sole member of the carrier LLC.

Holding: The effort of the sole member to avoid Texas law, and personal liability, fails and the motion for summary judgment granted against the sole member for the liabilities of the LLC. The sole member attempted to register the LLC as a Georgia LLC but the Georgia Secretary of State's records reflected a "flawed/deficient" status without further explanation. As a result, the Texas LLC had not properly "converted" to a Georgia LLC. Texas law applied and the sole member was liable to the plaintiff for $116,469.44 plus pre-judgment interest and costs.

Presenter: Rob Spears

38. **Artisan & Truckers Cas. Co. v. Hanover Ins. Co.,** 2015 WL 5081458 (N.D. Ill. Aug. 27, 2015). Star Way Corp. and/or its affiliated individuals and entities agreed to transport two backhoes belonging to CNH America from Iowa to two designated consignees. The consignees never received their backhoes, though, as they were reported stolen from Star Way's Illinois facility. Hanover Insurance Company compensated CNH, its insured, for the loss and then sought reimbursement from Star Way through a Carmack Amendment action. Star Way looked to its insurer, Artisan and Truckers Casualty Company, for a defense. Artisan denied coverage and filed a separate declaratory judgment action, asking the court to find that Artisan does not have a

duty to defend and indemnify Star Way in the underlying Hanover suit. Artisan filed a summary judgment motion to resolve the coverage issue, asserting that the policy at issue does not provide cargo coverage and that at least six exclusions in the Commercial General Liability Endorsement of the policy preclude coverage. Both Hanover and Star Way opposed the motion.

Issue: Are damages caused by theft of cargo "property damage" for purposes of triggering CGL insurance coverage? If so, do such damages fall under one or more exclusions in the policy?

Decision: If the facts alleged in the underlying complaint are within or potentially within policy coverage, the insurer has a duty to defend and cannot prevail on summary judgment. The allegations in the underlying complaint must be liberally construed in favor of the insured. However, the burden is on the insured to prove that its claim falls within the policy's coverage. The court held that Star Way failed to prove that. The CGL Endorsement in the policy provides that Artisan "will pay those sums . . . that [Star Way] becomes legally obligated to pay as damages because of bodily injury or property damage." Though the parties' arguments suggested that all agreed that theft constitutes "property damage," the court did not agree, holding that such damages do not fall within the "property damage" definition in the policy, citing settled case law on the issue. Therefore, Hanover and Star Way failed to meet their burden to establish that the Hanover claim falls within the CGL Endorsement's coverage.

The court did not stop there in its analysis. It reviewed the six exclusions cited by Artisan and found that, even if there were otherwise coverage for the cargo theft, the "Damage to Your Work" and "Damage to Impaired Property or Property Not Physically Injured" exclusions apply to the allegations in the underlying complaint. Because the theft of the backhoes arose during Star Way's performance of its work (accomplishing delivery), the DTYW exclusion applies; and, because the underlying complaint includes no allegation that the backhoes were physically injured, the NPI property exclusion applies. Artisan was therefore granted the requested summary judgment, holding that it owes no duty to defend or indemnify Star Way.

Presenter: Jason Orleans

39. Maher Terminals, LLC v. The Port Authority of New York and New Jersey, 805 F.3d 98 (3d Cir. Oct. 1, 2015). Maher sued the NY-NJ Port Authority invoking the U.S. Constitution's "Tonnage Clause" under which the states may not "lay any Duty of Tonnage" without consent of Congress. The PA's relevant terminal lease requires Maher to pay, in addition to base rent, certain "Container Throughput Rental" charges assessed on the volume of containers moving in and out of the terminal. Maher contends the container "Rental" charges amount to an unlawful state tax on cargo.

Decision: Reviewing Tonnage Clause precedents, the Third Circuit held the Clause was intended by the Founders to protect only commercial vessels and their representatives from state taxation. The Court of Appeals declined to extend the Tonnage Clause's "zone of interests" protection to a land-based stevedore, like Maher, having only a contractual relationship with ship owners. The Court affirmed the dismissal of Maher's constitutional claim on the grounds that Maher: (1) is a stevedore, not a protected vessel or ship owner representative and (2) failed to allege the "Container Throughput Rental" charges are solely to raise revenue and unrelated to services rendered by the PA.

A well-reasoned dissent criticized the majority for applying a more restrictive "zone of interests" test to Maher than the broader ("interests related to the protection of interstate commerce") standard applied in Commerce Clause cases. The dissent also concluded that Maher had sufficiently pleaded a Tonnage Clause claim by alleging the PA is levying duties on cargo that are disguised as "rent."

Presenter: George Wright

40. Port Drivers Federation 18, Inc. v. Fortunato, 2015 WL 3495574 (D.N.J. 2015). This is a case about independent contractors and about piercing the corporate veil involving layered carriers and warehouses owned, controlled and operated by a single individual. Defendant, Anthony Fortunato, was the owner and sole shareholder of All Saints Express, Inc. ("All Saints") and St. George Trucking and Warehouse ("St. George"). Defendant used All Saints to contract with owner-operators. St. George's dispatchers then contacted All Saints' contract operators to transport freight. All Saints also leased equipment to the owner-operators. All Saints' sole business was to supply independent contractor drivers to St. George.

In 2010, the Port Drivers Federation 18, Inc. and a number of the All Saints owner-operators sued All Saints in Federal Court in New Jersey alleging, among other things, All Saints violated the Truth-In-Leasing Federal Regulations. That Court granted summary judgment to the Plaintiffs and awarded $278,837.00 in reimbursement of counsel fees. Port Drivers v. All Saints, 757 F. Supp. 2d 443 (D.N.J. 2010). Shortly after the Judgment, Fortunato caused All States to cease doing business and did not pay the Judgment. Plaintiff then sued Fortunato in New Jersey State Court seeking to pierce the corporate veil. The trial court granted Fortunato's motion for summary judgment. The Appellate Division reversed and remanded.
The test for corporate veil piercing is:

(i) whether the subsidiary was dominated by the parent company and

(ii) adherence to the corporate fiction of separate existence would perpetuate a fraud or injustice or would otherwise circumvent the law. Some of the factors to consider are gross undercapitalization of the subsidiary, the daily involvement of the subsidiary and the parent, lack of observation of corporate formalities, insolvency, no payment of dividends, lack of corporate records or whether the subsidiary is merely a façade.

In this case, as to the first prong - All Saints did not observe corporate formalities, may have been undercapitalized, had no other officers or directors, had scant financial records, paid no dividends to Fortunato and no separate business existence other than to serve as a "cut out" of sorts for Fortunato and St. George. Discovery also showed certain All Saints checks were made out directly to Fortunato. As to the second prong – there was evidence All Saints was closed by Fortunato solely for the purpose of avoiding enforcement of the judgment. For example, Fortunato was paid $11,000.00 by All Saints days after entry of the judgment. Also, All Saints transferred a $140,000.00 account receivable to St. George shortly after entry of the judgment. Based on the foregoing, the Court felt there were substantial questions of fact militating against summary judgment and reversed and remanded.

Presenter: Ian Culver