CONFERENCE OF FREIGHT COUNSEL
SUMMER 2017 MEETING
WYNDHAM GRAND JUPITER AT HARBOURSIDE PLACE
JUPITER, FLORIDA
JUNE 10-12, 2017

AGENDA OF CASES

I. LIMITATION OF LIABILITY

1. ***Exel, Inc. v. Southern Refrigerated Transport, Inc.***, 2017 WL 1838010, 2017 U.S. Dist. LEXIS 69909 (S.D. Ohio May 8, 2017)

Facts: In November 2008, Exel arranged for SRT to transport a shipment of shipper Sandoz, Inc.'s pharmaceuticals from Exel's warehouse in Mechanicsburg, Pennsylvania to Memphis, Tennessee. Before the shipment, Exel prepared bills of lading on Sandoz's behalf. Exel personnel loaded the pharmaceuticals onto SRT's container and signed the bills of lading and gave them to the SRT driver, who also signed them. On the bills of lading, the freight was labeled "Item 60000 Class 85, RVNX $2.40," and the bills of lading contained the following "certification" language:

> Carrier, SFRI . . . RECEIVED, subject to the classifications and Tariff, in effect on the date of issue of this bill of lading . . . The Proper[sic] described below, in apparent good order, . . . which said carrier . . . agrees to carry . . . that every service to be performed here-under shall be subject to all terms and conditions of the Uniform Domestic Straight Bill of Lading . . . in the applicable motor carrier classification or tariff if this is a motor carrier shipment. Shipper hereby certifies that he is familiar with all the said terms and conditions of the said bill of lading set forth in the classification or tariff which governs the transportation of this shipment and the

> terms and conditions are hereby agreed to by shipper and accepted by himself and his assigns.

(Emphases added). The bills of lading also had the "declared value" box:

> "NOTE-Where the rate is dependant [sic] on value, shippers are required to state specifically in writing the agree[sic] or declared value of property. The agreed or declared value on the property is hereby specifically stated by the shipper not to be not exceeding ___ per ___."

No value was declared on the bills of lading, nor was "RVNX" defined in the bills of lading. During litigation, SRT argued that RVNX was an abbreviation for "Released Value Not to Exceed" and that it therefore operated as a per pound limit of liability for any claim against the carrier related to the loss or damage of the cargo.

On November 7, 2008, the SRT truck carrying the Sandoz shipment was stolen and the goods were never recovered. On November 14, 2008, Sandoz made a claim for the lost goods with Exel. Exel, in turn, submitted a claim to SRT on behalf of Sandoz pursuant to the MTSA demanding the full replacement value of the shipment, $8,583,631.10. SRT denied the claim, stating that its recovery was limited to $56,766.36, based on the terms in the bills of lading, namely the "RVNX $2.40" times the weight of the cargo. Sandoz and Exel, not surprisingly, rejected this, and Sandoz informed Exel that it intended to hold it fully liable for the claim, and demanded payment for the claim in the amount of $8,585,631.10.

On October 18, 2010, Sandoz assigned its rights and interests in the lost cargo to Exel. On November 5, 2010, Exel, "for the use and benefit of" Sandoz, filed a complaint against SRT, alleging (1) breach of contract (Count I); (2) breach of bailment (Count II); (3) breach of the ICC Termination Act (previously the Carmack Amendment) (Count III); and (4) a request for a declaratory judgment to determine "whether the terms of the Agreement or the terms of the bills of lading govern the claim for damages in this matter" (Count IV). Exel sought $8,583,671.12 in damages.

SRT filed its answer and motion for judgment on the pleadings as to Counts I, II, and IV of the complaint. In the motion SRT argued that the Carmack Amendment, 49 U.S.C. § 14706, et seq., governed the relationship between the parties and preempted Counts I, II, and IV. The district court ruled on SRT's motion for judgment on the pleadings on December 15, 2011, holding that the Carmack Amendment preempted Counts I and II. It therefore granted judgment to SRT on those counts. The district court found it unnecessary to address the declaratory judgment question in Count IV, reasoning that a declaration would not settle the initial question of whether SRT was, in the first place, liable under the Carmack Amendment for the loss of the shipment. Count III, the Carmack count, remained pending.

The parties filed cross-motions for summary judgment as to Count III. After oral arguments on the motions, the court, sua sponte reversed its decision as to Count IV. The court remarked that it had "viewed this case as one in which Exel stands

in the shoes of the shipper Sandoz with rights no greater than those which could be asserted by Sandoz," but that at the May 23, 2012 hearing, Exel had also asserted separate and additional rights under the MTSA. The district court "examined the MTSA" and found "that it does contain language which may create obligations independent of the shipper-carrier relationship" outside the purview of the Carmack Amendment. The court referenced the provision giving the MTSA trump power over conflicting bills of lading, as well as the provisions making the carrier liable to the Customer for loss, measured by the replacement value. The district court "also re-examined the complaint" and held that "in its claim for declaratory judgment Exel did articulate a claim of individual rights under the MTSA," finding that "[t]hese factual allegations would be sufficient to support a claim for breach of contract." The district court then amended its earlier order and concluded: "[Exel] has alleged a claim for breach of contract based on the provisions of the MTSA, which may not be preempted by the Carmack Amendment." The court ordered the parties to file supplemental briefs.

Following supplemental briefing, the court held on July 27, 2012, that the Carmack Amendment did not preempt Exel's breach of contract claim under Count IV, observing that the Carmack Amendment does not expressly preempt state law claims between a broker and a carrier. The district court also rejected SRT's argument that, absent preemption of Exel's contract claim, it could be subject to double recovery. The court found that was "not a possible outcome of this case," because Sandoz had assigned its claim for the lost cargo to Exel. Thus, SRT "need not be concerned by a separate action by Sandoz, and Exel seeks recovery here either under the bill of lading or the master agreement, not both." The district court therefore vacated its order of December 15, 2011 with respect to Count IV and denied SRT's motion for judgment on the pleadings as to that count. The court denied the parties' motions for summary judgment without prejudice.

After additional discovery, the parties submitted new motions for summary judgment. On August 26, 2014, the district court held that the MTSA was an enforceable contract, which Exel had standing to enforce. It also held SRT was responsible for the replacement value of the lost goods under the plain language of the MTSA, in the amount of $5,890,338.82. The district court therefore granted Exel's motion for summary judgment as to Count IV for that amount. The court dismissed Count III, apparently as duplicative, because it noted in a footnote that "the Carmack Amendment claim for the use and benefit of Sandoz is an alternative claim to Exel's individual breach of contract claim."

On appeal, SRT first argued that the district court erred in finding it liable for breach of contract because Exel had suffered no injury (i.e. damages) under the contract and that it lacked standing to enforce the rights of Sandoz under the MTSA. SRT also argued that the breach of contract claim was preempted by the Carmack Amendment. The Sixth Circuit agreed with SRT that Exel had suffered no injury to give it standing to sue SRT for breach of the MTSA, relying primarily on the fact that Exel had not paid any amounts to Sandoz for the cargo loss and refused to acknowledge that it was contractually liable to Sandoz for the loss (perhaps seeking to avoid conceding its own liability to Sandoz in the event that

SRT's liability to Exel is limited by the bills of lading). And because Exel was seeking to recover only the replacement value of the lost cargo - a loss which only Sandoz had suffered - it could point to no independent injury it had borne to establish standing to pursue the breach of contract claim.

The Court of Appeals also rejected Exel's novel argument that it should be able to sue SRT for breach of the MTSA under the Carmack Amendment itself. Seeking to take advantage of the statute's grant of permission to enter into contracts other than bills of lading, Exel sought to shoehorn the MTSA into the Carmack Amendment by contending that the MTSA would constitute an enforceable contract authorized by the Carmack Amendment and on which it could sue SRT for cargo loss. However, the court, citing longstanding case law as well as the text of the Carmack Amendment itself, noted that as a broker Exel had no cause of action under the Carmack Amendment and, in any event, lacked standing to sue for breach of the MTSA - under the Carmack Amendment or otherwise - because it had suffered no injury.

Lastly, the court addressed Exel's right to bring a Carmack Amendment claim against SRT as assignee of Sandoz. Citing *R.E.I. Transp., Inc. v. C.H. Robinson Worldwide, Inc.*, No. 05-57-GPM, 2007 WL 854005, at *5-6 (S.D. Ill. Mar. 16, 2007) and *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1098-99 (9th Cir. 2011), the court noted that a party standing in the shipper's shoes has the right to assert a Carmack claim against a carrier. Since Exel had a proper assignment from Sandoz that allowed it to pursue the Carmack claim, the only issue to be resolved was whether SRT's liability was limited. On this point, Exel argued that the MTSA's terms making SRT liable for full replacement value controlled because of the MTSA's language providing that it governed over contrary terms in the bills of lading. SRT, in contrast, asserted that the bill of ladings' terms providing for a released-rate-based limitation controlled.

The court held that issues of fact precluded summary judgment for either party on this issue and remanded to the trial court. Importantly, the court made clear that the MTSA was not relevant to the question of whether SRT's liability was limited. Because the MTSA was operative only between the broker and the carrier, it could not constitute an agreement with the shipper limiting the carrier's liability. As to SRT's claim that the bills of lading limited its liability, the court found that the venerable Hughes test, known in the Sixth Circuit as the Toledo Ticket test, continues to apply as the relevant test for determining whether a carrier and shipper have agreed to a limitation on the carrier's liability. Thus, on remand, it was for the district court to apply the Hughes test to SRT's claim that its liability is limited by the language in the bills of lading.

Issue: Whether the released rate on the Bill of Lading limited SRT's liability to Exel as assignee of Sandoz.

Holding: The Court held that the notation "RVNX $2.40" did not limit SRT's liability because it was included in the section of the BOL that provided that ""NOTE—where the rate is dependant [sic] on value, shippers are required to state

specifically in writing the agree [sic] or declared value of property. The agreed or declared value on the property is hereby specifically stated by the shipper to be not exceeding _____ per _____." Because the rate charged by SRT was not dependent on value (but was instead a negotiated contract rate), the released rate could not apply by the terms of the BOL. Further, SRT's tariff, which the court held was applicable, did not limit SRT's liability because it did not contain rates or applicable limits on liability that offered the shipper a reasonable choice.

In the remaining portion of the opinion, the Court held, anti-climactically, that the material deviation doctrine did not apply and that it could not award damages based on genuine issues of fact.

Presenter: Wes Chused

2. ***Eastern Air Express, Inc. v. FedEx Freight, Inc.***, 2017 U.S. Dist. LEXIS 29010 (S.D. Fla. Feb. 27, 2017)

Facts: This case arises out of damage to an airplane engine during transportation by FedEx Freight, Inc. from Terre Haute, Indiana to Fort Lauderdale, Florida. Eastern Air Express, Inc. leased an airplane from its owner Gemair, Inc. Gemair authorized Eastern to arrange the transport of the plane's engine to a repair facility in Terre Haute, Indiana. Eastern engaged Echo Global Logistics, Inc. to facilitate the transportation and Echo utilized FedEx with whom it had a contract carrier agreement (CCA). The engine arrived in Indiana without incident. After it was discovered that the engine was too damaged to repair, Gemair purchased a reconditioned engine from the facility and authorized Eastern to arrange for its transport to Fort Lauderdale. Once again, Eastern utilized Echo to facilitate transportation and Echo utilized FedEx. Shortly after arriving in Fort Lauderdale, Eastern discovered that the engine was damaged and commenced the claims process with Echo. Plaintiffs recovered $550.43 ($245 for damages at $0.50 per pound for the 490-pound engine and $305.43 in refunded freight charges). Eastern and Gemair filed suit against FedEx seeking to recover full actual damage to the engine plus loss of use damages.

Issue: Whether FedEx properly limited its liability through its contract carrier agreement with Echo such that its liability for the damage to the used or reconditioned engine was limited to $.50 per pound per package, with a maximum limitation of $10,000.00.

Holding: Citing *Bio-Lab, Inc. v. Pony Exp. Courier Corp.*, 911 F.2d 1580 (11th Cir. 1990), the Court analyzed the four-prong test to determine whether FedEx effectively limited its liability under the Carmack Amendment. The Court determined that Plaintiffs' agent Echo created the Bill of Lading, that FedEx and Plaintiffs, through their agent Echo, had an agreement to limit liability (either through the CCA or the Bill of Lading, both of which referenced the FedEx Tariff), that FedEx gave Plaintiffs a reasonable opportunity to choose between two or more levels of liability in its Tariff, that 50 cents per pound was not unreasonable for a reconditioned engine that is deemed airworthy, that Plaintiffs are bound by the Tariff, by the CCA and/or by the Bill of Lading prepared by their agent, all of which

reference the Tariff, and that the Bill of Lading was issued prior to moving the shipment. Thus, all four prongs of the Eleventh Circuit test having been satisfied, the Court granted summary judgment in favor of FedEx on the affirmative defense of liability limitation.

Presenter: Edwina Kessler

II. CARMACK PREEMPTION

3. *Pickett v. Graebel Kansas City Movers Inc.*, 2017 WL 2264451 (D. Kan. May 24, 2017)

Facts: Denise and J.D. Pickett hired Graebel Van Lines to move their belongings from their residence in Johnson County, Kansas to their new residence in Morgantown, West Virginia in August 2015. When the truck arrived in West Virginia, some of the Picketts' property was missing. Though Graebel demanded an additional payment of $6,287.89 to deliver the missing property (according to plaintiffs), plaintiffs eventually received only a portion of the remaining property and some of the delivered furniture was damaged or broken. Plaintiffs filed suit, claiming liability under both the Carmack Amendment and a negligence theory.

Graebel moved to dismiss the negligence count. Plaintiffs, in turn, moved to amend their complaint, keeping in the Carmack count, eliminating the negligence count, but also adding a claim alleging unconscionable acts and practices under the Kansas Consumer Protection Act. Graebel opposed the motion, asserting that the KCPA claim was preempted by Carmack.

Issue: Does Carmack preempt a state consumer protection count that provides for recovery in excess of that provided by Carmack?

Holding: The Court described the broad preemptive scope of the Carmack Amendment, but noted that a plaintiff may be allowed recovery under a state statute in addition to the Carmack Amendment if the state statute merely provides for incidental costs and does not allow an additional remedy. Pursuant to the Kansas statute asserted by plaintiffs, "[t[he court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with cost, disbursements and reasonable attorney fees and any equitable relief that the court determines is appropriate." Because the statute provides an alternative avenue of recovery for goods that were lost or damaged in interstate commerce and plaintiffs do not allege any facts in addition to their Carmack Amendment claim that would warrant an additional recovery, the proposed second count is preempted by Carmack and therefore not permitted.

Presenter: Ken Hoffman

4. *Starboard Holdings Ltd. v. ABF Freight Systems, Inc.*, 2017 WL 696124, 2017 U.S. Dist. LEXIS 23359 (S.D. Fla. Feb. 16, 2017)

Facts: Plaintiff, Starboard Cruise Service, hired ABF Freight to transport watches retail valued at $935,000 from Dallas, Texas to Miami, Florida. There

were two shipments that arrived in the same week in February of 2014 at ABF's terminal in Miami. The cargo was placed into two storage trailers and then the watches were stolen before they could be delivered to Starboard's warehouse in Miami.

Plaintiff alleged causes of action based upon bailment, negligence, breach of contract and conversion. ABF contended that the causes of action were preempted by Carmack, that it was not a warehouseman, and that delivery to the plaintiff would not have been completed until delivery was made to plaintiff's warehouse.

ABF filed a motion for summary judgment and alternatively partial summary judgment based upon its limitation of liability.

Issue: Whether carrier ABF continued to act as a motor carrier, rather than as a warehouseman, when it stored shipper's goods at its warehouse while the shipments were awaiting appointments for delivery to shipper's warehouse, and, if so, whether the Carmack Amendment preempted shipper's state law claims.

Holding: The District Court held that the case law cited by ABF on what constituted delivery of the goods to plaintiff, which were not commented upon by plaintiff's counsel, supported ABF's position that delivery would not have been completed until delivery to plaintiff's warehouse which was the ship-to address on the two bills of lading. The Court relied on the decision in *Intech v. Consolidated Freightways* from the First Circuit in 1987 as well as several other decisions in concluding that the intent of the parties was for final delivery to plaintiff's warehouse. Plaintiff should have pled an alternative Carmack cause of action in its Complaint and, for its failure to do so, ABF obtained summary judgment. Plaintiff has decided not to appeal the decision.

Presenter: Heidi Roth

5. ***Al Joukhay Trading LLC v. Vantage International Shipping Inc.***, 2017 WL 1382296, 2017 U.S. Dist. LEXIS 58753 (E.D. Mich. Apr. 18, 2017)

Facts: Al Joukhay Trading LLC contracted with Vantage International Shipping, Inc. and Norfolk Southern Corporation to ship perishable goods from Michigan to the country of Jordan. Vantage picked up shipping containers loaded with Al Joukhay's goods, but Defendants did not complete the delivery because the shipping containers exceeded allowable weight limitations. Defendants were on notice that the goods were perishable and time was of the essence but nevertheless failed to inform Al Joukhay of the weight issue. By the time Defendants delivered the goods to Jordan, their expiration date had passed. As a result of the delay, Al Joukhay argued the goods spoiled, customs officials destroyed the goods when they arrived in Jordan and Al Joukhay allegedly suffered $236,001.88 in damages. Al Joukhay's second amended complaint alleged state and common-law causes of action, breach of contract, breach of warranty, fraud, negligence, and bailment. Norfolk Southern removed the case to federal court and filed a motion to dismiss Al Joukhay's second amended complaint on the ground that the Carmack Amendment completely preempts Al Joukhay's state-law claims.

Issues: (1) Al Joukhay contends the Carmack Amendment does not apply because the "shipping containers never left the state of Michigan" and, therefore, never traveled in interstate commerce. (2) Should Al Joukhay's state law claims against Vantage likewise be dismissed even though Vantage did not join in Norfolk Southern's motion to dismiss.

Holding: Al Joukhay's assertion that the goods never left the state of Michigan was contradicted by its second amended complaint: "Once the Defendants Vantage Int'l Shipping Inc., and Norfolk Southern Corporation finally delivered the crate to Aqaba, Jordan, the authorities ordered the entire product to be destroyed," and "[w]hen Defendants Vantage Int'l Shipping, Inc. and Norfolk Southern Corporation did ship, it was shipped months later than expected, beyond the date by agreement." So whether or not the shipping container made its way to Jordan, Al Joukhay alleged that the Defendants transported the goods in interstate commerce. Therefore, the Carmack Amendment applies and Al Joukhay's state law claims are preempted.

The claims stated against Vantage are the same as those lodged against Norfolk Southern. Al Joukhay's second amended complaint fails to state a claim upon which relief can be granted, and because the claims stated against Vantage are the same as those lodged against Norfolk Southern, the claims against Vantage should be dismissed for the same reasons, despite the fact Vantage did not join in the motion.

Presenter: **Dirk Beckwith**

6. ***Monga v. ABS Moving & Storage, Inc.***, 2017 WL 749236 (D. Md. Feb. 27, 2017)

Facts: This is a household goods case, with alleged loss and damage to goods as well as a claim that the goods were "held hostage" to extort additional money from plaintiff.

Plaintiff got a new job with a United Nations agency located in Austria. He had already moved to start work when the logistics department of the UN arranged for the international shipment of plaintiff's goods from Maryland via ocean shipment. For some reason that is not immediately apparent, the carrier retained by the UN was not tasked with picking up the goods from plaintiff's residence. Instead, plaintiff himself arranged for ABS (a local Maryland household goods mover) to pack and load his household goods and transport them to ABS's warehouse in Baltimore to await the carrier retained by the UN to truck the goods the very short distance to the Port of Baltimore for the onward ocean shipment.

Plaintiff filed suit in Maryland state court including counts for violations of Maryland's CPA and Household Goods Movers Act; breach of contract; unjust enrichment; trover and conversion; negligence; and intentional infliction of emotional distress. Plaintiff alleges that: (1) following the move to temporary storage he was charged an amount higher than the estimate; (2) a short time later ABS demanded more money without explanation or justification, advising that it

would not release the goods to the international carrier until all outstanding balances were paid, to which Plaintiff objected, but ultimately paid under protest; (3) ABS also demanded the original of a notarized authorization executed by plaintiff to release the goods to the international carrier and there was then a further delay of several weeks when ABS was unresponsive and uncooperative in transferring the goods to the international carrier; and (4) when the international carrier finally made the pick-up there were missing and damaged goods.

ABS removed the case to federal court based on federal jurisdiction pursuant to the Carmack Amendment.

Issues: Plaintiff filed a motion to remand arguing that there were two completely unrelated, separate and distinct contracts, with no continuity or a unifying element because: (1) the ABS contract did not reference the future international shipment; (2) the contracts had different parties; and (3) there was a three-month gap in time until the international shipment happened. Plaintiff ultimately claimed the contract with ABS was purely intrastate, such that the Carmack Amendment did not apply and thus there was no federal jurisdiction. Defendants responded that, pursuant to 49 U.S.C. § 13501(1)(E), the essential character of the transportation and intent that it be a "continuation of foreign commerce" was determinative, rather than the number of contracts or different parties to those contracts. Defendants also filed a motion to dismiss all the exclusively state law causes of action in the complaint based on Carmack preemption.

Holding: In denying the motion to remand, the district court found the essential "character of the commerce" and the "continuing intent" of the shipper were key. In this case it was clear plaintiff's intent all along was to have his goods shipped to Austria, irrespective of the number of contracts and parties, and thus there was a "continuous or unified movement." In regard to the gap between the moves, the district court recognized that temporary storage is irrelevant to break the chain of unity, that there are other cases with much longer periods that were still considered "temporary," and that at least two months of the gap were caused by defendants' refusal to release the goods where plaintiff always intended the gap be less than 30 days.

The court granted in part and denied in part defendants' motion to dismiss for Carmack preemption, finding Carmack only preempts claims for "actual loss and damage" and that claims for over-charging and holding goods hostage are not preempted. Defendants have since filed a motion for clarification or reconsideration on the partial denial of the motion to dismiss for Carmack preemption and have filed a motion to dismiss on FAAAA preemption grounds.

Presenter: **Colin Bell**

7. ***Heniff Transportation Systems v. Trimac Transportation Services***, 847 F.3d 187 (5th Cir. Jan. 30, 2017)

Facts: Heniff Transportation Systems was hired to transport chemicals from Texas to Illinois. Heniff, in turn, hired Trimac Transportation Services to clean the tanker prior to the trip. The cleaning was not performed correctly, and the chemicals became contaminated. Heniff sued Trimac for the resulting damages.

Finding that Heniff's state law claims against Trimac were preempted by the Carmack Amendment, the District Court ordered them dismissed. Heniff appealed.

Issue: Whether the tank-cleaning services of a carrier that did not transport the goods are sufficiently related to transportation to fall within the preemptive effect of Carmack.

Holding: Rejecting Heniff's appeal, the Fifth Circuit agreed with the District Court that Heniff's claims are preempted by the Carmack Amendment because the service that Trimac provided, a tanker wash, was a service related to the movement of property in interstate commerce, as defined in 49 U.S.C. § 13102(23). The Court rejected Heniff's suggestion that because Trimac had no knowledge of the upcoming shipment and did not know that the particular tanker it was washing was going to be used to transport chemicals across state lines, it was not subject to the Carmack Amendment. The Court explained that the Carmack Amendment does not have any scienter requirement, expounding that "all that matters is whether the claims fall under the 'jurisdiction' of the Carmack Amendment, [] regardless of whether Trimac knew as much at the time it provided the wash services."

Presenter: **Kurt Vragel**

8. ***Konecne v. Allied Van Lines***, 2017 U.S. Dist. LEXIS 41348 (D. Nev. Mar. 20, 2017)

Facts: Plaintiffs Meghan Konecne and Howard Misle contracted with defendant Allied Van Lines and Allied's agent, Berger Transfer & Storage, to move their household goods from California to Nevada. Things did not go well with the move. Plaintiffs filed suit against both Allied and Berger, stating causes of action under the Carmack Amendment for damage to their goods and for negligence, trespass to chattels and conversion for damage to a staircase in their California house.

Defendants filed a motion to dismiss the state law claims as against both defendants on Carmack preemption grounds and all claims as against Berger, asserting that no right of action exists against an agent for a "disclosed principal carrier."

Issue: Does Carmack's preemptive scope extend to claims for damage to a shipper's real property? Does a shipper have a right of action under Carmack against the carrier's agent?

Holding: Defendants prevailed on both arguments. Citing to Ninth Circuit precedent, the court held plaintiffs' state law claims for damage to their staircase preempted: "It is well settled that the Carmack Amendment constitutes a complete defense to common law claims alleging all manner of harms." The non-Carmack counts were therefore dismissed from the complaint. Because the state law claims were dismissed, so, too, was Berger as a defendant. "Not only does the statutory language impose liability on a motor carrier for the acts and omissions of the carrier's agent, but case law holds that the agent of a disclosed principal cannot be held liable pursuant to a duly issued bill of lading contract."

Presenter: Vic Henry

9. ***Service First Logistics, Inc. v. J. Rodriguez Trucking, Inc.***, 2017 WL 1365410 (E.D. Mich. Apr. 14, 2017)

Facts: Michigan-based plaintiff broker retained Florida-based defendant motor carrier to haul produce (lettuce mixes in plastic clam shells) from Georgia to Florida. There was a dispute as to whether the temperature was properly maintained and consignee rejected the load. Broker paid shipper $21,000 and then filed a Carmack claim in Federal Court in Michigan. A default and default judgment were entered against carrier before counsel was retained. Defendant requested plaintiff set aside the default and default judgment for lack of subject matter jurisdiction given that freight was exempt commodities and therefore Carmack did not apply. Plaintiff refused and a combined motion to dismiss and motion for summary disposition was filed.

Issues: Whether the court has subject matter jurisdiction under Carmack regarding the load of alleged exempt commodities (produce).

Holdings: The court held, pursuant to 49 USC §13506(a)(6), that Carmack did not apply to exempt commodities. The Court went on to find that the cargo at issue was in fact exempt commodities pursuant to ICC Administrative Ruling 107 (now Composite Commodity List Administrative Ruling 119) and Frozen Food Express v. U.S., 148 F. Supp. 399, 402-03 (S.D. Tex. 1956), affirmed 355 U.S. 6 (1957). That being the case, there was no subject matter jurisdiction and the Court (1) set aside the default, (2) set aside the default judgment, and (3) dismissed the claim without prejudice.

Presenter: Mike Tauscher

10. ***Chisesi Brothers Meat Packing Company, Inc. v. Transco Logistics Co.***, 2017 WL 2189829 (E.D. La. May 18, 2017)

Facts: In February 2016, Transco transported a specialized injection machine by truck from New Jersey to the Jefferson Parish, Louisiana plant of purchaser Chisesi Brothers Meat Packing Company. When the injector arrived, it was severely damaged and several components were missing. Chisesi obtained a repair estimate of approximately $126,000 and, guided by the broker that made the arrangements with Transco, submitted a claim to Transco's insurer, Travelers

Property Casualty Company of America. After Travelers failed to make any offer of settlement, Chisesi filed suit against both Transco and Travelers, asserting claims of negligence and breach of contract against both and bad faith against Travelers.

Transco filed a motion to dismiss, contending that the Carmack Amendment preempts plaintiffs' claims. Travelers filed a similar motion, asserting Carmack preemption of the counts against it and adding an argument that Chisesi has not properly established a right of action under Louisiana's Direct Action Statute ("LDAS").

Issue: (1) Are negligence and breach of contract counts against a motor carrier arising out of damage to an interstate shipment preempted by the Carmack Amendment? (2) Are the same counts against the carrier's insurer also preempted by Carmack? (3) Does plaintiff have a direct right of action against Travelers under the cited Louisiana law?

Holding: The first question was answered by the Court with relative ease, applying traditional Carmack Amendment preemption analysis. Agreeing with plaintiff's contention that the required elements of a Carmack claim are contained in the complaint, plaintiff was given an opportunity to amend the complaint to allege a single count under Carmack.

The court, however, did not reach a decision on the issues raised by Travelers. In its response to Travelers' motion, Chisesi asserted that the Carmack Amendment does not preclude its LDAS claims of negligence and breach of contract because the LDAS "reverse preempts" the Carmack Amendment under the McCarran-Ferguson Act; and that Carmack does not preempt its bad faith claim against Travelers. Apparently unsatisfied with the parties' submissions on the issues, the court instructed the parties to submit supplemental briefing. Travelers' motion is set for hearing on June 14.

Presenter: Eric Zalud

11. ***Starr Indemnity & Liability Company v. YRC, Inc.***, 2017 WL 168179, 2017 U.S. Dist. LEXIS 6260 (N.D. Ill. Jan. 17, 2017)

Facts: YRC was retained by shipper Cessna Aircraft Company to move two jet engines from Florida to West Virginia. The cargo was damaged when YRC's truck rolled over in transit. Cessna's insurer, Starr Indemnity, sued YRC to recover the $1.9 million it paid to its insured.

The complaint contained a Carmack claim and three claims seeking relief under 49 U.S.C. § 14704 for alleged violations of the federal regulations. YRC moved to dismiss all but the Carmack count on Carmack preemption grounds.

Issue: Is the Carmack Amendment's preemptive umbrella broad enough to cover other federal statutes?

Holding: Though recognizing that Carmack's preemptive scope is broad, the court noted that it is not all-inclusive. The Carmack Amendment preempts state

law and common law, but not other federal statutes. Plaintiff's claims under § 14704 are not based on state law or common law and thus are not preempted by the Carmack Amendment. YRC's motion to dismiss the counts seeking relief under § 14704 was therefore denied. The court did, however, suggest that YRC may have another basis for challenging such counts: "Defendant does not challenge whether § 14704 provides a private right of action for the violations of the federal regulations that Plaintiff alleges in this case, so the Court does not address this issue."

Presenter: Bruce Spitzer

III. CARRIER LIABILITY

12. ***Klein v. Zugabe***, 2017 WL 374733 (S.D.N.Y. Jan. 24, 2017)

Facts: *Pro se* plaintiff and former attorney Shmuel Klein sued United Parcel Service, Inc., three of its employees (including its CEO), and a slew of other local political and law enforcement officials pursuant to 42 U.S.C. § 1983 and related legal theories following his arrest, conviction, and its reversal. Klein had held for ransom a package sent to a former tenant against whom he had an unsatisfied unlawful detainer judgment. Inexplicably, UPS filed a criminal complaint with the local police department, and plaintiff refused to relinquish the package when law enforcement arrived and allegedly resisted arrest. A UPS employee Richard Smith was in attendance at the time of the arrest. A prior civil action was dismissed for plaintiff's failure to serve defendants in a timely manner. Plaintiff's conviction was overturned on technical grounds, and the district attorney declined to prosecute the remaining charge.

Issue: Whether plaintiff's claims should be dismissed on a 12(b)(6) motion pursuant to the operative statutes of limitation.

Holding: The court held that all but plaintiff's malicious prosecution claims against the arresting officers and an assistant district attorney (name unknown) in relation to the charge of resisting arrest should be dismissed with prejudice. Significantly, the court observed the years' delay between plaintiff's first civil suit and the second in dismissing the bulk of his claims on statute of limitations grounds. The court additionally ruled that the dismissal pursuant to Rule 4(m) could not form the basis of a *res judicata* defense. As they say, "when a lawyer represents himself, he has a fool for a client."

Presenter: Tom Koziol

13. ***Rosenberg v. United Parcel Service General Services Co.,*** 2017 WL 481471, 2017 U.S. Dist. LEXIS 16429 (S.D.N.Y. Sep. 6, 2017)

Facts: Plaintiff sued for delay damages to four packages of Apple iPhone 5S cell phones transported via air from the U.S. to Israel. The packages were delivered to Israeli customs in May 2014 but held up by Israeli Customs until mid-August of 2014 when plaintiff paid the shipping charges, custom duties, taxes, fees and surcharges. UPS completed the delivery on September 1, 2014, one day after

Customs released the cargo.

UPS filed a motion for summary judgment based on the notice requirements of the Montreal Convention and based on preclusion of any delay damages in the UPS contract with the Plaintiff. Plaintiff did not submit a counterstatement of facts per Local Rule 56.1(c). Thus, UPS' statements were deemed undisputed except to the extent contradicted by a declaration of Plaintiff's counsel (NY federal courts follow the NY state practice of motions being submitted upon or with the inclusion of an affirmation of the moving party's counsel).

Issue: Whether Plaintiff's claims against UPS for delay in delivery caused by Customs officials is barred by the Montreal Convention or UPS' contract.

Holding: The Court granted UPS' Motion, but not on the basis of the notice requirement but on the basis that Plaintiff failed to prove that the delay was caused by UPS under Article 19 of the Montreal Convention. The Court focused on a series of cases within the 2nd Circuit that has found that delay due to customs border patrol or airport security measures are not the responsibility of the carrier. The Court also agreed that the UPS contract bars any damages for consequential economic losses and delayed delivery, which terms are available on the UPS website. The Plaintiff's fraud claim was also dismissed on the basis that it was not pled with sufficient particularity.

Presenter: Richard Furman

IV. REMOVAL/FEDERAL COURT JURISDICTION

14. ***South Middleton Township vs. Amerifreight Systems LLC***, Case No. 1:17-cv-00269-SHR (M.D. Penn. Mar. 30, 2017)

Facts: On August 25, 2014, a tractor trailer driven by defendant Mohamed Warsame and owned by defendant Amerifreight Systems became stuck on a historic, one lane concrete bridge in South Middleton Township, Pennsylvania. Plaintiff is a Pennsylvania municipality. Amerifreight Systems is an Illinois corporation. Warsame is a citizen of Illinois.

Plaintiff commenced the action in state court by Writ of Summons. After the Writ was filed, defense counsel thrice wrote to plaintiff's attorney and asked for a formal demand and for information regarding the cost to repair the bridge. No response, either by phone or mail, was provided to any inquiry, so Amerifreight filed and served a Rule to File Complaint upon plaintiff. The Complaint was subsequently filed, asserting a claim for damages "in excess of $50,000.00." Defendant then removed the case to federal court based upon 28 USC § 1332(a), as the case involved a dispute among citizens of different states and the amount in controversy exceeded the sum or equivalent value of $75,000.00, exclusive of interest and costs.

Plaintiff filed a Motion to Remand, relying primarily upon two Affidavits submitted with the Motion, wherein the affiants attested that the damages did not exceed $75,000.00.

Amerifreight argued in opposition that the Court could not consider the Affidavits submitted after removal, that the Motion to Remand must be evaluated in light of the sum claimed in the state court action and that the amount in controversy is not defined by what plaintiff elects to describe as its entitlement, but by what it may actually recover. In addition, defendant referenced averments in the Complaint describing the bridge as "historic" and that it sustained "extensive damage;" and reminded the Court that the subject bridge predated the American Civil War, was traversed by Union and Confederate armies prior to the battle of Gettysburg and spans an internationally recognized "Class A" trout stream. Thus, Amerifreight argued, it is more than reasonable to expect that the costs associated with surveying, assessing, inspecting, repairing and re-inspecting the bridge after repair while preserving the surrounding environment and historical significance of the bridge would exceed $75,000.00, exclusive of interest and costs.

In addition, defendant offered to consent to remand upon execution by plaintiff of a Stipulation that the amount in controversy did not exceed $75,000.00, exclusive of interest and costs. No response, comment or return followed.

Issue: To what may the court look to determine the amount in controversy for diversity jurisdiction purposes?

Holding: The Court denied plaintiff's Motion to Remand, agreeing with defendant that plaintiff's self-serving attestations regarding the value of the case provided insufficient basis to refute Amerifreight's arguments and finding plaintiff's refusal to sign a Stipulation limiting damages under $75,000.00 to be particularly significant. Put simply, the plaintiff was "stuck" with the averments of the Complaint and no subsequently-filed Affidavits to the contrary could undo their claims.

Presenter: Jim Wescoe

15. ***Bad Company, Inc. v. Expeditors of Washington, Inc.***, 2017 WL 1969479 (E.D. Va. May 4, 2017)

Facts: Plaintiff Bad Company, a Virginia-based auto customizer and installer, contracted with Expeditors to ship two automobile engines from New Jersey to Texas. The engines went missing in transit. Plaintiff filed suit in state court in Virginia, seeking the $40,000 value of the engines, alleging breach of contract and unjust enrichment for Expeditors' failure to make the delivery. Expeditors removed the case, asserting federal jurisdiction under Carmack; and moved to dismiss the complaint on preemption grounds. Bad Company, rather than filing an opposition to the motion to dismiss, voluntarily dismissed the case without prejudice; and then filed a new action demanding $9,900 plus costs through a "warrant in debt," a short form civil claim for money. Defendant again removed the case, this time with a motion for a more definite statement under FRCP Rule 12(e) for a clearer statement of plaintiff's claim. Bad Company opposed the motion and moved to remand.

Issue: How is a federal court to determine from a bare bones complaint whether the amount in controversy in a cargo claim case exceeds $10,000 to confer subject matter jurisdiction under the Carmack Amendment over a removed case?

Holding: The answer is: order the plaintiff to file a more definite statement under FRCP Rule 12(e), explaining the legal and factual bases of its claims. Plaintiff's "warrant in debt" does not plead sufficient facts to give notice of its claims. Though Expeditors made a "plausible assumption" that the claims are similar to those in the initial complaint, it is an assumption nonetheless. Therefore, in order for the court to determine whether removal or remand is the proper course, more details are required of plaintiff, the court ruled.

A review of the case docket reveals that Bad Company subsequently filed a stipulation and supporting affidavit confirming that it only seeks $9,900. The court therefore granted plaintiff's motion to remand.

Presenter: Bob Rothstein

V. VENUE/FORUM SELECTION CLAUSE

16. ***Maxima International, S.A. v. Interocean Lines, Inc.***, 2017 WL 346826 (S.D. Fla. Jan. 24, 2017)

Facts: Defendant Interocean transported computer equipment from Miami to Peru. The cargo was lost or stolen. Maxima, the intended consignee, filed suit under COGSA in Florida pursuant to a forum selection clause in the Interocean bill of lading, which specifies the U.S.D.C. in the Southern District of Florida in Miami as the place of suit. Interocean moved to dismiss based on forum non conveniens, arguing the action should be venued in Peru.

Issue: Whether a case can be moved on forum non conveniens grounds where there is a forum selection provision in the contacts between the parties supporting the place of suit.

Holding: The Court determined that the bill of lading had a valid forum selection provision (Interocean argued the provision not to be valid because there was also a provision permitting arbitration in NY). The Court applied the analysis that where there is a valid forum selection provision in the contract between the parties, the traditional forum non conveniens analysis is modified and the suitability of the alternative forum is not a high hurdle. Despite finding that all of the not-so high hurdles in favor of the case being brought in Peru were met, including the superior interest of the Courts of Peru in adjudicating this action, the Court determined that the facts of the case are not so unusual such that the forum selection clause should not be enforced. Interocean's motion was denied.

Presenter: Scott McMahon

17. ***Celtic International, LLC v. J.B. Hunt Transport, Inc.***, 2017 WL 696017 (E.D. Cal. Feb. 13, 2017)

Facts: In this related case arising out of the same Texas derailment (described in Case No. 24 below) that sadly deprived so many Arkansas and Tennessee oenophiles of cases upon cases of Napa Valley wine, Defendant J.B. Hunt Transport, Inc. moved to transfer venue from the Eastern District of California to the Western District of Arkansas pursuant to 28 U.S.C. § 1404(a) based upon a forum selection clause between the parties.

Issue: Whether the Carmack Amendment would preclude the operation of a forum selection clause contained in a broker-carrier agreement where Plaintiff Celtic International, LLC was suing as an assignee of Cobalt Transport Services, Inc. that was itself suing as an assignee of three wine wholesaler shippers.

Holding: Looking beyond the parties' papers, the court held that public policy favored resolving the matter in the Eastern District of California inasmuch as the Carmack Amendment codified the right of a shipper to sue a carrier in a convenient forum of the shipper's choice. The court further held that, though Celtic is itself a broker, it had standing to sue based upon the assignments by the shippers to Cobalt and the assignment by Cobalt to Celtic, despite the fact that the court did not have the benefit of viewing the actual bills of lading.

Presenter: Hillary Booth/Pam Johnston

18. ***Goal Zero, LLC v. Cargo Freight Services, Ltd.***, 2016 WL 7406796, 2016 US Dist. Lexis 177643 (N.D. Cal. Dec. 22, 2016)

Facts: Goal Zero, the shipper, tendered solar energy equipment to ocean carrier Cargo Freight Services (CFS) in Hong Kong for transport to Rotterdam, Netherlands. CFS failed to deliver the cargo, valued at $95,183.55. Goal Zero's insurer paid the loss, less the applicable deductible; Goal Zero and its insurer then sued CFS in California federal court, asserting that venue was proper under 28 U.S.C. § 1391(b). CFS moved to dismiss plaintiffs' claims or, alternatively, transfer the case to Georgia, contending that venue in California was improper because it did not fall within § 1391(b), and because the backside of the bill of lading included a forum selection clause requiring all disputes to be litigated in "the United States District Court in the State of Georgia." Plaintiffs opposed the motion, noting that a separate venue provision on the front of the bill stated that "[a]ny proceedings against the Carrier must be brought in the courts of the United States of America and no other court"; because this provision differed from the one relied on by CFS, they argued that the bill of lading terms were ambiguous and contradictory and should be construed against CFS.

Issue: Was plaintiff's choice of venue in California proper notwithstanding contradictory forum provisions in bill of lading?

Holding: No. The front and back of the bill of lading must be read as a whole. The court determined that there was no ambiguity in the two venue provisions, as

the Georgia provision was more specific than, but not in conflict with, the more general front side BOL venue provision. Under these facts, the more specific language on the back carried more weight than, and controlled over, the general language on the front. Moreover, the court agreed that venue was not proper in California under 28 U.S.C. § 1391, as (1) CFS did not reside in California, (2) none of the events relating to the dispute occurred in California, and (3) plaintiffs did not allege that CFS was subject to personal jurisdiction in California with respect to this action. Rather than dismiss the case, the court transferred it to Georgia in the interest of judicial economy.

Presenter: Richard Furman

19. ***Thyssenkrupp Materials NA, Inc. v. M/V Kacey***, 2017 WL 666114 (S.D.N.Y. Feb. 16, 2017)

Facts: Plaintiff sued for damage to 447 steel pipes shipped on board M/V Kacey during transport from the Philippines to Houston. The bill of lading contained a forum selection provision providing for suit where the "Carrier has his principle place of business." Defendants filed a motion to dismiss based on forum non conveniens.

Issue: Whether forum non conveniens applies where there is a forum selection provision in the contacts between the parties.

Holding: The Court discussed 2nd Circuit law that finds the forum selection clause presumptively valid if it is reasonably communicated, mandatory and applies to the subject action unless the Plaintiff proves that the enforcement of the clause would be unjust or unreasonable or that the clause was invalid for reasons such as fraud. The Court also pointed out that, under COGSA, forum selection clauses are unenforceable if they will reduce the carrier's obligations to less than required by COGSA. The Plaintiff argued that Greece, where the Court deemed the Carrier to have its principle place of business, would be an adequate forum. While Greece does not recognize *in rem* actions, the Court determined that there will not be any substantive benefits available to the Plaintiff in an *in rem* action that would not be available in its *in personam* action against SPV 1. Furthermore, Plaintiff's own Greek law expert conceded that the Greek courts would apply Hague-Visby Rules, which do permit *in rem* action as an international convention's rules of "superior legal power" to domestic Greek legislation. The Court also disregarded the argument that the Greek courts would have no jurisdiction over Technomar on the basis that the terms of the BOL already prevents suit against Technomar based on an exoneration clause in the BOL that specifies that only the ship owner shall be liable for any damage or loss. Through a rather laborious analysis, the Court held that the Harter Act, which prevents a carrier from avoiding its liability for loss or damage from its negligence or fault, does not apply to invalidate this exoneration clause since the ship owner can bring a subsequent suit against Technomar.

Presenter: Dirk Beckwith

VI. CARRIER CLAIMS AGAINST THIRD PARTIES

20. ***Starboard Holdings Ltd. v. ABF Freight Systems, Inc.***, 2017 U.S. Dist. LEXIS 18628 (S.D. Fla. Feb. 8, 2017)

Facts: Plaintiff, Starboard Cruise Service, hired ABF Freight to transport watches retail valued at $935,000 from Dallas, Texas to Miami, Florida. There were two shipments that arrived in the same week in February of 2014 at ABF's terminal in Miami. The cargo was placed into two storage trailers and then the watches were stolen before they could be delivered to Starboard's warehouse in Miami. Defendant Electric Guard Dog performed electric outdoor perimeter security services for the warehouse at ABF's Terminal in Miami.

Plaintiff alleged causes of action against ABF based upon bailment, negligence, breach of contract and conversion and against EGD for negligence and breach of contract. When filing its answer asserting, among other defenses, Carmack preemption (see Case No. 5 above), ABF also filed a cross-claim against EGD for contractual indemnity.

EGD filed a motion a summary judgment against ABF alleging that the indemnity provision in the security agreement did not provide indemnification for theft and that ABF failed to activate the security system on the night of the theft. ABF contended that the provision of the security agreement covering indemnity for "loss" included "theft" and that the omission of the word "theft" did not mean that EGD had no obligation to provide indemnification.

Issue: Whether the language of the security agreement supported ABF's claim against the security service for contractual indemnity for plaintiff's theft claim.

Holding: The District Court held that "loss" included theft and that, even if a loss for damage to property did not literally mean "theft," there was still damage to property arising out of EGD's provision of services to ABF under the terms of the agreement. However, based upon EGD's contention that ABF did not arm the security system, which contention was supported by deposition testimony and the customer activity reports showing that the alarm system was not activated, the Court held that ABF was negligent and that, therefore, the security agreement did not indemnify ABF for its own negligence.

Presenter: Heidi Roth

21. ***Schneider National Carriers, Inc. v. Fireworks Northwest***, 2017 WL 1438035, 2017 U.S. Dist. LEXIS 62033 (W.D. Wash. Apr. 24, 2017)

Facts: Plaintiff Schneider National Carriers was contacted by regular customer Victory Fireworks to arrange transportation of 28 pallets of fireworks from Wisconsin to a seasonal fireworks market on an Indian Reservation known as "Boom City." Schneider picked up the fireworks on a bill of lading prepared by Victory containing the correct delivery address. While the shipment was in transit, a Schneider employee made a change in the company's computer system to the

delivery address, directing that delivery be made to one of Victory's competitors, Fireworks Northwest. What happened next is unclear: Schneider claims that it delivered the fireworks to Fireworks Northwest and Fireworks Northwest says it never got the shipment. With an assignment from Victory of its claim for retail value of $161,460, Schneider filed suit against Fireworks Northwest for conversion, equitable restitution, interference with business relations and violation of Washington's Consumer Protection Act.

Issue: What must a carrier establish to prevail on claims against a receiving party arising out of alleged misdelivery by the carrier?

Holding: Before the court was Schneider's motion for summary judgment on its conversion and equitable restitution claims. To prevail on its conversion claim, Schneider was required to establish some affirmative wrongful act by the defendant, either an actual conversion or a refusal to return property upon demand. Possession by the defendant is an essential element. With competing declarations from the parties on whether Fireworks Northwest actually received the shipment, summary judgment, said the court, is inappropriate. The same issue of material fact that prevented Schneider from proving conversion also prevented it from prevailing on its equitable restitution claim, which requires a showing that the defendant received the property of another under circumstances resulting in unjust enrichment.

Presenter: Steve Dennis

22. ***Travelers Property Casualty Company of America v. USA Container Co., Inc.***, 2017 WL 1382482 (3rd Cir. Apr. 18, 2017)

Facts: In 2006, USA Container contracted with Meelunie B.V./Amsterdam a corn syrup distributor, to arrange for the transfer of corn syrup from rail cars to drums and then on to Meelunie's customers overseas. For the corn syrup to be moved from the rail cars to the drums, it had to be heated in accordance with standard operating procedures developed by Meelunie's corn syrup supplier. USA Container subcontracted with Passaic River Terminal to perform all of the work necessary to transfer the corn syrup to the drums for transport. Passaic River failed to follow the SOPs and damaged Meelunie's corn syrup by overheating it. The damage was discovered after the corn syrup was shipped to Meelunie's customers, who rejected it. Meelunie subsequently sold the corn syrup at a reduced rate and ultimately incurred $782,723.77 in damages. Meelunie demanded that USA Container compensate it for its loss and USA Container turned to its insurer, Travelers, claiming coverage for the loss. Travelers denied USA Container's claim, asserting that the damage was not covered under the terms of the parties' Commercial General Liability policy. USA Container and Meelunie later entered into a settlement agreement whereby Meelunie agree to accept $425,000 in settlement of its claim.

Multiple rounds of litigation between USA Container and Travelers followed, and the District Court issued two orders, first finding that the CGL Policy covered the property damage, and second that Travelers was obligated to pay USA Container

for its loss in the amount of $732,000. The District Court also awarded USA Container prejudgment interest and attorney's fees. Travelers timely appealed the District Court's orders.

Issue: (1) Whether USA Container's loss arising from the damage to the corn syrup is covered under the terms of the CGL Policy; (2) whether the District Court correctly concluded that USA Container's loss under the Settlement Agreement was for $732,000; and (3) whether the District Court correctly calculated prejudgment interest and attorney's fees.

Holding: The Circuit Court affirmed the lower court's ruling on the coverage issue, finding that USA Container carried its burden of establishing coverage under the policy (with the damage to the corn syrup falling within the definition of property damage for which Travelers is to pay "those sums that [USA Container] becomes legally obligated to pay . . .") and Travelers failed in its burden of proving the applicability of an exclusion (neither Exclusion j(6) in the standard CGL policy pertaining to work to restore, repair or replace property nor Exclusion n regarding precautionary recalls factually applied to the damage claim at issue). The amount of the award entered by the District Court was vacated, though, along with the award on interest and fees, as the settlement agreement between the parties only required USA Container to pay $425,000, not the full amount of its customer's loss.

Presenter: Fritz Damm

23. ***Macy's Corporate Services, Inc. v. Western Express, Inc.***, 2017 WL 1194358, 2017 U.S. Dist. LEXIS 47617 (M.D. N.C. Mar. 30, 2017)

Facts: Macy's had a contract with Western Express (a motor carrier) for transportation services, to obtain and deliver cargo to Macy's from various manufacturers. Details regarding that contract are not provided in the opinion. As part of those services, Western agreed to transport and deliver cargo owned by Macy's from Coty in North Carolina to a Macy's facility in Connecticut. Coty (apparently the manufacturer) prepared two bills of lading for the shipment which included liability limitations of $2.90 per pound, for a total declared value of $93,145.58. Based on the declared value, Western did not make any special arrangements for the protection of the cargo and it was stolen during transport. Macy's sued Western under the Carmack Amendment to recover $585,000 as the full value of the cargo. Western filed a third-party complaint against Coty for indemnity, contribution, negligent misrepresentation, and violations of North Carolina's deceptive trade practices act, essentially contending that Coty misrepresented the value of the cargo and impliedly contractually agreed to indemnify Western for any loss in excess of the $93,145.58 declared value. Coty moved to dismiss the third-party claims for failure to state a claim upon which relief could be granted.

Issue: Is manufacturer Coty entitled to dismissal of carrier Western's third-party claims for indemnity and misrepresentation?

Holding: Coty's motion to dismiss was granted in part and denied in part. The court found that Western's indemnification and contribution claims were plausible under state law principles and therefore not subject to dismissal. The negligent misrepresentation claim was dismissed due to Western's failure to identify any duty owed to it by Coty separate and distinct from the duties owed under the bill of lading, and the DTPA claim was dismissed because mere breach of contract was insufficient to support it. The opinion, which is vague, confusing, and poorly written, focused exclusively on state law principles.

Presenter: Tom Burke

VII. BROKER CLAIMS AGAINST CARRIERS

24. ***Celtic International, LLC v. BNSF Railway Company***, 2017 WL 714379, 2017 U.S. Dist. LEXIS 25726 (E.D. Cal. Feb. 23, 2017)

Facts: Plaintiff Celtic International, LLC, as freight broker and in conjunction with non-parties Cobalt Transport Service, Inc. and DSB, Inc., arranged for three large shipments of wine in three intermodal containers from California's Napa County to destinations east (Little Rock and Memphis) by both truck and rail. Celtic paid the claims and received assignments from the wine wholesaler shippers to pursue Defendant BNSF Railway Company, which had possession of the wine when it was spilt in a derailment near Summerfield, Texas following an extreme windstorm that BNSF characterized as an Act of God. Celtic contracted with J.B. Hunt Transport, Inc., which turned to BNSF for the rail leg of the transportation. As between Hunt and BNSF, the BNSF Intermodal Rules and Policy Guide was incorporated into the rate BNSF charged to Hunt. Celtic alleged a claim under the Carmack Amendment, and BNSF moved for summary judgment. The opinion also resolved three other motions, primarily procedural.

Issue: Whether Celtic was permitted to sue BNSF in light of the Direct Suit Prohibition contained in BNSF's Intermodal Rules and Policy Guide, that is, whether Celtic was bound by a downstream limitation of liability. The court did not reach three other issues, one of which was whether BNSF had established the Act of God defense.

Holding: Having been under submission for over a year and a half, the court held that the Direct Suit Prohibition did not violate the Carmack Amendment and was permissible under 49 U.S.C. § 10502(e) and could be viewed not as an exculpatory provision but as a limitation of liability. The court further held that there was sufficient evidence to find that, under the limited agency rule, J.B. Hunt was Celtic's agent in dealing with BNSF for purposes of negotiating downstream limitations of liability. The court noted that the rule would not necessarily work an injustice, as Celtic retained the ability to sue J.B. Hunt, which Celtic had done.

Presenter: Hillary Booth/Pam Johnston

25. ***United Road Logistics LLC v. Alpha Transportation Group LLC***, 2017 WL 1755825 (E.D. Mich. May 5, 2017)

Facts: Broker United Road Logistics filed an action against motor carrier Alpha Transportation for alleged damage to an interstate shipment of goods. The complaint contained two counts, one for breach of contract based upon the "Broker/Contractor Agreement" entered by the parties and the other under the Carmack Amendment. Defendant filed a motion to dismiss the complaint, asking that the breach of contract count be dismissed on the ground that the Agreement is void because it does not include an express written waiver of the Carmack Amendment pursuant to 49 U.S.C. § 14101(b); and that the Carmack count be dismissed because a broker has no standing to sue a carrier under Carmack.

The court denied the motion as to the breach of contract count, holding that URL has a claim for direct contractual indemnity under the terms of its broker-carrier contract with Alpha and that URL's breach of contract claim is not preempted by Carmack, but granted the motion as to the Carmack count.

Alpha filed a motion for reconsideration, arguing that the Court made an error when it rejected Alpha's argument that plaintiff URL's breach of contract claim is preempted by the Carmack Amendment without an express written waiver of Carmack in the Agreement.

Issue: Is a broker's breach of contract suit against a carrier for freight loss or damage preempted by the Carmack Amendment in the absence of an express written waiver under 49 U.S.C. § 14101(b)?

Holding: The Court denied Alpha's motion for reconsideration, stating that Alpha has not met its burden of demonstrating a palpable defect by which the court has been misled. Instead, said the Court, Alpha reargues the same arguments that have already been rejected. Under the plain terms of § 14101(b), only a shipper and a carrier can enter into an agreement waiving rights under the statute; the statute does not apply to broker/carrier agreements. Because the breach of contract count is a claim for direct contractual indemnity under the terms of a separate broker/carrier contract, and not a claim under the bill of lading, it is not preempted by the Carmack Amendment.

Presenter: Wes Chused

VIII. BROKER LIABILITY

26. ***Mitsui Sumitomo Insurance USA, Inc. v. Maxum Trans, Inc.***, 2016 WL 7496737, 2016 U.S. Dist. LEXIS 180471 (S.D. Ohio Dec. 30, 2016)

Facts: This is a subrogated cargo damage case seeking $24,625.63 on a shipment of various kinds of pellets from Ohio to Alabama. The allegation was the motor carrier, Maxum Trans, Inc., swerved during the motor carriage transport, which caused the different kinds of pellets to mix together, thus allegedly making them unmarketable.

The Plaintiff insurance company paid the claim of the insured shipper, subrogated and sued the carrier, Maxum, and the freight broker, Buckeye Transportation. The Complaint alleged causes of action pursuant to the Carmack Amendment and various state-created causes of action such as negligence and breach of bailment. The Complaint also specifically named Buckeye as a freight broker.

Plaintiff was unable to serve the carrier, Maxum, and, as such, Maxum was dismissed from the case. For its part, Buckeye, filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

Issue: (1) Does an assertion of liability against a broker under the Carmack Amendment create federal_question jurisdiction; and (2) may a plaintiff assert a cause of action against a broker under the Carmack Amendment.

Holding: Yes on (1); and no on (2).

On the issue of subject matter jurisdiction, the Court held that "regardless of the viability of Plaintiff's Carmack Amendment claim against [the broker], plaintiff has alleged a violation of a federal statute. That alone is sufficient to give the Court subject matter jurisdiction."

On the issue of a failure to state a claim, the Court granted the broker's motion and dismissed the Carmack Amendment claims holding they did not apply to brokers. The Court also declined to exercise jurisdiction over the remaining state-created causes of action. In opposition, Plaintiff argued it was entitled to discovery to probe whether the broker held itself out as a carrier. The Court disagreed, noting Plaintiff specifically identified Buckeye as the broker in the Complaint. Moreover, the Court further noted a plaintiff is "not entitled to discovery unless it first alleges a plausible claim," citing Iqbal, 556 U.S. at 678-79.

Presenter: John Alden

IX. FAAAA PREEMPTION – CARGO CLAIMS

27. ***Luccio & Frerichs v. UPS, Co.***, 2017 WL 412126, 2017 U.S. Dist. LEXIS 14069 (S.D. Fla. Jan. 31, 2017)

Facts: Plaintiffs shipped cryopreserved embryos intrastate within the State of Florida. The embryos were allegedly mishandled and damaged during their transportation to a storage facility. As a result, plaintiffs brought suit against the medical providers involved and also against UPS, the defendant carrier. Plaintiffs alleged negligence against UPS for its handling and storage of the embryos during their transportation across Florida. UPS removed the case to Federal Court, contending that there was federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337 because plaintiff's complaint alleged a violation of state law which is preempted under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4). Although a carrier would normally remove the case to Federal Court under the Carmack Amendment, it is clear that the Carmack Amendment applies only to damages arising from the interstate transportation of goods. Accordingly, UPS was forced to remove and

argue preemption under the FAAAA. Because no federal cause of action was pled on the face of plaintiff's complaint, UPS also argued that the FAAAA completely preempted the plaintiff's state law claims to support federal jurisdiction. Not surprisingly, plaintiffs moved to remand the case to state court, arguing that the FAAAA does not reach plaintiffs' claims because the shipment of embryos was intrastate.

Issue: Whether the FAAAA preempted claims arising from intrastate transportation? If so, whether this created federal question jurisdiction.

Holding: The United States District Court for the Southern District of Florida denied plaintiffs' motion to remand. In so doing, the Court found that the plain text of the FAAAA preempts state laws that are related to price, route, or service of a carrier with respect to transportation of property without regard to whether the transportation is intrastate or interstate. The Court noted that there was no exemption in the statute for the intrastate transportation of goods except for the transportation of household goods as defined in 49 U.S.C. § 13102. As the Court concluded that the embryos that were being transported were not household goods, it held that the transportation of them did not fall within the statutory exemption. Furthermore, the Court noted that 49 U.S.C. § 14501 is captioned "Federal Authority Over Intrastate Transportation," which implies that the statute is meant to apply to intrastate transportation. Concluding that plaintiffs' negligence claim against UPS related to the price, route, or service of UPS' transportation of the embryos, the Court found that plaintiffs' claims were preempted. The court did not distinguish between defensive preemption and complete preemption.

Open questions: What law governs a plaintiff's claim for damages when FAAAA preempts state law? Is a breach of contract claim preempted by FAAAA (contra *Wolens v. American Airlines*); if not, would the assertion of one prevent FAAAA preemption and removal?

Presenter: Bruce Spitzer

28. ***Mammoth Manufacturing Inc. v. C.H. Robinson Worldwide, Inc.***, 2017 WL 1047363 (W.D. Okla. Mar. 17, 2017)

Facts: Shipper versus broker case. Plaintiff Mammoth retained broker C.H. Robinson to deliver a large quantity of polyurethane hose to its customer. Robinson retained a motor carrier that, *en route*, overturned and damaged the hose valued at $280,000. The motor carrier lacked sufficient insurance to cover the loss and Mammoth pursued Robinson. In a first-filed state court action alleging claims for negligence, negligent supervision, and breach of contract, Robinson prevailed on a motion to dismiss alleging 49 U.S.C. § 14501 preemption. A year later, plaintiff sued Robinson in federal court for breach of contract and fraud. Robinson moved to dismiss the fraud claim, once again under section 14501.

Issue: Whether plaintiff's fraud claim was preempted under the FAAAA.

Holding: The court held that plaintiff's fraud claim was indeed preempted. In its complaint, Mammoth alleged that Robinson had made several false representations to Mammoth on both its website and through salespersons (though the opinion does not state, likely related to the qualifications of its selected motor carriers and the insurance that they carry). The court determined that, as a plain matter of statutory language, the claims of Mammoth fell within the preemptive provisions of the statute. The court also determined that the first-filed state court's determination that Robinson was a broker was entitled to preclusive effect by means of the doctrine of issue preclusion.

Presenter: Grant Brooker

29. ***Centuori v. United Parcel Service, Inc.***, 2017 WL 1194497, 2017 U.S. Dist. LEXIS 48191 (W.D. Wash. Mar. 30, 2017)

Facts: UPS mistakenly delivered three packages to plaintiff's home as the result of an error in UPS's internal address correction procedures; the packages were intended for someone else in another state. UPS left the heavy packages outside plaintiff's home, blocking his door. Plaintiff injured his back while moving the packages and sued UPS for his injury, alleging three theories of negligence: (1) UPS failed to follow its policies in correcting the wrong address on the packages; (2) UPS left the packages at the plaintiff's home without his consent; and (3) UPS left the packages obstructing an entrance to the plaintiff's home. UPS moved for summary judgment on all of plaintiff's claims, asserting federal preemption under FAAAA.

Issue: Are plaintiff's negligence claims against UPS preempted under the FAAAA?

Holding: Plaintiff's second theory of negligence - that UPS failed to obtain his consent before leaving the packages - was preempted under the FAAAA because it would require UPS to obtain the recipient's consent every time it rerouted a package to the recipient, which would have an impermissible effect on UPS's services. However, the court found that plaintiff's first and third theories of negligence (correction of the delivery address and the placement of the packages) were not preempted.

Presenter: Kathy Garber

X. FREIGHT CHARGES

30. ***Kennedy Tank & Mfg. Co., Inc. v. Emmert Industrial Corporation***, 67 N.E.3d 1025, 2017 WL 24875 (Sup. Ct. Ind. Jan. 3, 2017)

Facts: Kennedy Tank & Manufacturing Company contracted with Emmert Industrial Corporation to transport an enormous process tower vessel from Indiana to Tennessee for $197,650.00. Construction delays, road closures, permit applications, safety escorts and bureaucratic delays led to additional unforeseen costs of $691,301.03. Emmert ultimately successfully delivered the vehicle in November 2011; and later sought recovery of the additional charges from Kennedy.

When discussions between the parties dragged out for over two years, Kennedy refused to pay, citing the 18-month federal statute of limitations for collection of freight charges (49 U.S.C. § 14705(a)). Emmert then sued, alleging breach of contract and unjust enrichment.

Kennedy moved to dismiss Emmert's complaint, arguing that the federal statute of limitations preempts Indiana's 10-year limitations period. The trial court denied the motion to dismiss, finding no preemption, but the Indiana Court of Appeals reversed, finding that the state statute was preempted. An appeal to the state Supreme Court followed.

Issue: Does the 18-month statute of limitations in 49 U.S.C. § 14705(a) preempt state breach of contract statutes of limitations in actions to recover freight charges for interstate transportation?

Holding: No, according to a unanimous Indiana Supreme Court, which agreed with the trial court, holding that Indiana's statute of limitations is not preempted by the federal statute of limitations. The Court pointed out that Congress "provided no indication that it intended to impose a uniform national statute of limitations, and breach of contract collection actions are not an area of federal regulation." Further, according to the concept of conflict preemption, a federal law can void a state law only when it is "physically impossible" to comply with both laws and when the state law does "major damage" to the purpose of the federal law. Emmert could have filed suit within the 18-month federal limitations period, so it was not a physical impossibility for the company to comply with both statutes of limitations. Additionally, Indiana's statute of limitations does not do "major damage" to Congress' purpose because the Interstate Commerce Commission Termination Act shifts regulatory authority from the federal government to the states, reflecting Congress' "goal of reducing federal involvement in motor carriers' private contracts."

Presenter: Eric Baker

31. ***Phoenix Capital Group, LLC v. Western Express Inc.***, 2017 WL 347573 (M.D. Tenn. Jan. 24, 2017)

Facts: Plaintiff Phoenix entered into an oft-amended factoring agreement with nonparty FJ Logistics, Inc. Defendant Western had worked with FJ to provide services to various companies, including Amazon (yes, that Amazon). When Western fell behind in its payments to Phoenix as factor, rather than deal with Phoenix, Western dealt with FJ and claimed to have reached an accord and satisfaction to which Phoenix was not a party. When Western claimed that no further payment was owed, Phoenix filed suit for breach of contract against Western and Amazon and unjust enrichment against Amazon. Both defendants moved to dismiss and, additionally, Western moved to dismiss for Phoenix's failure to join FJ, alleged to have been an indispensable party.

Issue: Does a motor carrier's factor have a viable breach of contract cause of action against a shipper that was not a party to the factoring agreement?

Holding: With regard to Amazon, the court held that, notwithstanding the Ninth Circuit's decision in *Oak Harbor*, because there was no allegation of a contract between Amazon and either Phoenix or FJ, bill of lading or otherwise, the motion to dismiss as to the breach of contract claim should be granted. With regard to Western, the court held that under the factoring agreements Phoenix was the proper assignee of the claims of FJ as against Western. The court also determined that FJ was an indispensable party and therefore must be joined into the suit.

Presenter: Eric Zalud

32. ***Landstar Express America, Inc. v. Nexteer Automotive Corporation***, 2017 WL 1206690, 2017 Mich. App. LEXIS (Ct. App. Mich. Mar. 30, 2017)

Facts: When Landstar could not recover more than $1.1 million on its $6 million federal court judgment against shipper Contech, with whom it had an express contract, it sued consignees Nexteer and SteeringMex in state court to make up for the deficiency. As between Contech, however, and its customers, Contech had agreed to be responsible for freight charges including expedited charges where the necessity of expedited service fell upon Contech. Landstar sued for breach of contract and unjust enrichment, and all parties moved for summary judgment. The court granted defendants' motions, denying plaintiff's.

Issue: Whether the manufacturer defendants were liable for the unpaid shipping costs incurred by nonparty supplier Contech by virtue of their acceptance of the consignments.

Holding: The court held that, because defendants' contracts with Contech were clear as to which party would bear responsibility for the shipping costs, and because of the positions that Landstar took in its previous case against Contech, the court would not imply a contract between Landstar and the defendants, in law or in equity. The court also observed that Landstar should bear some fault for permitting Contech to run up a debt more than one thousand times greater than its credit department had recommended.

Presenter: Fritz Damm

33. ***Top Worldwide LLC v. Midwest Molding, Inc.***, 2017 WL 1422841 (Ct. App. Mich. Apr. 20, 2017)

Facts: Michigan-based broker, assignee of related brokers who were assignees of motor carriers, sued an Illinois manufacturer listed as shipper on the subject bills of lading. The subject 35 shipments were the tail end of 700+ shipments over the previous two years, which had been arranged for by the consignee mid-tier automotive supplier which had also paid all of the freight charges except for the last 35 shipments before going out of business. The Illinois manufacturer had never had direct contact with the motor carriers or the brokers as all shipments were arranged by the consignee. The terms of the supply contract were FOB Illinois; the Illinois manufacturer had never been billed for any shipments in the previous two+ years. It was not until several months after the

consignee went out of business that the plaintiff sued defendant manufacturer. A key factor in the litigation was that the manufacturer had issued documents entitled "bill of lading" that listed itself as shipper, though no carriers were ever listed, the format was not a complete uniform bill of lading, and it more closely resembled a shipping manifest than an actual bill of lading; however, the form did have a "Section 7" box which was never checked.

Plaintiff filed a motion for summary judgment alleging that the bills of lading had the force and effect of law and that the broker, as an assignee of the motor carriers, had a duty to collect the freight charges. Defendant manufacturer argued that (1) the "effect of law" and "duty to collect" were vestiges of the now-discarded Filed Rate Doctrine and could not be the basis for summary disposition; (2) that the facts demonstrated that the consignee was the shipper in fact as shown by the extensive course of dealing and defendant's non-involvement in the shipping arrangements, prior payments, etc.; and (3) that there were genuine issues of material fact as to numerous issues that also precluded summary judgment.

Issue: Was the manufacturer liable as a shipper where it issued a form resembling a bill of lading and did not check Section 7?

Holding: The Court of Appeals affirmed the trial court's ruling, holding that federal law, including ICCTA, had no application to the state court breach of contract action. It further held that the documents entitled bills of lading created a presumption of liability on behalf of the defendant manufacturer and that none of the arguments created a genuine issue of material fact. It rejected the concept that a party could show an agreement for another party to be liable for freight charges by something other than an express written statement, rejecting the concept that a course of dealing could suffice to at least create a genuine issue of material fact. The Court of Appeals distinguished the authority relied upon by defendant, *Thunderbird Motor Freight Lines v. Seaman Timber Company*,734 F.2d 630 (11th Cir. 1984), and *Estes Express Lines v. Macy's Corporate Services*, 2010 WL 398749 (D. N.J. 2010), instead choosing to follow *Bestway Sys, Inc. v. Gulf Forge Co.,* 100 F.3d 31 (5th Cir. 1996).

The Court recast the claim as a state court contract action to which state contract rules of interpretation applied, together with the common law presumption of liability under a bill of lading where Section 7 was not selected.

This case was decided shortly after *Landstar Express America, Inc. v. Nexteer Automotive Corp.* (Case No. 33 on this Agenda), another case decided by essentially the same Court of Appeals panel.

Presenter: Mike Tauscher

34. ***Reveille Trucking, Inc. v. Lear Corporation***, 2017 WL 661521 (S.D. Tex. Feb. 17, 2017)

Facts: This is a somewhat typical "double payment" scenario involving a claim for recovery of freight charges by a carrier three steps removed from the

broker (broker contracts with carrier A, which contracts to carrier B, which contracts to plaintiff carrier). Plaintiff Reveille Trucking moved 106 shipments between Texas and Indiana in 2013 and 2014 with Lear shown on each bill of lading as either the consignee or consignor. When it did not receive payment Tropical, the carrier that requested Reveille's services, Reveille sued Lear to recover $234,000 in unpaid freight charges. Lear declined to pay, asserting that it had already paid the carrier contracted by third party logistics provider, Ryder Logistics, and that Reveille, in its contract with Tropical, agreed to look solely to Tropical for payment. The parties filed cross-motions for summary judgment.

Issue: Can a consignee or consignor be compelled to pay freight charges to a downstream carrier, with whom it did not contract, when the consignee already paid its broker?

Holding: The court held that the transportation agreement between Reveille and Tropical "is able to waive Reveille's right to recover from Lear" under the bills of lading, though Lear was not a party to that agreement, and that Lear is an intended third-party beneficiary, with the right to enforce the contract. That was not the end of the inquiry though. The court found that the Reveille dispatcher that signed the agreement lacked authority to bind Reveille. Lear nevertheless argued that Reveille assented to its terms through conduct. On that point, the court found a triable issue, precluding the entry of summary judgment for either party. Through a lengthy opinion, the court denied both parties' motions on Reveille's breach of contract and unjust enrichment claims and granted Lear's motion on the negligence and fraudulent nondisclosure claims, knocking those claims out of the case.

Presenter: Vic Henry

35. ***Arnold Transportation Services, Inc. v. Framaur Associates, LLC***, 2017 WL 26901, 2017 U.S. Dist. LEXIS 215 (D. N.J. Jan. 3, 2017)

Facts: This is a breach of contract freight charge case. Plaintiff motor carrier entered into a contract with defendant broker. Plaintiff carrier was transporting freight (beer) from North Carolina to New York and New Jersey. Under the initial version of the contract, defendant was to pay plaintiff $1.40/mile plus certain accessorials. Also, under the contract, the carrier "dedicated" a certain number of pieces of equipment for the defendant. If defendant booked "backhaul," defendant was to get 100% of that rate. Before the contract terminated, the contract was amended via an exchange of e-mails evidencing, among other things, a price increase from $1.40/mile to $1.70/mile.

Defendant failed to pay about $1.4 million in freight charges. At or about the time the complaint was filed in July 2014 defendant for the first time disputed the rate increase. For its part, the defendant counterclaimed alleging breach of contract. Plaintiff moved for summary judgment on its affirmative claims, plus interest and fees and costs and to dismiss defendant's counterclaim.

Issue: Is the plaintiff motor carrier entitled to contract damages, plus interest

and fees and costs for defendant's failure to pay freight charges?

Holding: Yes on damages and interest. No on fees and costs. Reviewing the documents and the motion papers, the Court quickly found the defendant was liable for breach of contract. The Court then proceeded to the amount of damages and found that some of the freight charge invoices were entirely unpaid and some were partially paid. Applying the credit for the partially paid invoices, the Court awarded compensatory damages in the amount of $1,368,398.01.

The Court also granted summary judgment dismissing defendant's counterclaim, finding that the defendant had no factual basis to support its mere denials or assertions of breach of contract.

Moving on to an award of interest, the Court applied the pre-judgment interest rules of the State of New Jersey. Interest is awarded in the discretion of the Court guided by equitable principals and to make the plaintiff whole. The Court pointed out that the case dragged on for three years largely because the defendant was dilatory in discovery. Thus, the Court felt that equitable principals favored an award of interest. The Court then instructed plaintiff to provide an affidavit of the appropriate amount, rate and calculation of interest.

On the issue of fees and costs, the Court denied plaintiff's motion. Plaintiff argued defendant's dilatory discovery tactics evidenced bad faith litigation tactics that were frivolous as a matter of law and thus giving rise to an award of counsel fees. The Court disagreed and found there was nothing in the record to actually demonstrate bad faith on the part of defendant's counsel and that any delay in discovery was not the result of frivolous arguments being made by defendant.

Presenter: John Lane

36. ***Wisconsin Central, Ltd. v. TiEnergy, LLC***, 2017 WL 1427065 (N.D. Ill. Apr. 21, 2017)

Facts: Plaintiff Wisconsin Central filed a one-count complaint against defendant TiEnergy, seeking demurrage charges in the amount of $104,595.00. Wisconsin Central handled used railroad ties shipped from Ontario to Wisconsin. The consignee, TiEnergy, is a company which disposes of used ties. TiEnergy had an oral agreement with shipper Allied Track Services in which they agreed to accept the ties by rail, unload them, chip them and dispose of them as fuel, keeping all the funds they received for the disposal. TiEnergy held the cars with the ties and took the position that all the responsibility for demurrage at destination was that of the shipper. With only an oral agreement, it was not clear what the agreement was between them.

However, after depositions were taken, the terms of the agreement became much clearer and TiEnergy admitted it understood demurrage and had not released the cars. They claimed they never agreed to be the named consignee but admitted that their company received and unloaded the cars and profited from the sale of the used ties.

TiEnergy's counsel, seeing how difficult it can be for a railroad to collect demurrage charges in the Seventh Circuit, began to allege facts which did not agree with the deposition transcript of his client's principal. Counsel submitted an affidavit from the deponent with completely different facts than he gave in his deposition. He thought that he would at least defeat the summary judgment motion that the railroad had made. *He was wrong*.

Issue: Who is the consignee for purposes of determining liability for demurrage charges? How do parties that fail to follow local rules regarding motion filings expect the court to find the needle in a "proverbial haystack?"

Holding: Before the court were Wisconsin Central's and TiEnergy's cross-motions for summary judgment and third-party defendant Allied's summary judgment motion against TiEnergy. TiEnergy was on the losing side of all three motions. By accepting the railroad cars containing the ties at its facility and with a beneficial interest in the ties, TiEnergy was the consignee by operation of law, liable for payment of plaintiff's demurrage charges. TiEnergy's attempts to avoid liability through contentions that the bills were incorrect and that snow caused delays as did customs at the border were rejected as raised for the first time in response to Wisconsin Central's motion and not in its own motion.

In deciding the motions, the judge called TiEnergy's attorney on violation of the "sham affidavit" rule, disregarded the affidavit and relied on the deposition testimony as the facts in the matter. The judge was also none too pleased with the attorney for trying to confuse the court by citing different facts in its submissions on the different motions.

Presenter: John Fiorilla

37. ***Illinois Central Railroad Company v. Kinder Morgan Liquids Terminals***, 2017 WL 1862644, 2017 U.S. Dist. LEXIS 70391 (N.D. Ill. May 9, 2017)

Facts: CN through its US subsidiary Illinois Central filed an action in the US District Court in Chicago against Kinder Morgan Liquids Terminals for demurrage exceeding $1,000,000 which accrued on freight rail cars at Kinder Morgan's Argo, Illinois facility. KM filed a motion to dismiss under Rule 12(b)(6) asserting that CN's interpretation of the new demurrage regulations was incorrect, specifically, that since KM had an agreement with its customers to pay demurrage KM is relieved of the legal responsibility to pay the carrier even though the carrier is not a party to the agreement.

Issue: Whether a terminal operator is liable for demurrage and intraplant switching fees under CN's tariff and the STB's new demurrage regulations.

Holding: The court denied KM's motion to dismiss CN's demurrage and switching fees counts. Reading the new federal demurrage regulations to make the party who controlled the cars responsible for demurrage without proving the reasons for the demurrage's accrual, the court rejected KM's position that the

carrier must show that KM somehow caused the demurrage to make them liable. The court also rejected KM's position that, because it was not consignor, consignee or owner of the goods, it could not be responsible for switching charges for switching cars on its property. The court noted that KM ordered the switches and that, under the CN tariff, ordering such switches makes that party responsible to pay for them. KM will now answer the complaint and the court will probably order limited discovery after which the parties will probably file Summary Judgment motions.

Presenter: John Fiorilla

38. *Mediterranean Shipping Co., S.A. v. Best Tire Recycling, Inc. v. Armstrong International, Inc.*, 848 F.3d 50 (1st Cir. Feb. 6, 2017)

Facts: In 2012, John Wayne Kwange, dba Armstrong Exchange, hired Best Tire, a Puerto Rico-based corporation that collected and transported scrap tires, to deliver forty containers of scrap tires to the Port of San Juan for $600 per container. Best Tire instructed John Wayne to contact Mediterranean, an ocean carrier, to get booking information and inform Best Tire of the arrangement. John Wayne dealt with an agent of Mediterranean and copied Best Tire on his emails. Wayne listed Best Tire as the "shipper." Mediterranean's agent confirmed the booking arrangements to John Wayne and Best Tire. Best Tire then subcontracted with another company to bring it the containers from the Port of San Juan to Best Tire's storage facilities elsewhere in Puerto Rico, and then to transport the containers filled with scrap tires back to Mediterranean at the Port of San Juan. All the containers were delivered, and Mediterranean issued ocean bills of lading for each of the shipments, identifying Best Tire as the shipper. The ocean bills of lading had standard definitions for "Merchant" and "Freight," and incorporated Mediterranean's terms and conditions of its tariff. The shipment arrived at the destination in Vietnam, but the consignee refused to accept the shipment because it arrived late, requiring Mediterranean to store it and incurring significant demurrage charges of $350,083.50, post-storage charges of $36,780, and an administrative fee of $300. Mediterranean also was owed $69,889.54 for freight.

Issue: Whether the fact that Best Tire was listed as the shipper on the ocean bills of lading made it liable to Mediterranean Shipping for all of the incurred expenses. The District Court sitting in admiralty had ruled in favor of Mediterranean, holding that Best Tire was a party to the contract of ocean carriage and, as such, was liable to Mediterranean for all of the related freight charges and expenses.

Holding: Initially, the Circuit Court, relying on the case of *Eimskip v. Atlantic Fish Market, Inc.*, 417 F.3d 72 (1st Cir. 2005), stated that courts looked primarily to the bills of lading to determine if the parties entered into a contract. Best Tire also relied on language in that case to contest its liability, noting that any presumption based on the bill of lading can be overcome by statute, contractual provisions or the parties' course of conduct, and that, for this shipment, the parties' course of conduct overcame the pattern and presumption that Best Tire

was liable to Mediterranean. The court disagreed, noting that Best Tire's reliance on the *Eimskip* decision was misplaced, noting that the *Eimskip* case, at most, suggests that John Wayne and/or Armstrong may also be held liable, but did not absolve Best Tire of liability, given that Best Tire was designated as the shipper on all of the ocean bills of lading and made no objections until long after the shipments had been completed.

Presenter: Dennis Minichello

39. ***Hanjin Shipping Co., Ltd. v. Port Transport Inc.***, 2017 WL 319181 (D. N.J. Jan. 23, 2017)

Facts: This is an ocean freight charge case in which plaintiff Hanjin alleged that defendant Port Transport failed to remit payment of $255,295.00 for transporting third-party merchandise by ocean freight. The complaint included fourteen counts relating to fraud and breach of contract, etc. The individual defendants, as owners and operators of defendant-company, moved to dismiss all claims against them. Plaintiff opposed under the "alter ego" theory. stating the defendants owned significant interest in the company, drove its business dealings, appeared as signatories on its bank accounts and failed to obtain certification for the company to transact business under New Jersey law.

Issue: Are the individual owners and operators of the company that arranged for Hanjin's services on the hook for the ocean freight charges?

Holding: No. The court granted the individual defendants' motion to dismiss without prejudice, concluding that the evidence submitted by plaintiff of the individuals' involvement with the company did not distinguish the company from most other small, family-owned businesses. The court stated it would not disregard the corporate entity and expose the defendants to personal liability merely because their company was closely-held.

Presenter: Bill Bierman

40. ***Interpool, Inc. v. Four Horsemen, Inc.***, 2017 WL 522161, 2017 U.S. Dist. LEXIS 17693 (D. N.J. Feb. 8, 2017) and 2017 WL 1284766 (D. N.J. Mar. 24, 2017)

Facts: The plaintiff container chassis lessor had an equipment lease with the defendant drayage companies. The defendant draymen used Interpool's equipment to haul loaded intermodal containers being transported under ocean through bills of lading from rail yards to inland destinations, but allegedly failed to pay Interpool's charges.

Issue: Is a container chassis lease a maritime contract giving rise to federal admiralty jurisdiction?

Holding: The Court analyzed the U.S. Supreme Court's decision in *Kirby* and held that a chassis lease agreement covering only land transportation of cargo is not a maritime contract. The Court vacated its Supplemental Admiralty Rule B

maritime attachment orders, but retained subject matter jurisdiction based on diversity of citizenship.

Having satisfied itself that it had subject matter jurisdiction and, through a subsequent proceeding, that it had personal jurisdiction over the defendants, the Court turned its attention to plaintiff's motion for entry of default judgment against the defendants. Following a brief analysis of the relevant factors, the Court entered judgment in plaintiff's favor in the sum of $490,642.95 plus costs, but with no prejudgment interest, finding that the plaintiff had failed to show an entitlement to interest under the contract between the parties.

Presenter: George Wright

41. ***Pittsburgh Logistics Systems, Inc. v. B. Keppel Trucking, LLC***, 153 A.3d 1091 (Sup. Ct. Penn. Jan. 6, 2017)

Facts: In September 2009, Pittsburgh Logistics Systems, a transportation broker, called carrier B. Keppel Trucking to offer a load for one of the broker's customers. When the parties orally agreed on the price, the broker sent the carrier its "carrier set-up packet" containing, among other things, a Motor Carrier Service Contract. B. Keppel signed and returned the Contract. Twelve days after the carrier completed delivery, Pittsburgh Logistics emailed a confirmation containing a hyperlink to its online Terms of Use, which Terms were accessed by carriers that used Pittsburgh Logistics' web-based system to bid on loads. B. Keppel was not one such carrier.

A few years later, Pittsburgh Logistics again contacted B. Keppel to handle a series of loads. When the broker was short paid by its customer, it short paid B. Keppel by over $50,000. Relying on the arbitration provision in the Motor Carrier Service Contract, B. Keppel initiated arbitration to recover the freight charges. Pittsburgh Logistics sought to stop the arbitration, contending that, though B. Keppel signed the Contract, Pittsburgh Logistics never did and, therefore, the arbitration provision was invalid.

An arbitrator awarded the trucking company nearly $52,000 in damages, and a trial judge subsequently confirmed the award. Pittsburgh Logistics, however, filed an appeal, continuing with its claim that the contract was merely a draft agreement and not enforceable because it had not been signed by both parties.

Issue: Can a trucking company with a payment dispute with a broker take advantage of the arbitration clause in the broker's contract despite the fact that the broker never actually signed the agreement?

Holding: The Appellate Court agreed with the lower court that the contract was enforceable based on a clause stating that the parties were "intending to be legally bound." "This statement is not an express requirement for both parties' signatures," the Court ruled. "The phrase 'legally bound' constitutes consideration for the contract."

The Court further found that there was clear evidence that Pittsburgh Logistics

intended to be bound by the terms of the Contract, pointing to the facts that the broker had provided B. Keppel with a copy of the Contract at the beginning of their relationship and that the broker had said it would not provide payment for B. Keppel's work until the contract was returned. Meanwhile, there was no evidence that B. Keppel had ever received or operated under the Terms of Use available to carriers that bid for work through Pittsburgh Logistics' online system.

Presenter: Chris Merrick

42. ***Alliance Shippers v. Casa de Campo, Inc.***, 2017 WL 1436114, 2017 N.J. Super. Unpub. LEXIS 1020 (N.J. App. Div. Apr. 24, 2017)

Facts: This case is unnecessarily procedurally complex. Boiled down to its most basic elements, plaintiff obtained a judgment in New Jersey State Court for freight charges. The defendant had insufficient funds to pay, so plaintiff took supplemental discovery to try to enforce the judgment. Plaintiff sought an order compelling a customer of defendant, Reguitti, to take certain accounts payable to defendant and pay them over to plaintiff.

The case was then removed by Reguitti to the Federal Court in New Jersey on the basis the debts sought were governed by the Perishable Agricultural Commodities Act, 7 U.S.C. § 499(c)(5) ("PACA"). The Federal Court entered a Consent Judgment against Reguitti to pay accounts payable over to Plaintiff. Reguitti also filed a counterclaim in Federal Court. The Federal Court then remanded.

Substantial motions and procedural issues then arose in State Court post-remand over the application of the Consent Judgment issued in the Federal Court and the counterclaim filed in the Federal Court. Ultimately, these issues resulted in sanctions and fees and costs being awarded against Plaintiff's counsel primarily for counsel's refusal to appear for a trial date. Plaintiff appealed to lift the sanction and Reguitti cross-appealed on the basis the sanction was not severe enough.

Issue: What procedural rules govern pleadings filed in the Federal Court post-remand to State Court?

Holding: The Court reviewed the Federal law, specifically, 28 U.S.C. § 1447 (c) related to remand and found it did not directly answer the question. Instead, 28 U.S.C. § 1447 (c) says that, after remand, the state court "may thereupon proceed with such case." The Court noted this language does not give specific guidance to State Courts about proceeding further with the record developed in the Federal Court.

The Court then cites a New Jersey case (which itself cites a United States Supreme Court case) to the effect that it is up to the State Court to "determine what shall be done with the pleadings filed and testimony taken" in Federal Court once the case is remanded. Looking to how other states address the issue, the Court noted that "[o]ur sister states have not uniformly adopted a policy on the effect of federal pleadings once a matter is remanded. For example, some state a strict position not to accept pleadings filed in federal court . . . [while others] have chosen to give

effect to all federal pleadings filed before remand."

Ultimately, the Court referred the matter to the State Supreme Court's Standing Committee on Civil Practice for further guidance. The Court also reversed the Order entering sanctions and sent the case back to the trial court to conduct further proceedings including case management and scheduling of Alliance's motion to dismiss Reguitti's motion seeking judgment on the counterclaim.

Presenter: Tom Martin

XI. MISCELLANEOUS

43. *Surface Transportation Board Decision - Petition for Suspension and Investigation*, Docket No. ISM 35008 (Jan. 10, 2017)

Facts: The Transportation and Logistics Counsel (TLC) asked the STB to suspend and investigate the proposal of the National Motor Freight Traffic Association (NMFTA) to revise the Uniform Straight Bill of Lading. The NMFTA opposed the submission of the TLC pleadings on the basis that this is not an "open proceeding".

Issue: Whether the STB has authority to enjoin the NMFTA changes to the USBOL under 49 U.S.C. §721(b)(4) and investigate the changes under § 13703(a) and 14701.

Holding: The STB denied TLC's petition on the basis that the STB does not regulate agency practices such as those of the NMFTA unless they are established under approved rate bureau agreements. Since the revisions were not adopted under an approved collective rate-setting agreement, they are not subject to the requirements of § 13703 and therefore not subject to STB review. Since the STB terminated its approval of all motor carrier rate bureau agreements other than those for household goods or a water carrier in noncontiguous domestic trade in 2007, there are no longer any STB-approved agreements subject to review under 13701(a)(1)(C). Thus, there is no basis for investigation under §§ 721(b)(4) and 14701.

Presenter: Ken Hoffman

44. *Sunset Transportation, Inc. v. Texas Department of Transportation*, 2017 WL 1534222, 2017 Tex. App. LEXIS 3570 (Ct. App. Tex. Apr. 21, 2017)

Facts: Federal law imposes requirements on interstate motor carriers, and preempts certain categories of state requirements relating to the intrastate operations of interstate motor carriers. Texas imposes registration, fee and financial-responsibility requirements on motor carriers as a prerequisite to operating intrastate within its borders. Two motor carriers sued Texas, alleging that certain Texas requirements (which they allegedly violated) were preempted by

federal law. The district court rejected their challenges to the Texas statutory scheme, and the motor carriers appealed.

Issue: Does an interstate motor carrier's compliance with the Unified Carrier Registration requirements excuse it, by federal preemption or Texas law, from complying with Texas requirements with respect to its intrastate operations conducted in Texas?

Holding: No, at least not with respect to the Texas requirements at issue in this matter. On appeal, the court held that a Texas rule requiring motor carriers to comply with Texas's minimum-insurance requirements with respect to their intrastate operations was not preempted by federal law. It similarly held that a Texas rule requiring motor carriers, following revocation of their intrastate operating authority for noncompliance with Texas's minimum-insurance requirements, to submit applications, insurance filings and related fees in order to regain their authority, was not preempted by federal law. It accordingly affirmed the district court's judgment.

Presenter: Hank Seaton

45. ***Griffin v. Sirva***, 2017 WL 1712423, 2017 N.Y. LEXIS 1244 (N.Y. Ct. App. May 4, 2017)

Facts: The national van lines use criminal history hiring guidelines for their household goods agents' employees and contractors who enter customers' homes to perform services on interstate jobs. SIRVA and Allied Van Lines' Certified Labor Program (CLP) rules bar agents from using persons convicted of violent felonies, including sexual assault, from working on Allied jobs. The CLP rules do not restrict agents' hiring for their own local moving businesses.

Two convicted child rapists filed suit for race and employment discrimination against Allied agent, Astro Moving & Storage, when Astro allegedly fired them after discovering their criminal convictions, which they first concealed and then misrepresented to Astro. Plaintiffs' convictions for sexual assaults against 7-year-old children classify them as "Sexually Violent Offenders" under NY law which prohibits them from having unsupervised contact with anyone under 18. Plaintiffs also sued SIRVA and Allied for employment discrimination alleging their CLP rules "forced" Astro to fire them.

The E.D.N.Y. granted SIRVA and Allied summary judgment before trial on the ground that neither was plaintiffs' "employer" under the NY Human Rights Law (NYHRL) which governs hiring of persons with criminal histories. After the E.D.N.Y. granted SIRVA and Allied summary judgment, plaintiffs tried their race and criminal conviction discrimination claims against Astro to a Brooklyn jury which rendered a verdict in Astro's favor on those claims. Plaintiffs appealed from the summary judgment in favor of SIRVA and Allied, but not the jury verdict for Astro.

Issues: The NYHRL makes it unlawful to deny employment solely based on an applicant's criminal history and requires prospective employers to consider eight (8) factors. The law gives an employer discretion not to hire an applicant if, after considering the factors, the employer concludes (1) there is a direct

relationship between the conviction and the job sought or (2) granting employment would pose an unreasonable risk to the property, safety or welfare of specific individuals or the public.

Holding: On plaintiffs' appeal from the summary judgment in favor of SIRVA and Allied, the Second Circuit certified three (3) questions to the NY Court of Appeals. The latter court answered the Second Circuit's certified questions as follows:

Question No. 1: Is NYHRL liability for criminal conviction employment discrimination limited to a plaintiff's employer? Answer: Yes. The NYHRL's legislative history and text reflect that its main liability provisions only apply to an employer's handling of a job application or existing employment.

Question No. 2: Does the NYHRL term "employer" include a "joint employer" as construed by some federal courts in Title 7 cases? Answer: No. The NY Court of Appeals followed lower New York appellate court precedent and held an "employer" is a party with power to "order and control" the plaintiff. The Court rejected the broad "joint employer" standard, applied in some Title 7 cases, under which a non-employer may be liable for discrimination if its conduct ultimately results in a loss of employment.

Question No. 3: What is the scope of NYHRL liability for "aiding and abetting" criminal conviction employment discrimination? Answer: A non-employer third party, even if located outside NY, may be liable for knowingly aiding and abetting an employer's unlawful conduct having an impact in NY.

The case is back in Second Circuit for a decision based on the NY Court of Appeals' opinion.

Presenter: George Wright

46. ***Mervyn v. Atlas Van Lines, Inc.***, 2017 WL 1437159 (N.D. Ill. Apr. 20, 2017)

Facts: Plaintiff Thomas Mervyn is an individual owner-operator who leased his truck and driving services to several of Defendant Ace's separate corporations at different times. Defendant Ace World Wide Moving & Storage Co., Inc. (wrong named party and granted summary judgment - actual agent is Ace World Wide Moving Inc. - court analyzes case as if right party was named anyway) is an agent of Defendant Atlas Van Lines, Inc., a carrier. Atlas is required to publish tariff rates showing the rates for each task in a move, and will negotiate discounts based on these rates to win business. After a shipment is completed, Atlas collects the revenue and distributes it among the various agents involved in the shipment, such as Ace, who then pay the owner-operator (if one was used) under the terms of the hauling agent's lease with that owner-operator.

Atlas instituted an "effective bottom line discount" ("EBLD") policy to distribute costs of providing discounts across all participants in the shipment. Plaintiff contends that Atlas used "rebates" or "freebies" to siphon revenue to itself at the expense of owner-operators, and accordingly, by providing 100% discounts,

breached the owner-operator lease and violated portions of the Truth in Leasing Regulations.

Under their EBLD policy, Atlas divides the total dollar value of the discounts provided to the customer by the total maximum dollar value of that particular shipment using tariff rates, and Atlas multiplies that EBLD percentage by the tariff charges for each agent to determine how much that agent should receive. Plaintiff provides an example of this policy to illustrate its effect: Atlas gives customer a 100% discount for moving "bulky articles" in a shipment which Plaintiff hauled for Atlas' agent Ace. If the agent's compensation depended solely on what Atlas allocated to a particular service on that client invoice, Atlas would not have distributed any money to the agent for those services for which no charge was allocated. However, Atlas applies its EBLD policy and spreads the cost of this and other discounts across all participants, and allocates some of the revenue to "bulky articles" even though the customer was not billed for that work. Atlas then pays Ace, who pays Plaintiff his contractual share for the "bulky articles" work. Atlas uses a computer system to calculate its "Financial Result," which contains "Invoice Distribution" and "Payable Distribution" tables. The Invoice Distribution shows the charges invoiced to the customer before its EBLD policy is applied and the Financial Result shows the charges after the application of the EBLD calculation.

Plaintiff's lease with the earner's agent, Ace, provides that Ace would pay Plaintiff 100% of the "Fuel Surcharge," as Atlas would charge its customers a fuel surcharge for rising fuel prices. However, customers would also negotiate a discount for that fuel surcharge below the tariff rate. Plaintiff was also entitled to 58% of the line haul charges, according to the lease.

Plaintiff alleged Defendants violated 49 C.F.R. § 376.12(d), which provides that "the amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease," by not disclosing in the lease agreement that two separate and different discount would be applied to determine "line haul" amounts - one to be charged to the customer and the other to be used to calculate owner operator compensation. Plaintiff also alleges violations of the regulation above and breaching the lease, which required Plaintiff to be paid 100% of the fuel surcharge, but ultimately received less than that as a result of undisclosed discounts being applied.

Issue: Whether Defendants breached the lease between carrier Atlas' agent and Plaintiff as owner-operator, by failing to pay Plaintiff the full amount due under the terms of the lease and not disclosing the discounts applied thereby also violating 49 C.F.R. § 376.12(d).

Holding: Defendants' motion for summary judgment granted, all pending motions denied as moot, and the civil case terminated. For the breach of contract claims, the court looked to the lease between the owner-operator and the agent, which states: "payment documents shall be conclusively presumed correct and final if not dispute within 30 days after distribution." Here, Plaintiff admittedly

never disputed his compensation as set forth in the payment documents until he filed the instant lawsuit, nearly four years after he hauled his last shipment for Ace. The court held the claim is barred by the plain and clear language of the lease, and rejected Plaintiff's argument that 30 days is unreasonably short and unenforceable, as the provision only prevents contesting the accuracy of the amount, but does not bar Plaintiff from suing on the amount owed, had he not been compensated.

The court went further and stated even if the 30-day limitation in the lease had not barred Plaintiff's breach of contract claims, the Defendants would still be entitled to summary judgment because the lease explicitly states "charges shall be determined by applying the applicable effective or predetermine effective bottom line discount (determined under Atlas' rules)."

Though not defined by the lease, the effective bottom line discount is expressly indicated as being under Atlas' rules. The court noted that parties are bound by a contract's clear terms, even if they do not understand them. *Raasch v. City of Milwaukee*, 750 N.W.2d 492 (Wis. Ct. App. 2008). The court also found that the Defendants did not violate the federal regulation above, as it was based on a breach of the lease, which the court found did not occur.

Presenter: Dennis Minichello

47. ***Sheeran v. Blyth Shipholding S.A.***, 2017 WL 1157847, 2017 U.S. Dist. LEXIS 44208 (D. N.J. Mar. 27, 2017)

Facts: This case involves the roles, duties and liability of various stevedores, charter parties, port agents and payroll/HR outsourcing companies in connection with an injured stevedore. Plaintiff, a stevedore, was injured during the process of unloading a pallet of fruit from the cargo hold of an ocean vessel while the vessel was berthed at the Gloucester Port in New Jersey. Plaintiff sued various parties and eventually settled with some of them. Plaintiff was also awarded certain workers' compensation payments.

Included as defendants in the lawsuit were Holt Logistics Corporation, NYK Cool and Inchcape Shipping Services. Plaintiff alleged that under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, and under general concepts of Admiralty and Maritime Law, these defendants were liable for failing to properly control or operate the vessel and/or failing to properly administer the unloading process.

Holt provided "back office" support for plaintiff's employer such as payroll, taxes, human resources, benefits administration and the like. NYK Cool was the time charterer of the vessel. Essentially, it was NYK Cool's job to make sure the vessel was "manned and navigated" for a set, limited period of time. Inchcape was the "port agent," responsible for communicating with the other parties and the vessel to make sure the vessel gets to the correct berth at the right time at the ocean terminal.

Plaintiff hired an expert witness, who essentially said that the actions of Holt, NYK Cool and Inchcape all constituted various levels of direct and indirect control over the vessel and the unloading process, thus giving rise to a duty that was allegedly breached.

Defendants moved for summary judgment alleging they had no control over the vessel or the unloading process and, therefore, as a matter of law, owed no duty to the plaintiff.

Issue: Are secondarily-related "back office" support, time charterers and port agents liable for accidents occurring during vessel operation or unloading?

Holding: No. Despite the expert testimony to the contrary, the facts showed none of the defendants had control or a right of control over the vessel or the unloading process and thus owed no duty to Plaintiff. Holt, providing only "back office" logistics, was too far removed from the accident. NYK Cool could not have been liable because they had no control over the operations. Moreover, Inchcape merely communicated with others who were actually servicing the vessel and the unloading process. Accordingly, the Court held as a matter of law that Holt, NYK Cool and Inchcape owed no duty to the plaintiff. All three motions for summary judgment were granted.

Presenter: Tom Martin

48. ***BNSF Railway Co. v. Tyrrell***, -- S.Ct. --, 2017 WL 2322834 (May 30, 2017)

Facts: The Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., makes railroads liable in money damages to their employees for on-the-job injuries. Respondent Robert Nelson, a North Dakota resident, brought a FELA suit against petitioner BNSF Railway Company in a Montana state court, alleging that he had sustained injuries while working for BNSF. Respondent Kelli Tyrrell, appointed in South Dakota as the administrator of her husband Brent Tyrrell's estate, also sued BNSF under FELA in a Montana state court, alleging that Brent had developed a fatal cancer from his exposure to carcinogenic chemicals while working for BNSF. Neither worker was injured in Montana. Neither incorporated nor headquartered there, BNSF maintains less than 5% of its work force and about 6% of its total track mileage in the State. Contending that it is not "at home" in Montana, as required for the exercise of general personal jurisdiction under *Daimler AG v. Bauman*, 571 U.S. ——, ——, 134 S.Ct. 746, 187 L.Ed.2d 624, BNSF moved to dismiss both suits.

Its motion was granted in Nelson's case and denied in Tyrrell's. After consolidating the two cases, the Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF because the railroad both "d[id] business" in the State within the meaning of Section 56 of FELA and was "found within" the State within the compass of the Montana civil procedure rules. The due process limits articulated in *Daimler*, the court added, did not control because *Daimler* did not involve a FELA claim or a railroad defendant.

Issue: Does FELA permit courts to exercise personal jurisdiction over a railroad company that is not "at home" in that state?

Holding: No. The Montana courts' exercise of personal jurisdiction under Montana law does not comport with the Fourteenth Amendment's Due Process Clause and, contrary to the Montana Supreme Court's ruling, finds no basis in FELA. While Section 56 of FELA addresses venue and subject matter jurisdiction in actions against railroads, it does not address personal jurisdiction. The state courts must therefore look to whether an out-of-state corporation's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State" in order to exercise personal jurisdiction. Because BNSF is not incorporated or headquartered in Montana and its activity there is not "so substantial and of such a nature as to render the corporation at home in that State," the Montana Supreme Court's judgment was reversed.

Presenter: Paul Keenan