CONFERENCE OF FREIGHT COUNSEL
WINTER 2017 MEETING
LAGUNA CLIFFS MARRIOTT RESORT & SPA
DANA POINT, CALIFORNIA
JANUARY 7-9, 2017

AGENDA OF CASES

I. CARMACK PREEMPTION

1. ***Kidd v. American Reliable Insurance Company***, 2016 WL 4502459; 2016 U.S. Dist. LEXIS 118960 (C.D. Cal. Aug. 23, 2016)

Facts: The Kidds purchased a boat in Connecticut and insured it through American Reliable Insurance Company ("ARIC"). The Kidds hired Cedar Island Marina to prepare the boat for transport to California; Cedar Island transferred the boat to Deep Water Transport ("DWT") for delivery to California. After delivery, the Kidds discovered that the engine had been damaged by salt water intrusion. They filed an insurance claim with ARIC, which was denied. The Kidds sued ARIC for breach of contract and breach of the covenant of good faith and fair dealing. ARIC filed a third-party complaint against Cedar Island and DWT seeking a declaratory judgment for subrogation in the event ARIC was required to pay the loss. Cedar Island filed a cross-claim against DWT for indemnity, apportionment and contribution. DWT filed a motion for judgment on the pleadings against both ARIC and Cedar Island, asserting that all claims

against it were barred under the Carmack Amendment and that ARIC and Cedar Island lacked standing to raise their claims.

Issue: Are ARIC and Cedar Island's claims against DWT barred by Carmack; and do ARIC and Cedar Island lack standing?

Holding: No – motion for judgment denied. ARIC has standing as a subrogee of the Kidds under California law, as it has the right to bring its claim for declaratory relief in anticipation of future subrogation. Cedar Island's cross-claims seek liability allocation and therefore are also in the nature of a declaratory judgment action. Because declaratory judgments themselves do not alter the nature or scope of liability, they are not preempted by the Carmack Amendment. Accordingly, both ARIC and Cedar Island have standing to pursue their claims against DWT.

Presenter: **Hillary Booth**

2. ***Rising Up Garden Center v. Online Freight Services, Inc.***, 2016 WL 3546582; 2016 U.S. Dist. LEXIS 84606 (D.N.J. June 29, 2016)

Facts: This is Carmack Amendment preemption case involving allegations of cargo damage and late delivery of Christmas trees transported from Oregon to New Jersey. Plaintiff shipper filed suit in New Jersey State Court for $15,000.00, asserting causes of action for negligence, breach of contract and breach of bailment. Defendant Online Freight removed the case to the Federal Court and moved to dismiss for failure to plead a cause of action pursuant to the Carmack Amendment. The motion was unopposed.

Issue: Can Plaintiff's state law claims against the motor carrier for damage to the transported trees stand?

Holding: No. The Court first considered the efficacy of subject matter jurisdiction and, citing cases from the 5th and 9th Circuits. found the Carmack Amendment completely preempted Plaintiff's state law claims. Notably, the Court cites *Certain Underwriters at Interest at Lloyds of London v. United Parcel Service of America*, 762 F.3d 332 (3d Cir. 2014), regarding "ordinary" or "conflict" preemption and says the Third Circuit has not actually applied complete preemption for cases governed by the Carmack Amendment.

The Court then applied the Carmack Amendment cause of action elements to the allegations in the complaint; and concluded the Plaintiff made no factual allegation that the freight was delivered to the motor carrier in good condition. Therefore, the complaint was insufficient on its face and failed to assert facts to sustain a cause of action under the Carmack Amendment. The motion to dismiss was granted under Rule 12 (b)(6) and the case was dismissed, subject to submission of an amended complaint stating a proper Carmack claim.

Presenter: **Tom Martin**

3. ***Lloyd v. All My Sons Moving & Storage of Southwest Florida, Inc.***, 2016 WL 3883195 (M.D. Fla. July 18, 2016)

Facts: Everything that could go wrong with a household goods move did for plaintiff Suzanne Lloyd. In September 2013, Ms. Lloyd hired defendant All My Sons Moving to move her belongings from Naples, Florida to Old Lynne, Connecticut, with the exact delivery date to be set in the future. Months later, she asked for her goods to be delivered out of storage. Instead of making one smooth delivery, defendant delivered plaintiff's goods in spurts, with some damaged and others missing; and insisted on payment of thousands of dollars extra to complete their work. Naturally unhappy with the service, Ms. Lloyd sued for emotional distress and breach of contract in addition to Carmack Amendment liability.

Issue: Does defendant carrier's egregious behavior preclude application of Carmack preemption?

Holding: No. Because all her claims arose out of defendant's failure to deliver some of her belongings and damage to others, all were deemed to fall squarely within the ambit of Carmack. Only claims based on conduct separate and distinct from the delivery, loss of or damage to goods escape preemption. Therefore, the case proceeded strictly on that basis with no extra pound of flesh for all the distress the carrier caused plaintiff.

Presenter: **Gregg Garfinkel**

4. ***Antino Della Cioppa v. Dennis Schultz***, 2016 WL 6652764 (W.D. Tex. Nov. 10, 2016)

Facts: Plaintiff was leaving paradise for Texas and hired Kona Transportation Company, Inc. to move him. Kona handled the move locally and hired another carrier to handle the remainder of the move. Plaintiff's possessions, likely including a surfboard he would not soon need, were damaged in transit. Plaintiff commenced an action in Comal County, Texas, which Kona removed on the basis of the Carmack Amendment, filing a motion to dismiss thereafter, which motion plaintiff failed to oppose.

Issue: Whether the Carmack Amendment preempted the claims of the Hawaiian bound for New Braunfels, Texas for fraud and breach of contract against the Hawaiian moving company the plaintiff hired.

Holding: The Western District of Texas held that, even though Kona's conduct was solely intrastate, the Carmack Amendment and its preemptive scope would apply given that the ultimate destination of the plaintiff's possessions was Texas, and the gravamen of the fraud and breach of contract claims was damage to goods traveling in interstate commerce. The opinion also contains a good discussion of Kona's attack on the court's personal jurisdiction over it on the grounds that Kona's connection with Texas was by mere chance and was not

purposefully availed.

Presenter: **Bill Bierman**

5. ***Tenkasi Viswanathan v. Moving USA, Inc.***, 2016 WL 4521676 (D. Nev. Aug. 29, 2016)

Facts: Plaintiff contracted with Defendant Moving USA Inc. to ship his household goods from North Carolina to Nevada. At the time of the pick-up, the driver increased the price arbitrarily and failed to pick up all of the goods, causing Plaintiff to abandon certain goods. Prior to the pick-up, Moving USA had informed Plaintiff that insuring the goods was unnecessary as they were guaranteed against loss by Moving USA. In addition, the bill of lading mentioned, but did not expressly identify "the Carrier," nor did it provide the address of Defendant Moving On Up Inc., which Plaintiff alleges may have performed the move as Moving USA's agent.

Plaintiff's goods met with several problems: the shipment was delivered two months after the promised delivery date and, when it arrived, some items were missing and others were damaged. Plaintiff filed multiple claims with Moving USA and Moving On Up. After receiving no response from either Defendant, Plaintiff's attorney sent a demand letter asserting a claim of $2,160. After again receiving no response, Plaintiff sued Defendant for (1) violations of the Carmack Amendment; (2) negligence; (3) "overcharging"; (4) fraud; (5) nuisance; and (6) intentional infliction of emotional distress.

Issue: Whether the Carmack Amendment preempts Plaintiff's state law claims.

Holding: The Court found that the Carmack Amendment preempts all of Plaintiff's state law claims because Plaintiff's allegations all arose from the same conduct as his claims for delay, loss, and damage to the shipped property.

Plaintiff also asserted that his state law claims should not be dismissed because Defendants failed to prove that they are motor carriers to which the Carmack Amendment is applicable. However, the Court concluded that Plaintiff's Complaint contained allegations that both Defendants were involved in transporting Plaintiff's property across state lines, and accordingly, the Carmack Amendment applied to all claims and all Defendants. The Court granted Defendants' motion to dismiss for failure to state a claim.

Presenter: **Vic Henry**

6. ***Crane v. Zip 2 Zip Transfer***, 2016 WL 6839329; 2016 U.S. Dist. LEXIS 162098 (C.D. Cal. Nov. 21, 2016)

Facts: Plaintiff alleges that Defendant lost and damaged the Plaintiff's household goods when Defendant transported the goods from California to New

Mexico. Plaintiff alleges damages in the amount of $18,200. Plaintiff asserted six claims against defendant including: 1. Trespass to personal property; 2. Conversion; 3. Negligence; 4. Breach of contract; 5. Liability pursuant to 49 U.S. Code § 14706; and 6. Unfair business practices. The defendant removed the action to Federal Court based on federal question.

Defendant filed a motion to dismiss plaintiff's state law claims as pre-empted by the Carmack Amendment.

Issue: Does the Carmack Amendment pre-empt the claims against defendant?

Holding: Yes. The Court dismissed all of the Plaintiff's state law-based claims without prejudice.

Presenter: **Beata Shapiro**

7. ***Sanofi-Aventis U.S., LLC v. Great American Lines, Inc.***, 2016 WL 4472949; 2016 U.S. Dist. LEXIS 112171 (D.N.J. Aug. 22, 2016)

Facts: This is a decision on a motion for reconsideration by the defendant carrier of an earlier decision covered on our Winter 2016 agenda in a case involving theft of a shipment of pharmaceuticals worth $9,000,000.00. The shipper and the carrier entered into a transportation agreement containing an express waiver of Carmack under 49 USC § 14101:

> Pursuant to 49 U.S.C. A. [§] 14101 (b), the parties expressly waive any and all provisions of the ICC Termination Act of 1995, U.S. Code Title 49, Subtitle IV, Part B, and the regulations thereunder to the extent that such provisions conflict with the terms of [the Transportation Contract] or the parties' course of performance hereunder.

The plaintiff in the case was the consignee, not the shipper who had signed the contract. The consignee argued that, because it was not a party to the contract, it did not waive any Carmack rights and can therefore pursue the carrier under the strict liability standard of Carmack.

In the December 2015 Order, the court held that the waiver provision in the transportation agreement was ambiguous because the terms "to the extent that such provisions conflict with the terms of [the Transportation Contract] or the parties' course of performance hereunder" were not specific.

In the instant matter, defendant Great American Lines, the carrier, moved for reconsideration, arguing that the court's Order leads to the implicit result that a "carrier could be subject to § 14101 contractual liability and Carmack liability for the same shipment." The court agreed and engaged in a reconsideration of its prior ruling.

Issues: Does the Carmack Amendment apply to the claims by the consignee against the carrier? If so, was Carmack waived by operation of the Transportation Contract between the pharmaceutical manufacturer/shipper (Sanofi) and carrier Great American Lines? Also, does the Carmack Amendment preempt the state law breach of contract and breach of an implied contract of bailment claims?

Holding: On reconsideration, the court reversed itself and held that the contract language constituted an effective waiver of the Carmack Amendment. The reasonable explanation for the limiting language ("to the extent that such provisions conflict with the terms of [the Transportation Contract] or the parties' course of performance hereunder") was that the parties to the contract agreed to waive Carmack as a whole but wanted to make it clear that any of the default rules of the Carmack Amendment that they specifically wrote into the contract should not be disturbed.

The court also concluded the plaintiff/consignee does not have to be a party to the transportation contract to be bound. § 14101(b)(1) states "[i]f the *shipper* and *carrier*, in writing, expressly waive [Carmack] *the transportation provided under the contract* shall not be subject to the waived rights and remedies." Therefore, there was an effective waiver of Carmack, and the plaintiff, as consignee, was bound thereby.

Defendant, Great American Lines also moved for summary judgment against the plaintiff/consignee on certain breach of contract allegations. Though not a party to the transportation contract, plaintiff argued it was an intended third-party beneficiary. Third-party beneficiary status requires a showing the parties to the contract intended a third party should receive a benefit which the contract may have conferred. Here, the contract stated it applied only to the contracting parties. As such, the defendant/carrier's motion for summary judgment to dismiss the plaintiff/consignee's breach of contract claims was granted.

Presenter: **Mark Andrews**

II. CARRIER LIABILITY

8. *Mecca & Sons Trucking v. White Arrow and Trader Joe's*, 2016 WL 5859018 (D.N.J. Sept. 16, 2016)

Facts: Cheese products were transported in interstate commerce from Bayonne, New Jersey to Los Angeles, California by rail and then by motor carriage by White Arrow from Los Angeles, California to Fontana, California. Shipper Singleton Dairy hired plaintiff Mecca to deliver the cheese to Trader Joe's; and plaintiff subcontracted the shipment to White Arrow. Eleven of the seventeen pallets of cheese were rejected by Trader Joe's based on TempTale readings exceeding the maximum temperature set by Trader Joe's in its Master Vendor Agreement with shipper Singleton Dairy.

White Arrow argued that bad condition at destination was not proven; that the cheese was not inspected for bad condition, as no pulp temperatures of the cheese were taken to determine its condition; that White Arrow's expert found that the cheese was in good condition when he inspected it two months after Trader Joe's rejected some of the cheese and yet accepted other cheese in the same reefer car that were subjected to the same temperatures; that White Arrow was not privy to the contract between Trader Joe's and Singleton Dairy; and that plaintiff never proved its damages.

Issues: Whether liability of White Arrow for damage was established notwithstanding the fact that no proof of actual damage to the cheese was presented; and, if so, whether plaintiff proved its damages.

Holding: The Court granted plaintiff's motion for summary judgment against White Arrow under the Carmack Amendment, finding Trader Joe's' rejection of the cheese reasonable and sufficient in itself to satisfy the damage at destination element of the shipper's prima facie case (the "fact that temperatures registered inside the trailer exceeded 40 degrees is sufficient to establish liability because the shipping temperature, like a seal, is a reasonable precaution to assure food safety"). However, the Court held that plaintiff did not prove its damages and granted White Arrow's motion for summary judgment as to the preempted claims in negligence and indemnification.

Presenter: **Barry Gutterman**

9. ***Mitsui Sumitomo Insurance Co., Ltd. v. Wheels Msm Canada, Inc.***, 2016 WL 6395428 (N.D. Ill. Oct. 28, 2016)

Facts: Plaintiff Mitsui Sumitomo Insurance Company, Ltd. as subrogee of its insured Sharp Electronics Corporation filed this action against Defendant Wheels MSM Canada, Inc. and Tigers Express, Inc. for breach of contract and for causing injury to property in violation of the Carmack Amendment. Sharp engaged Wheels to transport 442 packages of various electronics products from Tennessee to Illinois. Wheels issued a bill of lading and subcontracted the carriage of the cargo to another entity, which also subcontracted carriage to Tigers. While en route to Illinois, Tigers' driver fell asleep at the wheel causing the truck to collide with another vehicle, flip on its side, and skid over 100 feet, damaging a portion of the cargo. Sharp submitted a claim for damage to Mitsui, who paid Sharp $37,450.15 for the loss.

Issue: Whether Plaintiff can properly state a Carmack Amendment and/or breach of contract claims against Wheels, a subcontracting carrier.

Holding: Wheels argued that Plaintiff's Carmack Amendment claim against it should be dismissed because Wheels was not actually carrying the cargo at the time it was damaged. However, the Court held that under the Carmack Amendment, both an originating carrier (i.e., one that issued a bill of lading) and the delivering carrier can be liable for damage to the cargo regardless of who had

possession of the goods when damaged. The Court found that Wheels could not escape liability to Plaintiff by pointing at Tigers, and Wheels could later seek recovery from Tigers.

The Court went on to note that, under the Carmack Amendment, a carrier can only escape liability entirely by demonstrating "both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes,": (1) the act of God; (2) the public enemy; (c) the act of the shipper himself; (d) public authority; or (e) the inherent vice or nature of the goods. The Court found that there was no suggestion that any of the excepted causes might apply here.

Wheels also argued that Plaintiff's claim for breach of contract should be dismissed because it was preempted. However, Plaintiff argued that it pleaded the breach of contract claim only in the alternative so that if the Court were to ultimately determine Wheels was not acting as a "carrier," but rather as a "broker," then Plaintiff could fall back on its breach of contract claim. The Court, noting that the Carmack Amendment does not apply to brokers, agreed that, were it to find Wheels was a broker, then Plaintiff should be permitted to rely on its alternatively-plead breach of contract claim. The Court further ruled that it was premature to determine at this stage of the pleadings whether Wheels was a carrier or broker; and that such a ruling was more appropriate for summary judgment.

Presenter: **Ken Bryant**

10. ***Mitsui Sumitomo Insurance Company of America v. Mac R Behnke***, 2016 WL 6125691 (W.D. Mich. Oct. 20, 2016)

Facts: Denso Manufacturing Michigan, Inc. purchased 9,000 blower motors from its supplier ASMO North Carolina for installation into truck defrost systems and hired Defendant Mac R Behnke Rentals Ltd. under a Transportation Services Agreement to move the blowers from North Carolina to Michigan. En route, the truck went off the road in Ohio at 3:03 a.m., going through a concrete embankment and into a field. During recovery operations, the trailer containing the blower motors lost its axles. Ultimately, only 2,912 of the blower motors were placed into production. Plaintiff Mitsui Sumitomo Insurance Company of America paid Denso $114,473.66 on its all risks policy and brought an action in subrogation under the Carmack Amendment against Behnke. The parties made cross motions for summary judgment.

Issue: Whether Plaintiff had made a prima facie claim of damages and, if so, the amount thereof.

Holding: The court held that, because Behnke's expert acknowledged that at least 32 blower motors were damaged, Plaintiff had made its prima facie case but that the differing expert opinions created genuine issues of material fact as to the extent of Plaintiff's damages. The opinion also contains some discussion about

spoliation of evidence, Carmack preemption of a bailment claim, and insurance volunteers.

Presenter: **Fritz Damm**

11. ***Schneider v. Fifth Wheel, LLC***, 2016 WL 4424944; 2016 U.S. Dist. LEXIS 111468 (N.D. Ohio Aug. 22, 2016)

Facts: Plaintiff/consignee purchased a 1957 Mercedes Benz for $57,000.00; and arranged with a broker for the car to be transported from Washington to Ohio. Fifth Wheel, the carrier retained by the broker, loaded the car into a car carrier trailer with no cover or other protection. Some damage was noted at origin. At destination, additional damage was discovered to the Benz, caused by leaked fluid from another car ruining the paint job. Plaintiff then sued to recover the purchase price of the car.

Issues: (1) Can a carrier rely on the inherent vice of other vehicles on the trailer to avoid liability for damage to plaintiff's car? (2) If found liable, did the carrier effectively limit its liability? (3) If not, what is the applicable measure of damages?

Holding: As a defense to liability, the carrier asserted the damage to plaintiff's car occurred due to the inherent vice or nature of cars as a class to leak fluid. The Court rejected that defense on the basis that the inherent vice defense relates to the article shipped, not to other similar articles shipped. Moreover, if classic cars were subject to leaking, all the more reason for the defendant carrier to have provided a cover for the plaintiff's vehicle while in transit to establish freedom from negligence.

The defendant carrier also failed in its attempt to enforce the limitation of liability provision in the bill of lading. The "law requires that a shipper must be made aware of a carrier's intent to limit its liability, must agree to the limitation in writing, and must be provided with the bill of lading prior to shipment." Because the plaintiff only received the bill of lading at delivery and was not made aware of the limitation, he was not bound by the limiting terms in the bill.

Finally, the Court addressed the "actual loss" standard of damages under the Carmack Amendment. Noting that the owner of the goods is not entitled to windfall and that the testimony about pricing in the resale market for antique motor vehicles was ambiguous, the Court rejected resale price as a measure of damages. Moreover, because only the paint job was damaged (not the entire car), the Court rejected the claim for the purchase price of $57,000.00. Based on an estimate presented by the plaintiff, the Court awarded $12,383.00 to repaint the car.

Presenter: **Eric Zalud**

12. ***Paramount Export Company v. British Airways***, Av. L. Rep. 6093841 (C.C.H.); 2016 WL 6093841; 2016 US Dist. LEXIS 78718 (C.D. Cal. June 16, 2016)

Facts: Plaintiff Paramount Export Company shipped 386 cartons of produce via Defendant British Airways PLC to Lulu Muscat Hypemarket of Oman (by way of London) from Los Angeles using Able Freight Services, Inc. as freight forwarder. The cargo was delayed three days in London and, when it arrived in Oman, was decayed, wilted, and moldy. 303 of the cartons had to be destroyed. Paramount paid Lulu $12,251.75 for the damage and made a claim to Paramount's insurer, Plaintiff Great American Insurance Company of New York, for that amount plus the surveyor fees Paramount incurred, which the insurer paid. Plaintiffs commenced suit in state court for breach of contract, which suit was removed to federal court on the basis of the suit's arising under the Montreal Convention. Plaintiffs amended their pleading and the parties filed cross motions for summary judgment.

Issue: Whether Plaintiffs had established a claim under Articles 18 or 19 of the Montreal Convention and, if so, whether Defendant had established an exception.

Holding: The court held that British Airways' contract of carriage, to the extent that it deviated from the Montreal Convention, was unenforceable. The court further held that Defendant could not establish an inherent defect, quality, or vice by arguing that Paramount should have paid for expedited shipping or refrigeration. The court also held that, simply questioning the age of the produce or its geographical source does not suffice to meet Defendant's burden on the affirmative defense where no actual evidence was submitted on those points. The opinion also contains a significant discussion of standing and the right to sue under both Article III of the Constitution and the Montreal Convention.

Presenter: **John Husk**

13. ***United States v. Sealift, Inc.***, -- F.Supp.3d --; 2016 WL 4247002 (S.D. Tex. Aug. 10, 2016)

Facts: The United States sued Sealift, Inc. under COGSA and the Harter Act for damaged food aid shipments bound for various locations in Africa over the course of five years aboard eight vessels. At issue was Sealift's motion for partial summary judgment as to $615,073.05 in marine losses—losses assessed at the foreign port of discharge following issuance of clean ocean bills of lading. According to Sealift, it had no control over the discharge operations at the various ports of delivery where damages were alleged to have been documented, such that it has a defense to the claims of the US.

Issue: Whether Sealift could use COGSA's "q" clause and the custom of the port doctrine to obtain partial summary judgment on the government's claims based upon Sealift's lack of control at the various ports of discharge.

Holding: Following a good discussion of the interplay between COGSA and the Harter Act and the Custom of the Port and Practical Loss Doctrines, the court held that factual issues relating to when surveys were taken of the cargo for which clean ocean bills were issued, whether Sealift maintained control over discharge operation, and when damage to the goods occurred, were all sufficient to defeat the motion.

Presenter: **Dennis Minichello**

III. BROKER AS PLAINTIFF

14. ***United Road Logistics v. DVM Car Trans***, 2016 WL 4011264 (E.D. Mich. July 27, 2016)

Facts: In August 2014, United Road Logistics, a transportation broker, engaged DVM Car Trans, a motor carrier, to transport a newly manufactured 2015 Chevrolet Equinox in interstate commerce from the manufacturer to a dealer. URL and DVM had previously entered a written Broker Contractor Agreement for the transportation of vehicles. Damage to the Equinox was discovered upon delivery to the consignee. The manufacturer/shipper GM determined that, due to the damage, the vehicle was a total loss and destroyed the car, resulting in a charge to URL of $25,631.45. URL paid the full claim amount to GM and sought reimbursement from DVM. Having received no payment, URL filed suit against DVM under the Carmack Amendment.

Defendant DVM moved to dismiss, contending that URL, as a transportation broker, lacks standing to recover damages under the Carmack Amendment. Specifically, DVM argued that "the person entitled to recover under the receipt or bill of lading" is the owner of the cargo, GM, and not plaintiff URL, who merely brokered the transportation and who has alleged only the injury which GM suffered. URL responded that it is entitled to recover from the carrier the amount paid to GM, the owner of the property, and that the contract between URL and DVM attributed the risk between the parties in a manner agreed to by the parties yet did not expressly waive the Carmack Amendment.

Issue: Does a transportation broker have standing to recover damages from a motor carrier under the Carmack Amendment?

Holding: Without an assignment from shipper GM of its claim or a showing that broker URL has stepped into the shoes of the shipper, URL lacks standing to file suit against the carrier under Carmack. To cure the standing problem, URL sought leave to amend its complaint to bring United Road Services, a related entity that provided carrier services to GM pursuant to a written agreement, into the case as a plaintiff. However, the court noted that, as with URL, URS did not own the cargo or otherwise obtain an interest in it and had no assignment of GM's claim. The case was therefore dismissed without leave to amend.

Presenter: **Wes Chused**

15. ***Supreme Auto Transport, Inc. v. JBL Logistics, LLC,*** Civ. Action No. 16-cv-01733-RM-MJW (D. Colo. Dec. 16, 2016)

Facts: Broker Supreme Auto Transport ("Supreme") entered into a contract by which Supreme agreed to pay Nissan Motors ("Nissan") the full commercial value of automobiles damaged in shipments Supreme booked for transit ("the Nissan/Supreme Contract"). Supreme and JBL Logistics entered into a contract by which JBL agreed to provide motor carrier services to customers of Supreme Auto pursuant to specified terms (the "Contract"). The Contract provided in its paragraph entitled "Cargo Claims":

> "[JBL] shall be liable to [Supreme], for all damage … occasioned by the transportation of property arranged by [Supreme] while being transported by [JBL]. … [JBL]'s liability for cargo … damage from any cause shall be as described in the provisions of [Carmack], except to the extent modified by this Agreement. … If a shipment or any part thereof is … damaged, [JBL] shall pay to [Supreme] the full value of the cargo … damaged …."

Supreme booked with JBL transportation of two automobiles, owned by Nissan, from Mississippi to North Carolina. The parties dispute whether JBL issued a bill of lading. The cargo was damaged in transit. Supreme, per the Nissan/Supreme Contract, paid Nissan the cargo's full value of $34,426.45. Nissan later assigned to Supreme its rights against JBL to recover the cargo's value. Supreme sued JBL in a Colorado state court, alleging contract and Carmack liability. JBL removed to the District of Colorado and moved under FRCP 12 (b)(6) to dismiss based on Carmack preemption and lack of standing.

Issues: Does Carmack govern this claim, such that Supreme lacks standing and its contract claims preempted? Does federal jurisdiction apply?

Holding: No. While the assignment is valid, it was dated after the lawsuit was filed. It cannot be a basis for Carmack applicability and federal jurisdiction. The court dismissed the Carmack claim without prejudice. The court found JBL's arguments about Carmack preemption "unpersuasive," and remanded Supreme's contract claims. The court ruled: "JBL wants to have it both ways. It wants the Court to find that Supreme was not a shipper under the Carmack Amendment for standing purposes while simultaneously finding that they are a shipper for preemption purposes." In conclusion, the court ruled that it "… recognizes that the procedural posture of the case creates difficulties for the parties. It is likely that Nissan's assignment of its rights has provided Supreme with standing to pursue a future Carmack Amendment claim against JBL, which in turn would mean that Supreme's state law claims are preempted. … As it stands, Supreme did not have standing to bring its federal law claim but does have the ability to pursue its contract claims in state court."

Presenter: **Steve Block**

16. ***Total Quality Logistics, LLC v. O'Malley***, 2016 WL 4051880; 2016 U.S. Dist. LEXIS 99067 (S.D. Ohio July 28, 2016)

Facts: Plaintiff is before the Court on a Motion to Remand for improper removal to Federal Court. Defendant O'Malley, a motor carrier, agreed to transport freight for Plaintiff's (a freight broker) customers. Plaintiff alleges a breach of written contract against the Defendant for not rendering services on behalf of one of the Plaintiff's customers. Defendant allegedly owes Plaintiff $25,487.52 under the Broker/Carrier Agreement.

Plaintiff argues the action should be remanded to state court because the case was not properly removable and the federal court lacks jurisdiction. Furthermore, the Plaintiff argues that Defendant cannot remove the case based on Carmack Amendment because it is not a Carmack claim.

Issue: Whether the federal court has subject matter jurisdiction over the broker's case under the Carmack Amendment.

Holding: The Court granted the Plaintiff's motion to remand. Plaintiff is suing for the breach of the Broker-Carrier Agreement. Plaintiff did not allege a case under the Carmack Amendment. Here, Defendant O'Malley is a carrier, and Plaintiff is a broker. The Carmack Amendment does not extend to disputes between a broker and a carrier over a broker-carrier contract because Congress did not intend to protect the broker-carrier relationship. Since Plaintiff is a broker, and not subject to the Carmack Amendment, Defendant failed to demonstrate that the federal court has federal question jurisdiction.

Presenter: **Jeff Simmons**

17. ***Total Quality Logistics v. Lith Transport***, 2016 WL 5476148 (S.D. Ohio Sept. 29, 2016)

Facts: The facts, court, pleadings, issue and outcome are strikingly similar to those in the *TQL v. O'Malley* case. There is one significant factual difference, however, that defendant Lith Transport asserted required a different outcome: TQL attached to its complaint a "Release and Assignment," putting TQL in the shoes of its customer for purposes of Carmack.

Issue: Whether removal of the broker's breach of contract case against the carrier is proper under the Carmack Amendment and/or the FAAAA.

Holding: Under the well-pleaded complaint rule, the plaintiff broker, as the "master of the claim," has the right to choose whether to sue the defendant carrier as a broker or as an assignee. Though the court acknowledged that the assignment was attached to the complaint and questioned its purpose, it held that the document does not serve to confer subject matter jurisdiction on the

court. TQL's contract count is preempted by neither Carmack nor the FAAAA. Therefore, TQL's motion to remand was granted.

Presenter: **Marshal Pitchford**

18. ***Acuity v. Nick's Trucking & Excavating, LLC***, 2016 WL 4060975; 2016 U.S. Dist. LEXIS 99285 (E.D. Mich. July 29, 2016)

Facts: Killam, a freight broker, issued an order to Cedric Freight Brokerage to transfer 25 skids of steel from Richland Metals in Minnesota to Continental Metals in Michigan. Cedric contracted with Balsam Branch to transport the load, and Balsam Branch subcontracted the load to Nick's Trucking. The bill of lading identified Balsam Branch as the carrier, Richland Metals as the shipper, and Continental Metals as the consignee. The steel was delivered the next day and the bill of lading included a note that three bundles were wet. Continental Metals returned the load because it was not correct. Following its return, Killam asserted a claim against Cedric for damage, claiming that all 25 skids were returned in a rusted condition. Cedric in turn asserted a claim against Balsam Branch, whose insurance denied coverage on the basis that the load could not have rusted in the time frame alleged. Killam then filed a claim with its insurer, Acuity, who paid the loss and sued Nick's to recover. Nick's moved for summary judgment, contending (among other things) that Acuity lacked standing to bring a Carmack claim.

Issue: Does Acuity, as the subrogee of the transportation broker, have standing to bring a claim for cargo damage under Carmack?

Holding: Acuity lacks standing to sue Nick's under the Carmack Amendment. Acuity, as Killam's subrogee, has no greater rights than Killam would have as the broker. Killam is not referenced on the bill of lading and has no direct right to sue under the statute. Although a broker can bring a claim as an assignee of the shipper, Killam did not receive an assignment of the claim from Richland Metals; therefore, Killam (and its purported assignee, Acuity) has no standing to sue the carrier.

Presenter: **Dirk Beckwith**

19. ***Coyote Logistics, LLC v. All Way Transport, Inc.***, 2016 WL 7212487 (N.D. Ill. Dec. 13, 2016)

Facts: Plaintiff Coyote Logistics, a property broker, tendered a shipment of deli meats to All Way Transport, a motor carrier, for transportation from Baltimore, Maryland, to Harmony, Pennsylvania. All Way alleges that GN Trucking (an entity that, pursuant to written agreement with All Way, agreed to provide drivers, trucks and labor to All Way in connection with its deliveries) agreed to transport and deliver the shipment on behalf of All Way. The meats arrived at destination in "a damaged, off-temperature, and worthless condition," thereby purportedly causing Coyote to suffer a loss of $88,777.58.

Coyote filed a Complaint against All Way, who then filed a Third-Party Complaint against GN for breach of contract and violation of the Carmack Amendment, asserting a broker/carrier relationship between All Way and GN. GN filed a motion to dismiss the breach of contract count in All Way's Third-Party Complaint on Carmack preemption grounds.

Issue: Is a breach of contract claim by a transportation broker against a motor carrier preempted by the Carmack Amendment?

Holding: Though All Way alleges that it is a broker who arranged for transportation of the shipment, and not a carrier, the court held that, because All Way's status as a carrier or a broker is central to its claim against GN (claims for indemnity as a broker are separate and distinct claims outside the scope of the Carmack Amendment) and insufficient facts were presented to make a determination of All Way's role at this stage in the litigation, All Way should be allowed to proceed with its claim. GN's motion to dismiss was therefore denied.

Presenter: **Grant Brooker**

20. ***Golub Corporation v. Sandell Transport, Inc.***, 2016 WL 4703734 (N.D.N.Y. Sept. 8, 2016).

Facts: Plaintiff The Golub Corporation, a New York grocery store chain, placed an order for pistachios with the predecessors of Wonderful Growers Cooperative/Wonderful Pistachios & Almonds, LLC. To get the nuts from California to New York, Pellegrino Sales and Marketing hired Defendant Sandell Transport, Inc., who in turn hired GM Express as motor carrier through an industry job board. GM Express, however, was the victim of identity theft, and the nuts were thereby stolen by men pretending to be with GM Express. In releasing the nuts to the motor carrier, a Wonderful representative checked the driver's license of the passenger, which number matched the number given Wonderful by Sandell. The license, however, contained a typographical error in that it identified the driver's city of residence as "Northdridge, California," a place that does not exist as spelled. In a lawsuit between Golub and Sandell, Sandell impleaded Wonderful, alleging negligence, breach of contract, and fraud, and Wonderful moved to dismiss.

Issue: Whether broker Sandell had sufficiently stated a claim for negligence against shipper Wonderful in alleging that (1) the misspelled city name should have tipped Wonderful off that something was amiss and (2) that Wonderful should have checked the license of the driver as well.

Holding: The court held that, even assuming Wonderful owed any duty to Sandell, the failure to know that there was no such place as "Northdridge" would not amount to a breach of duty because it is unreasonable to expect that the Wonderful representative would know what city and town names are real and, thereby, conclude that the misspelling meant that the passenger was a thief and not, instead, the recipient of a DMV error. The court further held that it could

not imagine why Wonderful should have spoken to the driver after confirming the passenger's identity and, regardless, the complaint was silent on the issue. The opinion also discusses the pleading's shortcomings in its breach of contract and fraud claims, as well as local rules addressing proposed amendments to pleadings.

Presenter: **Ian Culver**

IV. LIMITATION OF LIABILITY

21. ***Kelly Aerospace Thermal Systems, LLC v. ABF Freight System, Inc.,*** 2016 WL 3197561 (E.D. Mich. June 9, 2016) and 2016 WL 4374917 (Aug. 17, 2016)

Facts: Plaintiff shipped used airplane parts to a testing lab to obtain FAA certification for prototype deicers attached to the used parts. The crate did not hold up to the rigors of shipping and the parts were damaged. The applicable tariff limited liability for new goods to $25.00 per lb. and for "other than new" good to 10¢ per lb. Plaintiff believed it was due several hundred thousand in damages, whereas the tariffs would limit liability to a maximum of either $22,000 or $88.00. A single-count complaint under Carmack was filed in Federal Court; and ABF filed a motion for partial summary judgment to determine the applicability of its limitations. A year before the subject shipment Plaintiff had requested discounts for future shipments and ABF issued "pricing agreements" that explicitly incorporated the ABF tariff and its limitation of liability sections. Plaintiff had used the pricing agreement for a shipment several months before the subject shipment, and at least twice shortly after the subject shipment, with 80% discounts applied in each case.

Issue: Whether ABF properly limited its liability.

Holdings: Citing *Hughes* and *Toledo Ticket*, but relying more upon *Exel, Inc. v. S. Refrigerated Transp., Inc.*, 807 F.3d 140 (6th Cir. 2015), the court first held that the 2013 pricing agreements applied to the subject shipment and, second, that ABF had properly limited its liability under the four-part *Hughes* test. The court relied upon the January 2013 pricing agreements to establish *Hughes* factor 1; in regard to factors 2 and 3 the court noted that Plaintiff was provided both a reasonable notice of options and opportunities to obtain the information about those options, including incorporation of the standard tariff limitations of liability into the pricing agreements "in exchange for deeply discounted shipping rates", and the ability to choose among various levels of liability as set forth in the tariff. The court felt it significant that Plaintiff went on Defendant's website and filled in the data required to generate the bill of lading and further noted that the pricing agreement, subsequent rate quotations and the bill of lading indicated that limitations will apply. Fourth, the court noted that a bill of lading issued. Thus, ABF's motion for partial summary judgment was granted.

Plaintiff moved for reconsideration which was given short shrift by the court.

The Court stated: "Plaintiff's motion makes a new argument, misconstrues the facts and re-hashes arguments previously made." For all of these reasons, the motion was denied. Plaintiff also made an alternative request to certify the original opinion and order for immediate appeal, which was also denied.

Presenter: **Mike Tauscher**

22. ***Yohan Choi v. ABF Freight System, Inc.***, -- Fed.Appx. --; 2016 WL 7212154 (3rd Cir. Dec. 13, 2016)

Facts: This case, which initially appeared on our Nashville agenda, involved a household goods move from Texas to New Jersey during which plaintiff's entire shipment was destroyed by fire in an accident. The plaintiff shipper filed suit against defendant ABF under the Carmack Amendment seeking $59,008.05 as the value of the entire shipment. The bill of lading, which memorialized the transportation agreement between the parties, limited the carrier's liability to $7,500. The agreement also allowed the shipper to choose between various levels of liability. The plaintiff argued that ABF could not limit its liability because only one of these levels covered "catastrophic loss."

The District Court granted ABF's motion for partial summary judgment limiting its liability to $7500. However, plaintiff appealed the decision to the Third Circuit.

Issue: Whether ABF's limitation of liability provision in its bill of lading validly limits its liability to plaintiff.

Holding: The Third Circuit affirmed the District Court's decision granting ABF summary judgment, holding:

- That the Carmack Amendment's two or more levels of liability requirement that a carrier must offer was satisfied;
- That Carmack does not require two levels of coverage per subset of liability – one for catastrophic loss and one for negligence, as no appellate courts have required multiple levels of coverage for subsets of liability to comply with Carmack; and
- That plaintiff could have purchased additional carrier negligence liability coverage but failed to do so.

Plaintiff, without any prior decisions supporting his position that the carrier had to offer two or more liability options per subset of damage, failed to carve out new law to hold the carrier liable for failing to provide such options.

Presenter: **Barry Gutterman**

23. ***Dickson v. UPS Store***, -- N.E.3d --; 2016 WL 4527197 (Ct. of App. of Ohio, Aug. 22, 2016)

Facts: Plaintiff went down to his local UPS Store to ship his much-loved amp from Austintown, Ohio to Johnson City, Tennessee for repairs. Plaintiff purchased insurance and declared a value of $4,000. Strangely enough, the UPS Store engaged United Parcel Service, Inc. to conduct the transportation. For the return trip, after the repairs were complete, either the local UPS Store or one in Tennessee arranged to have the amplifier returned to the plaintiff which, unfortunately, came back in far worse shape than it formerly was. After making a claim, the amp was sent to Pittsburgh of all places and not back to Tennessee for repairs. What happened to the amp thereafter is unclear, but UPS paid to the UPS Store, which had made the claim on behalf of plaintiff, $1,789.69 as replacement cost for the amp plus plaintiff's out of pocket shipping costs, which the UPS Store then passed along to the plaintiff.

Issue: Whether Mahoning County, Ohio's next big rock star's recovery was limited under the Carmack Amendment pursuant to UPS' tariff.

Holding: The court held that the UPS Store, not the musician, was the shipper with standing to sue UPS (because of the terms of the Parcel Shipping Order plaintiff signed) and that, as between the UPS Store and UPS, the UPS Tariff operated to limit its liability to the lesser of five limitation of liability regimes. When the plaintiff failed to challenge the amount of $1,789.69 with anything other than the declared value, he failed to create a material issue of fact, and summary judgment was entered in favor of the defendants.

Presenter: **Hank Seaton**

24. ***Houston Specialty Insurance Company v. Freightz Transportation, Inc.***, 2016 WL 6897793 (M.D. La. Nov. 22, 2016)

Facts: The case arises out of damage to a high resolution PET/CT scanner during Transportation by YRC Worldwide, Inc. from Minneapolis, Minnesota to Denham Springs, Louisiana. Suit was filed by the owner's insurer against YRC, Freightz Transportation (the broker that arranged for YRC's services) and the vendor from whom the owner purchased the scanner. Plaintiff Houston Specialty and YRC filed cross summary judgment motions to determine the amount of YRC's liability, if any.

Issue: Whether YRC properly limited its liability through its relationship with the intermediary Freightz.

Holding: Citing *Kirby* and *Werner*, the Court analyzed the four-prong limitation of liability test by looking to YRC's dealings with the broker with whom YRC contracted to perform the transportation services (a cargo owner is bound by the liability limitation agreed to between the intermediary and the carrier). Each of the four required elements was found to have been established (YRC

maintained a tariff that offered different levels of liability; Freightz made a choice among the liability levels, acting for the shipper; YRC provided Freightz with a reasonable opportunity to choose between two or more levels of liability through its online booking tool; and YRC issued a bill of lading prior to moving the shipment). The Court therefore concluded that YRC properly limited its liability.

Presenter: **Ken Hoffman**

25. ***Synergy Flavors OH, LLC v. Averitt Express, Inc.***, 2016 WL 4761932 (S.D. Ohio Sept. 12, 2016)

Facts: Synergy Flavors produces additives for the food industry. Over the years, Synergy had used Averitt hundreds of times for such shipments. These shipments were always booked via the internet and assigned a low NMFC rating. In this case, Synergy booked a shipment that was described as a "bowl." The persons entering this information for Synergy and Averitt assigned the same NMFC code to this shipment as they had to all of the past foodstuff shipments. When Averitt picked up the "bowl" at the Synergy facility in Hamilton County, Ohio, it was presented with a bill of lading that was generated by Synergy. The Averitt driver signed off on this document and also applied an Averitt pro-sticker. The Synergy bill of lading did not contain a space for specifically declaring the value of the item. Averitt's standard bill of lading did contain such a space. The "bowl" was delivered to Separators Inc. in Indianapolis, Indiana, where it was discovered that it had been damaged during transit. Synergy made a claim against Averitt for repairing the damage to the "bowl" which was then identified as a multi-part assembly for a high speed centrifuge used by Synergy.

The Synergy bill of lading contained the following language:

> "Note: Liability limitation for loss or damage in this shipment may be applicable. . . . Received, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and the shipper, if applicable, otherwise to the rates, classifications, and rules that have been established by the carrier . . .."

The Averitt "pro sticker" stated:

> "This shipment is subject exclusively to the Uniform Bill of Lading, the liability limitations and all other applicable provisions of the carrier's individual and collective tariffs, including current NMF 100. See *Exhibit A.*"

Averitt argued that the language in the Synergy bill of lading was sufficient to incorporate the Averitt tariff and thereby limit its liability pursuant to same. Under the tariff provision relating to used, reconditioned or refurbished articles or parts, Averitt's liability was limited to $0.10/lb. Based on the 450-pound weight of the shipment, Averitt asserted that its liability was limited to $45.00.

Both parties filed motions for summary judgment.

Issue: Whether the Synergy bill of lading incorporated the Averitt tariff such that Averitt's liability was limited to the release rate for used, reconditioned or refurbished articles or parts.

Holding: The court dismissed Synergy's common law negligence claim based on Carmack pre-emption; and denied the respective motions for summary judgment. Averitt argued that, because Synergy drafted the bill of lading without including any space for declaring a value for the item being shipped, as well as incorporating the terms and conditions of the Averitt tariff that this exhibited a deliberate decision by Synergy to subject itself to the terms and conditions of same. Averitt cited several recent cases to the effect that if the shipper generates the bill of lading used by it and the carrier, the shipper is bound by the language of its document, regardless of whether it understood the meaning or intent of the language. Synergy relied on the *Toledo Ticket* case and argued that because its own bill of lading did not contain a space to declare the value of the cargo, that it had not been given a fair opportunity under *Toledo Ticket* to choose between limits of liability. The court found that Synergy's failure to provide a space for a valuation of its property on the bill of lading or to list its valuation did not meet the *Toledo Ticket* standard of showing that the shipper had "an absolute, deliberate and well-informed" choice to limit its liability. Averitt was therefore not entitled to summary judgment on that issue.

Presenter: **Steve Dennis**

26. ***Essex Insurance Company v. Barrett Moving & Storage***, 12-cv-00219-JRK (M.D. Fla. Mar. 18, 2016)

Facts: This case arises from the transportation of a magnetic resonance imaging machine from Illinois to Texas. The shipper, Nationwide, alleges that the magnet component of the MRI was damaged in transit. Essex Insurance Company claims to have paid Nationwide for a portion of the loss and is attempting to subrogate against Barrett (an entity that serves as both a broker and a carrier under written agreement with Nationwide, which contains a limitation of liability provision) and Landstar (the carrier to which Barrett brokered the MRI for transportation under a written Broker-Carrier agreement containing its own limitation provision).

Nationwide and Essex's Complaint alleged one count against Barrett and Landstar under the Carmack Amendment. Through earlier cross-summary judgment motions between plaintiffs and Barrett, the court concluded that Barrett was liable under the Carmack Amendment as a carrier with respect to the shipment. The Court entered an Order in July 2014, directing that judgment be entered against Barrett and that the claims against Landstar be stayed pending resolution of any appeal taken by Barrett. Barrett appealed and the Eleventh Circuit dismissed the appeal for lack of jurisdiction. Upon return of the case to the District Court, plaintiffs and Landstar filed cross-summary

judgments, with Landstar seeking to enforce its limitation of liability and plaintiffs seeking full recovery against Landstar along with Barrett on a joint and several basis.

Landstar argues that the bill of lading issued to Nationwide at the pick-up and delivery locations is sufficient to limit its potential liability to $1.00 per pound (or $14,000). In response, plaintiffs point out that this Court already found that the shipment is governed by Barrett and Nationwide's contract, formed through emails, and that the bill of lading was merely a receipt that cannot limit defendants' liability

Issues: Whether Landstar's limitation of liability provision is enforceable where a separate agreement exists between the shipper and the broker; and whether a shipper can hold two carriers (or a carrier and a broker) jointly and severally liable under Carmack for damage to a shipment.

Holding: Standing by its earlier decision that the emails exchanged between Nationwide and Barrett prior to the shipment constituted the contract governing the shipment and that the agreement between Barrett and Landstar had no effect on the contract between Nationwide and Barrett, the court rejected Landstar's attempt to limit its liability for the damage.

The court then turned to the issue of joint and several liability, finding that both the facts and law support such a result: "As a common-law principle of damages, joint and several liability is available under the Carmack Amendment. . . . Plaintiffs brought suit against two carriers, Barrett and Landstar, and provided sufficient evidence for the Court to find both of them liable." Judgment was therefore entered in favor of plaintiffs and against Landstar and Barrett, jointly and severally, in the sum of $560,000, plus pre-judgment interest. That judgment is now on appeal to the Eleventh Circuit.

Presenter: **Kevin Branch**

27. ***Kimsey v. SML Relocation Services***, 2016 WL 4728108; 2016 U.S. Dist. LEXIS 122497 (E.D. Wash. Sep. 9, 2016)

Facts: Plaintiff hired defendant to move personal belongings from Las Vegas to Spokane, Washington. On both the day of the move and the day that the move was completed, plaintiff received and signed a household goods proposal/contract for moving services referencing a $.60 per pound per carrier liability limitation. Once the personal belongings were transported, plaintiff noticed some items damaged and others missing.

Plaintiff filed an amended complaint with claims of negligence, breach of contract and Carmack Amendment liability. Plaintiff argued that due to the extraordinary nature and uniqueness of the items, it is unreasonable to apply the $0.60 per pound valuation limitation. Defendant moved for partial summary judgment arguing that the plaintiff's claims are preempted by Carmack and damages are

limited pursuant to the Full Service Move Valuation Options on the form the plaintiff signed (limiting damages to $0.60 per pound per article).

Issues: (1) The reasonableness of defendant's rate of limiting damages to $0.60 per pound per article; and (2) whether failing to provide a copy of the bill of lading negates the issuance of the bill of lading prior to the shipment of goods.

Holding: Because the Carmack Amendment preempts state law claims, summary judgment is granted to defendant on plaintiff's first claim for negligence and his second claim for breach of contract.

Regarding the issue of reasonableness, the court found that plaintiff had reasonable notice and opportunity to make an informed choice when selecting one of the two Full Service Move Valuation liability limitation options. These options included Increased Carrier Valuation, which would require defendant to repair or replace damaged items or make a cash settlement for the cost of repair or replacement cost; or the other option, which the Plaintiff selected, Released Value Valuation option (at no cost) agreeing to accept repair or replacement for up to a maximum of $.60 per pound per article. Thus, plaintiff had an opportunity to make a choice when he picked the Released Value Valuation. Therefore, the $0.60 per pound per article limitation is not unreasonable.

Regarding the issuance of the bill of lading, the Court found that failure to provide a copy of the bill of lading does not negate defendant's issuance of the bill of lading prior to the move. Plaintiff signed the Household Goods Proposal/Contract for Moving Services prior to the move and again after the completion of the move. Thus the assertion that he did not receive a copy of the bill of lading is unpersuasive.

Presenter: **James Attridge**

28. ***Prime Potions Inc. v. Quik X Transportation Inc.***, (unreported) Court file SC-15-5186 (Ontario Sup. Ct. Justice, Small Claims Court, Nov. 15, 2016)

Facts: A load broker, ICE Logistics Inc., engaged carrier Quik X Transportation Inc. to transport a shipment of four cartons of cosmetics weighing 70 pounds from Toronto to Vancouver in February, 2015. The shipment required protection from freezing. The shipment was frozen while in transport on account of the Quik X driver failing to turn on the heating unit prior to departure. ICE's shipper customer, Prime Potions Inc., claimed the invoice value of the goods ($8,142) as damages. There being no declared value on the bill of lading, Quik X tendered a settlement offer of $140, representing the "uniform bill of lading" $2 per pound limitation of liability. Prime rejected the offer, citing two arguments.

The first was that the parties to the contract of carriage had contracted out of the deemed $2 per pound limit of liability on account of the carrier confirmation

sheet issued by ICE to the carrier which stated that "Acceptance of this load acknowledges agreement to the rate shown as including all the terms and conditions of the National Transportation Brokers Association Broker-Carrier contract version 7.02 found at www.ntba- brokers.com". These terms included a provision that:

> "[I]t is agreed that in respect of shipments from a Canadian origin that the BROKER on behalf of the SHIPPER is deemed to have declared the full value of the shipment for the carriage on the bill of lading . . . and carrier waives the provisions of clauses 9 and 10 of the uniform bill of lading in effect in the province of origin."

Quik X responded that the record showed that it and ICE had agreed on a freight quote and the basic shipment parameters and instructions prior to the latter's issuance of the carrier confirmation sheet, and that the freight quote had in fact incorporated Quik X's "Carrier Rules Tariff" which (confirming the legislated limit of liability on point) that "All rates and charges are based on a liability not exceeding $2 per pound, unless a higher value is declared by the shipper."

The plaintiff's secondary argument was that in any event of the foregoing given the carrier's culpability in the matter that it would be "unconscionable" for the court to limit its liability to $140.

Issues: (1) Was Quik X's liability limited to $2 per pound, or had the parties contracted out of the general legislative regime by the terms of the carrier confirmation sheet? (2) If the contract terms provided for a $2 per pound limitation, would this be unconscionable such that it ought not to be enforced?

Holding: As to the first issue, the facts established that the parties had agreed to the essential terms of a bargain – including the limitation of liability - at the outset when the broker accepted the carrier's freight quote. Accordingly, that framework was not later superseded by the carrier confirmation sheet and Quik X was able to limit its liability to $140. The court went on to find that this did not yield an unconscionable result: the broker was a sophisticated and experienced contracting party and there was no inequality of bargaining power at the time of the making of the contract.

Presenter: **Gordon Hearn**

29. ***Vilorio v. Sallaum Lines***, 2016 WL 3961624 (Sup. Ct. N.J. July 25, 2016)

Facts: Y & L Auto Sales hired TRT International to transport a Toyota RAV4 vehicle from the United States to the Dominican Republic via ocean transit. The TRT bill of lading for the shipment contained a limitation of liability provision which incorporated COGSA's limitation of $500 per package unless a higher value is declared and a higher fee paid. The bill of lading identified the vehicle as the "package;" no excess value was declared and no higher fee was paid. The vehicle ultimately arrived in the Dominican Republic with significant water

damage which it sustained during Superstorm Sandy while awaiting shipment at the port after clearing customs. Vilorio sued TRT and was awarded $500 in damages under COGSA. He filed a separate complaint against TRT for $15,000 in damages, alleging that he gave TRT his Toyota to ship to the Dominican Republic, and received it in a damaged and flooded condition. The trial court dismissed Vilorio's second suit, finding that he lacked standing to bring a claim and, in any event, he had already collected the maximum limit of liability of $500 from TRT. Vilorio appealed.

Issue: Was Vilorio entitled to maintain his second suit against TRT for damage to the Toyota?

Holding: No. Vilorio failed to show standing, as he was not listed as the owner or shipper of the Toyota on the vehicle title, bill of sale and bill of lading with TRT. Moreover, and even if he had established standing, TRT's liability was limited by the bill of lading and COGSA to $500 per package, which Vilorio had already collected from TRT. Under COGSA and the bill of lading, the liability limitation was extended to encompass the time period during which the vehicle was in TNT's custody, including before being loaded onto the ship. Therefore, TRT had no additional liability to Vilorio.

Presenter: **Tom Kuzmanovic**

30. ***Atwood Oceanics, Inc. v. M/V PAC Altair***, -- F.Supp.3d --; 2016 WL 3248440 (S.D. Ala. June 13, 2016)

Facts: Plaintiff Atwood Oceanics, Inc., is an offshore drilling company which purchased 85 marine drilling riser joints and one "crate seals accessories," and the owner, shipper, and consignor of the cargo. The cargo was damaged in transport from Malaysia to Alabama while aboard a vessel as "on-deck" cargo. When a rogue wave hit the vessel, one riser was lost and three others severely damaged.

Plaintiff sued the carrier defendants under COGSA. Specifically, Plaintiff asserted that the carrier was not entitled to assert the $500/package limitation of liability because Plaintiff's cargo was "on-deck" cargo to which COGSA does not apply. The bill of lading for the shipment provided that the cargo is "shipped on deck at shippers risk & expense." In addition, the bill of lading described the liability of the carrier as follows: "the Carrier shall in no case be responsible for loss of or damage to cargo . . . with respect to deck cargo." Moreover, the liability of the carrier was limited to not exceed the total loss of the cargo or if applicable the "Additional Clause." The "Additional Clause" provides: "[i]n case the Contract evidenced by this Bill of Lading is subject to" COGSA, COGSA "shall govern before loading and after discharge and throughout the entire time the cargo is in the Carrier's custody[.]" If COGSA applies, the Carrier's liability is limited to $500 per package.

Issue: Whether the carrier was entitled to assert the $500 per package limitation of liability under COGSA for cargo shipped "on-deck."

Holding: The Court held that COGSA compulsorily applies to and governs every bill of lading that evidences a contract for the carriage of "goods" by sea in foreign commerce to or from ports in the United States. However, COGSA defines "goods" as "goods, wares, merchandise and articles of every kind whatsoever, except cargo which by the contract of carriage is stated as being carried on deck and is so carried." Thus, the Court determined that COGSA did not, by its express terms, apply to this shipment. While the parties may contractually extend COGSA to on deck cargo by executing a bill of lading which "makes COGSA applicable at times when it would not apply of its own force," the Court found that the instant bill of lading did not employ sufficiently express language that the on-deck cargo was subject to COGSA. Thus, the Court concluded that COGSA did not apply to or govern this cargo, and Defendants could not rely on the $500/package limitation to the bill of lading.

Presenter: **Eric Baker**

31. ***Golden Hawk Metallurgical, Inc. v. Federal Express Corporation***, 2016 WL 5791198 (E.D. Mich. Oct. 4, 2016)

Facts: Plaintiff entered into two contracts with Defendant, for the shipment of precious metals and gems via overnight air mail, the terms of which were reflected on the airbills for each shipment. Plaintiff alleges that Defendant failed to deliver the precious metals and gems, and that one of Defendant's employees likely stole the goods. The terms of the contracts expressly limit Defendant's liability to $100, "unless a higher value is declared and paid for." Plaintiff did not declare a value on either shipment or pay for a value higher than $100 in relation to either shipping contract.

Issues: Whether the Airline Deregulation Act of 1978 ("ADA") preempts Plaintiff's claims for breach of duty as bailee and conversion, and whether Defendant's liability on Plaintiff's claim for breach of contract is limited to $100 under the terms of the contracts.

Holding: The Court found that Plaintiff's claims for breach of duty as bailee and conversion were preempted by the ADA, which contains the following preemption provision: "[A] State, a political subdivision of a state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1). The Court noted that preemption under the ADA depends on whether a claim "is based on a state-imposed obligation or simply one that the parties voluntarily undertook." Considering Plaintiff's claims, the Court concluded that these claims do not serve to protect the intentions of the parties or preserve their agreement, but rather, allege violations of "state-imposed obligations" that apply universally.

Accordingly, the Court found that these claims were preempted by the ADA, regardless of whether they arose from Michigan statutory or common law.

The Court also determined that the terms limiting the liability in the contracts to $100 for each shipment were unambiguous and enforceable, entitling Defendant to summary judgment. The Court found that when a shipper challenges an air carrier's contractual limitation of liability, federal common law governs. Sixth Circuit law requires courts to decide as a matter of law whether an air carrier's terms are enforceable via the "reasonable notice" test. The Court concluded that the airbills provide "conspicuous warnings" of Defendant's limited liability, and Plaintiff offered no evidence demonstrating Defendant behaved in a way to render the terms less clear.

Finally, the Court noted that the Carmack Amendment did not apply to this case because "there is significant precedent indicating that the Carmack Amendment simply does not apply to an air carrier such as FedEx." *Kemper Ins. Co. v. Federal Express Corp.*, 252 F.3d 509, 514 n. 5 (1st Cir. 2001).

Presenter: **Jeff Cox**

32. ***Heather James v. Day & Meyer***, 142 A.D.3d 842; 37 N.Y.S.3d 524; 2016 N.Y. App. Div. LEXIS 5996 (1st Dept. Sept. 22, 2016)

Facts: Plaintiff art dealer hired warehouseman Day & Meyer to receive ten Andy Warhol screen-prints valued at $1.4M from the 1967 "Marilyn Monroe" series and repack them for shipment to plaintiff's gallery. The framed prints arrived from Sotheby's at Day & Meyer's facility in an open bin with large cardboard separator sheets between each frame. All documents received by Day & Meyer referenced only the 10 prints as comprising the shipment. Per its usual practice, Day & Meyer discarded all paper packing material. One of the discarded pieces of cardboard was alleged to have been the serial-numbered portfolio box in which the collection was originally sold by Warhol. Very few Warhol print collections still have their original boxes. Plaintiff claims the original box had a discrete value of more than $200,000. Plaintiff settled its buyer's claim for the missing box for $175,000 and seeks indemnification from Day & Meyer.

Issue: Does plaintiff's gross negligence claim against Day & Meyer defeat its warehouse receipt $.30/lb. limitation of liability?

Holding: The NY Appellate Division upheld the NYUCC 7-204 requirement that a commercial goods owner must prove the warehouseman's actual conversion to its own use to void a contractual limitation of liability. Under NYUCC 7-204: (1) gross negligence is insufficient to void the warehouseman's limitation and (2) a bailee's conversion is no longer presumed from the unexplained disappearance of stored goods. The Appellate Division's ruling supersedes several reported NY trial court decisions holding that a bailee's gross negligence voids its limitation.

Presenter: **George Wright**

V. TIME LIMITATIONS

33. ***Skanes v. FedEx Ground System, Inc.***, 2016 WL 5661543 (M.D. Ala. Sept. 9, 2016) and 2016 WL 5660566 (Sept. 28, 2016)

Facts: Plaintiff Debra Skanes sued Federal Express Corporation and FedEx Ground Package System, Inc. asserting that, by delivering a shipment of legal papers (presumably to a court) five days late, defendants breached a fiduciary duty to her, causing her to suffer "financially, mentally, and emotionally" when her then-pending lawsuit was dismissed. In an earlier decision covered on our June 2016 agenda, FedEx Corporation was dismissed on the ground that it was not a party to the transportation contract; and the non-Carmack counts against FedEx Ground were dismissed as preempted. Before the Court in this decision was FedEx Ground's summary judgment motion on plaintiff's Carmack count.

Issue: Was the nine-month claim rule set forth in FedEx Ground's tariff binding on plaintiff in this action?

Holding: Yes. With the nine-month rule clearly stated in FedEx Ground's tariff and the tariff expressly incorporated into the order form signed by Ms. Skanes prior to transportation, the time-bar provision was found applicable to plaintiff's Carmack Amendment claim. Therefore, because she failed to file her delayed delivery claim with FedEx Ground within nine months of the package delivery date, judgment was entered in favor of defendant, denying plaintiff any recovery.

Presenter: **Heidi Roth**

34. ***Loves Express Trucking LLC v. Cent. Transp., LLC***, 2016 WL 4493674; 2016 U.S. Dist. LEXIS 114912 (E.D. Mich. Aug. 26, 2016)

Facts: Plaintiff Loves Express, a trucking company, purchased a new engine from Chicago Truck Parts to fix a tractor stranded at a truck stop in Illinois. Chicago Truck used its broker, Blue Grace, to arrange for transportation of the engine from Ohio to Illinois. Blue Grace retained defendant Central Transport to perform the transportation. Central issued a bill of lading acknowledging receipt of the engine and incorporating the NMFC and Central's rules tariff by name. The tariff contained a nine-month claim-filing time limit.

The engine arrived at the Illinois truck stop in damaged condition, following notice from Central to the broker that damage was discovered in transit. At delivery, Chicago Truck signed a receipt issued by Central, which incorporated the terms of the bill of lading. Chicago Truck attempted to report the damage to Central by phone. But, because Chicago Truck was not a direct customer of Central, Chicago Truck was told that it would have to go through the broker to submit the claim. Chicago Truck then reported the damage to Blue Grace, who

assured Chicago Truck that it submitted a claim to Central. But that was not true. Central never received a written claim for damage to the engine.

Plaintiff Loves filed an action against Central asserting a third party beneficiary claim based on the breach of contract between Central and Chicago Truck. Central removed the case to federal court, claiming that the claim was pre-empted by the Carmack Amendment, and filed a motion for summary judgment.

Issues: (1) Is Loves entitled to recover from the carrier, Central, under the bill of lading or receipt? (2) Is Central estopped from asserting the claim notice requirement because it had actual knowledge of the damage to the engine and allegedly did not allow Chicago Truck to file a notice of claim for damage?

Holding: Plaintiff is not entitled to recover under the receipt or the bill of lading. The court followed the holdings of prior cases that a party does not have standing to sue for damages under Carmack if the party is not a shipper, was not included in the bill of lading, did not possess the bill of lading, did not negotiate with the carrier, or was not a receiving party of the shipment. Here, plaintiff Loves was not a shipper or a consignee. Thus, summary judgment is appropriate.

The court further held that Loves has not successfully established that Central is estopped from asserting the nine-month claim rule as a defense to liability. Though Chicago Truck may have lied to Loves about having filed a claim, Central never received any written notice or a claim regarding the engine. Actual notice of the damage is not sufficient to satisfy the notice of claim requirement in the receipt or bill of lading. In the absence of proof that Central prevented the parties from filing a claim, the estoppel doctrine does not apply.

Presenter: **Dennis Kusturiss**

35. ***Heniff Transportation Systems v. Trimac Transportation Services, Inc.***, 2016 WL 5886915 (E.D. Tex. Mar. 17, 2016)

Facts: Huntsman Corporation retained motor carrier Heniff Transportation to move a load of chemicals from Texas to Lambent Technologies in Illinois. Heniff subcontracted to Trimac Transportation the job of sanitizing the trailer before the transportation began. The load was delivered to Lambent in a contaminated condition. Lambent submitted a claim to Heniff, who, along with its insurer, Hartford, paid the claim and obtained a release.

Heniff and Hartford then sued Trimac (not once, not twice, but three times) to recover $238,910.80 paid to Lambent. After disposing of the first two cases and Hartford's claim, Trimac moved for summary judgment against Heniff on the grounds that Heniff's state law claims were preempted by the Carmack Amendment and that the claim from Heniff was time-barred (received 14 months after delivery, i.e., outside the nine-month period required by Trimac's tariff terms).

Issue: Whether the state law claims against the carrier that did not transport the goods is preempted under Carmack; and whether the claims are barred by failure to comply with the nine-month claim rule.

Holding: The court granted Trimac's summary judgment motion, disposing of Heniff's complaint in its entirety. First, with little written analysis, the court ruled that Heniff's four state law claims were preempted by the Carmack Amendment because "in this transaction, Trimac acted as a motor carrier." The court then turned its attention to Heniff's Carmack apportionment count and Trimac's time-bar defense. Finding that the bill of lading between Heniff and shipper Huntsman incorporated all tariffs in effect on the date of the bill of lading, including Trimac's, and that Trimac's tariff included a nine-month claim-filing requirement, the court held that the claim from Heniff, submitted to Trimac 14 months after delivery, was not timely.

The court went on to state that, even if the initial letter from Hartford, received just ten months after delivery, had been submitted timely, it would not have constituted proper notice from Heniff because Hartford only asserted its claim for reimbursement of the mere $30K paid by Hartford (the balance of the $238K had been paid to Lambent by Heniff). A strict compliance approach is taken by the Fifth Circuit: "The burden lies on the claimant to 'say exactly what it seeks . . .'"

Presenter: **Eric Benton**

36. ***Lofthouse Manufacturing Ltd. v. Ports America Baltimore, Inc.***, 2016 WL 4662337; 2016 U.S. Dist. LEXIS 120388; 2016 A.M.C. 2540 (D. Md. Sept. 7, 2016)

Facts: Lofthouse and Brawo sued Ports America Baltimore, Inc. ("PAB") and Ports America Chesapeake, LLC ("PAC"), a Baltimore terminal operator, for $500,000 in damage to an electrical cabinet that was dropped while being transferred from a vessel to a Convoy Logistics flatbed truck for shipment to plaintiffs' facility in Canada. PAC had contracted with the National Shipping Company of Saudi Arabia ("NSCSA"), the carrier, to provide stevedoring and marine terminal services for cargo at the Port of Baltimore, but invoiced Convoy for delivering the cargo. PAB and PAC moved for dismissal/summary judgment, arguing that PAB had no involvement in the transfer and was not a proper party. PAC asserted that plaintiffs' claim was barred by COGSA's one-year statute of limitations; alternatively, PAC argued that damages were capped at $500. PAB's motion was granted and it was dismissed by the court.

Issue: Is PAC entitled to dismissal of or summary judgment on plaintiffs' claims based on COGSA's one-year limitation provision?

Holding: No. The court treated PAC's motion to dismiss as a summary judgment motion, and found there were genuine disputes that precluded summary judgment in its favor. COGSA's provisions cover "the period from the time when the goods are loaded on to the time when they are discharged from

the ship." Under the bill of lading, this time period was extended by the Harter Act to include prior to loading or from the time of discharge to the point of "proper delivery." The court found a genuine dispute about whether the bill of lading covered PAC's services at the time the cabinet was damaged, as there was a question as to whom PAC was acting for at the time in question and whether "delivery" had occurred. If PAC was operating on behalf of NSCSA during the loading process, it would be protected by COGSA's defenses; however, if it was operating on Convoy's behalf, delivery had likely already occurred when the cargo was damaged.

Presenter: **Colin Bell**

VI. VENUE

37. *Landstar Ranger, Inc., and Landstar Carrier Services v. Global Experience Specialists, Inc., d/b/a GES Logistics*, 2016 WL 3636941 (W.D.N.C. June 06, 2016)

Facts: Landstar paid a freight claim to shipper then sued GES for apportionment under 49 U.S.C. § 14706(b). GES filed a motion to transfer venue to the N.D. of Illinois because it did not transport the shipment in the W.D. of North Carolina, where delivery occurred and where suit was filed. GES made two arguments: (1) that venue in the W.D.N.C. is improper because, as a carrier other than the delivering carrier, it cannot be sued under the Carmack Amendment in any district where it operates but only in the district where it damaged or lost the goods at issue; and (2) that, even if venue is proper in the W.D.N.C., venue should be transferred to the N.D. Ill. Because of the convenience of parties and witnesses. The magistrate judge recommended that the motion to transfer venue be denied. GES then filed objections pursuant to 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(a). In the Order signed by the magistrate judge, he analyzed eleven (11) case specific factors and determined that the Defendant offered a cursory and incomplete analysis of how the factors applied in the present case, choosing only to address four or five. The Court found that the defendant did not meet its burden of showing that the foregoing factors favor transfer and was not persuaded that the Carmack Amendment required that the matter be transferred.

Issue: Whether Denial of Motion to Change Venue by the Magistrate's Court was proper.

Holding: The Court affirmed the magistrate judge. First, the Court held that the Carmack Amendment did not require that a non-delivering carrier be sued only in a district where the damage or loss occurred. Specifically, the Court held that the Carmack Amendment must be read as written when it is clear and unambiguous. The use of "may" in the statutory language is a permissive term, and thus it indicates that a court may use its discretion to grant or deny a defendant's motion to change venue under the Carmack Amendment. As to the

transfer based on the convenience of the parties and witnesses, the Court found that the eleven factors to be analyzed established, at most, that four factors weighed in favor of transfer. Accordingly, Defendant did not meet its burden of persuasion on the motion to transfer, and the motion was denied.

Presenter: **Fred Marcinak**

38. ***Tenkasi Viswanathan v. Moving USA Inc.***, 2016 WL 3267297 (D. Nev. June 7, 2016)

Facts: Shipper contracted with defendant Moving USA to transport household goods from North Carolina to Nevada. After numerous price increases, and after loss and damage to a substantial portion of the shipment, shipper sued Moving USA in Nevada state court under Carmack, negligence, fraud, and other state law claims. Defendant Moving USA removed the case to U.S. District Court in Nevada and filed a motion to transfer or dismiss for improper venue based on a forum selection clause in the shipping documents that stated that the parties "agree to submit to the personal jurisdiction and venue of a court of subject matter jurisdiction located in Broward County, State of Florida."

Issue: Does the permissive forum selection clause in the shipping documents warrant either transfer or dismissal?

Holding: The court stated that in order to be a mandatory venue provision, a forum selection clause must contain language that clearly designates the forum as an exclusive venue. The court held that the phrase "agreed to submit to" meant that both parties consented to jurisdiction and venue in Broward County, Florida, but such phrase did not exclude litigation in other courts. The motion to transfer or dismiss was denied.

Presenter: **Vic Henry**

39. ***Global Quality Foods, Inc. v. Van Hoekelen Greenhouses, Inc.***, 2016 WL 4259126; 2016 U.S. Dist. LEXIS 107121 (N.D. Cal. Aug. 12, 2016)

Facts: Global Quality Foods hired TQL to ship 25,000 pounds of swordfish from California to Massachusetts. TQL brokered the load to van Hoekelen for transport. Van Hoekelen delivered the fish three days late and in damaged condition, and Global Quality's buyer rejected the shipment. Global Quality sold the cargo to a third party at a reduced price and sued van Hoekelen under the Carmack Amendment in California federal court. Van Hoekelen impleaded TQL for indemnity and contribution. The contract between TQL and van Hoekelen included a forum-selection clause providing for exclusive jurisdiction and venue of any dispute in Ohio state court. TQL moved to dismiss van Hoekelen's complaint by invoking the Ohio venue clause. Van Hoekelen contended that FRCP 14, governing impleader claims, trumped the forum-selection clause and allowed the claim to be maintained in California. In support of its position, van

Hoekelen relied on *Am. Licorice Co. v. Total Sweeteners, Inc.*, 2014 WL 892409 (N.D. Cal. Mar. 4, 2014), which held that forum selection clauses cannot be invoked to dismiss or transfer third-party complaints.

Issue: Is TQL, as a third-party defendant, entitled to enforce the contractual venue clause with respect to van Hoekelen's impleader claims?

Holding: Yes. Although *Am. Licorice* supported van Hoekelen's position, the court disagreed with the holding, noting that other courts have held to the contrary. The court held that forum-selection clauses apply to Rule 14 impleader claims and, if enforceable under governing tests, a third-party complaint should be dismissed or transferred according to the parties' agreement. Here, van Hoekelen's claims fell within the scope of the contractual forum selection clause, and enforcement of the clause did not deprive van Hoekelen of its day in court as the claims between Global Quality and van Hoekelen did not require TQL to be in the suit as a third-party defendant. Moreover, application of the forum non conveniens factors did not disfavor enforcement of the forum-selection clause.

Presenter: **Kathy Garber**

40. ***Ponte Vedra Gifts v. APL***, 2016 WL 2854207 (M.D. Fla. May 16, 2016)

Facts: Shipper Ponte Vedra Gifts hired NVOCC APL Logistics to transport merchandise from China to Florida via ocean followed by truck. The goods arrived safely in Long Beach, California. A dispute arose between APL and the drayage carriers, who demanded more money to move the goods from California to Florida. APL declined to pay the extra money. As a result of the dispute, the goods were delayed in California. When the goods were delivered belatedly, the consignee rejected the shipment.

Shipper Ponte Vedra sued APL in Florida for deviation, fraud, and conversion, seeking unspecified damages. APL moved to dismiss based in part on a forum selection clause in the bill of lading that requires disputes over shipments to be adjudicated in the courts of Singapore or the Southern District of New York. Plaintiff Ponte Vedra contended that the case was properly filed in Florida pursuant to a forum selection clause in the parties' overall agreement that permitted referral of disputes to any court of competent jurisdiction.

Issue: Where should the lawsuit be adjudicated, in New York or Florida?

Holding: The case belongs in New York. The forum clause in the bill of lading rather than in the NVOCC Service Arrangement between the parties governs: "agreements like the NSA govern disputes related to pricing and volume of shipment, whereas bills of lading govern disputes over cargo damage, loss, or delay." The lawsuit was therefore transferred to New York.

Presenter: **Leslie McMurray**

41. ***Liberty Woods International, Inc. v. Motor Vessel Ocean Quartz***, -- F.Supp.3d --; 2016 WL 6645769; 2016 U.S. Dist. LEXIS 155428 (D.N.J. Nov. 9, 2016)

Facts: Plaintiff/consignee/owner of certain plywood freight sued the Defendant vessel *in rem* for damage to the cargo. Plaintiff initially also sued the vessel owner *in personam* and demanded a letter of undertaking in lieu of arresting the vessel. It was soon learned the vessel owner had chartered the vessel at the relevant time to Star Bulk Carrier, Co., S.A. and that in so doing the owner relinquished all control and responsibility for the vessel during the term of the charter (called "barefoot chartering"). The lawsuit therefore proceeded *in rem* against the vessel only. The vessel moved to dismiss on the basis of a forum selection clause in the bills of lading pointing to South Korea contained.

Issue: Is a forum selection clause in the bill of ladings enforceable in an *in rem* case under COGSA?

Holding: The Plaintiff opposed Defendant's motion to dismiss, taking the position that the forum selection clause is a contract of adhesion and is otherwise invalid under COGSA because South Korea does not recognize *in rem* actions. The Defendant vessel claimed that the overwhelming weight of case law points in favor of enforcing the forum selection clause and that Plaintiff can only point to a few outlier cases.

The Court, focusing on Fireman's Fund Ins. Co. v. M.V. DSR Atlantic, 131 F.3d 1336 (9th Cir. 1998), cert. denied, 525 U.S. 921, 119 S. Ct. 275, 142 L. Ed. 2d 227 (1998), sided with the vessel. In Fireman's Fund, the Northern District of California refused to enforce a forum selection clause and thus refused to dismiss an *in rem* action in favor of venue in Korea. The United States Court of Appeals for the Ninth Circuit reversed and enforced the forum selection clause because:

> (1) there was no proof litigation in South Korea was unreasonable or seriously inconvenient;
>
> (2) the forum selection clause was not in contravention of a strong public policy, i.e., the inability to proceed *in rem* in South Korea was not sufficient to invalidate a forum selection clause;
>
> (3) the forum selection clause was enforceable although the bills of lading could have qualified as adhesion contracts; and
>
> (4) the forum selection clause did not violate COGSA (among other things, COGSA prohibits contracts "lessening . . . liability," but Korean law was at least as favorable as COGSA even without recognizing an action *in rem*).

Plaintiff tried to attack the reasoning of Fireman's Fund asserting it was based on unsound law and that the forum selection clause cannot be enforced because *in rem* jurisdiction is a critical element of jurisprudence of ocean carriage.

Nevertheless, the Court agreed with the Ninth Circuit's analysis in Fireman's Fund and enforced the forum selection clause in the bills of lading for the same reasons cited by the Ninth Circuit.

Presenter: **Bill Taylor**

VII. OTHER PROCEDURAL ISSUES

42. *Allianz Global Risks U.S. Ins. v. Kutzler Express, Inc.*, 2016 WL 6108774 (E.D. Wis. Oct. 19, 2016)

Facts: This is a decision on a discovery dispute stemming from an ongoing case arising from the theft of load of T-Mobile prepaid cellular phones while being moved by tractor-trailer by Defendant Kutzler Express, Inc. from Indiana to Illinois. This case was previously part of the Toronto agenda where it was reported that Plaintiffs' motion for summary judgment that sought a finding that an NMFC limitation of liability contained in the Bill of Lading could not be enforced against Plaintiffs was denied. At issue was whether the Bill of Lading, which contained an NMFC classification limiting the load of cellular phones, valued at $212,861.55 was enforceable against the Plaintiff and its insured, NFI Industries, Inc. which brokered the load to Kutzler. In the previous decision, reported at 2016 U.S. Dist. LEXIS 67257 (E.D. 2016), the Court found that NFI "issued" the Bill of Lading and that therefore, there was an issue of fact whether the NMFC classification stated in the Bill of Lading, potentially limiting Kutzler's liability to $3.00/pound is enforceable against the shipper, even though Kutzler is not a member of the NMFC. The limitation would render Kutzler's liability $15,678.00. The Court held (citing Siren) that as an industry known classification/limitation, there was an issue of fact whether it binds NFI (and its subrogated insurer) as the "shipper" or shipper's agent that "issued" the Bill of Lading. The Court further observed that unauthorized use or incorporation of the NMFC into the Bill of Lading is not material to whether the limitation could be enforced against NFI.

Prior to the issuance of the Court's opinion denying Plaintiffs' summary judgment motion, Kutzler had issued Requests to Admit Facts and the Genuineness of Documents to lay a foundation for the Bill of Lading and further to request NFI's admission that it "issued" the Master Bill of Lading under which the cellular phones were shipped. After the Court's order denied summary judgment, the Plaintiffs answered the requests, admitting that NFI "issued" the Bill of Lading, in line with the Court's previous finding. However, NFI's Rule 30(b)(6) witness subsequently testified that NFI did not "issue" the Bill of Lading, but that it was rather "issued" by T-Mobile (albeit using directives issued by the shipper – Target Corporation to include NMFC classifications). Thereafter, Plaintiffs filed a Motion to Withdraw their Admissions and to file Amended Responses denying the admission as to the "issuance" of the Bill of Lading.

Issue: Whether Plaintiffs were allowed to withdraw their admission to "issuing" the Bill of Lading to conform with the testimony of NFI's Rule 30(b)(6) witness and, if so, whether the change from the admission to a denial would bear on the ultimate issue of whether the limitation NMFC limitation may be enforced against the Plaintiffs.

Holding: Citing Rule 36 (and its advisory committee notes) the Court observed that withdrawal or amendment of a response to a Request to Admit is appropriate to promote the presentation of the merits of the action and if it would not prejudice the requesting party. The Court also accepted the Plaintiffs' contention that it mistakenly thought that the request merely sought that Plaintiffs authenticate the Bill of Lading. Additionally, the Court noted that the request to withdraw and amend was made more than a month prior to the deadline for parties to file dispositive motions and that, therefore, the amendment would not prejudice Kutzler. Accordingly, the Court held that Plaintiffs could amend their response to deny that NFI "issued" the Bill of Lading. Notwithstanding the Court's earlier finding that NFI issued the Bill of Lading, the Court commented that allowing Plaintiffs to deny "issuance" of the Bill of Lading does not bear on the ultimate issue regarding the enforcement of the limitation at issue because enforcement may come down to other facts, such as which entity actually drafted Bill of Lading or directed the insertion of the NMFC classification into the Bill of Lading. The Court observed that these remain questions for a jury to decide.

In any event, subsequent to the Court's issuance of the Order allowing the amendment, Plaintiffs and Kutzler filed cross-motions for summary judgment relative to the enforcement of the NMFC classification/limitation as additional discovery completed suggested that the issue may be decided as a matter of law. Presently the parties await ruling on the cross motions for summary judgment and trial is set for January 30, 2017.

Presenter: **Jim Wescoe**

43. ***Moule v. UPS***, 2016 WL 3648961 (E.D. Cal. July 7, 2016)

Facts: Instead of carrying his precious Synthesized Generator Model #HP8673D to Hawaii himself and vacationing at the same time, Plaintiff entrusted a sensitive piece of equipment valued over $27,000 to UPS for a shipping price of $528. He packaged the equipment himself in lots of bubble wrap and warning stickers and even a device designed to detect rough handling in transit. When the package arrived in Hawaii, it was not wearing a lei; instead, it arrived crushed, taped together, and the 75G Shock Watch indicated that it had been mishandled. Plaintiff made a claim against UPS and heard nothing until he retained counsel, whereafter UPS denied the claim.

Issue: Whether Plaintiff's claim should be compelled to arbitration pursuant to the arbitration provision contained in the UPS Terms applicable to transactions over either the UPS WorldShip program or the UPS website and,

more importantly, whether a Carmack Amendment claim could be compelled to arbitration.

Holding: The court held that, no matter how the plaintiff interacted with UPS, the interaction was in the manner of a modified clickwrap agreement wherein the plaintiff had confirmed acceptance of the UPS Terms. After analyzing the procedural and substantive unconscionability of the arbitration agreement, the court determined that the broadly worded agreement encompassed Carmack Amendment claims without specifically referencing such federal law (as opposed to some employment statutes) because, given the preemptive reach of the Carmack Amendment, to have required specific reference would have been redundant.

Presenter: **Miles Kavaller**

44. ***Zurich Insurance Co. v. Crowley Latin America Services LLC***, 2016 WL 7377047 (S.D.N.Y. Dec. 20, 2016)

Facts: Adidas consigned 574 boxes of clothing to defendant Crowley for transportation from Honduras to Indiana via the port of Gulfport, Mississippi. Crowley engaged a motor carrier to take the goods from Gulfport to Indiana. While in transit from Gulfport to Indiana, Adidas' clothing was damaged by fire aboard the truck. As Adidas' insurer, Zurich paid for the loss. As equitable subrogee, Zurich seeks reimbursement from Crowley based on Crowley's alleged negligence in causing the damage.

The agreement between Adidas and Crowley contains a clause requiring the parties to submit any dispute arising from the contract to arbitration in New York City. While the agreement permits Crowley to subcontract its duties, it makes clear that Crowley remains "fully liable for the due performance of its obligations under this contract." The agreement also provides that Crowley's liability for cargo loss is governed by COGSA.

Zurich filed a petition with the federal court in New York to compel arbitration with Crowley pursuant to the Federal Arbitration Act ("FAA"). In response, Crowley moved for dismissal of the petition.

Issue: Is Zurich barred from enforcing the contractual arbitration provision by state insurance law, the doctrine of laches and/or the contract's provision barring enforcement by third parties?

Holding: No. None of Crowley's attempts to keep the dispute out of arbitration held water with the court. First, the insurance law that prohibits subrograted claims against the insured of an insolvent insurer is not applicable because, though one of Crowley's insurers is insolvent, at least one other is not. Hence, application of the FAA does not contravene state insurance law. Second, whether the laches doctrine serves as a defense against enforcement of an arbitration agreement is an issue for the arbitrator to decide. So, the court

deferred to the arbitrator to decide whether the defense is appropriate. Finally, the provision in the agreement that purports to bar third parties from enforcing the contract's provisions does not bar Zurich from proceeding in the shoes of its insured, Adidas, a party to the agreement. Accordingly, Zurich's petition to compel arbitration was granted and Crowley's motion to dismiss was denied.

Presenter: **Gordon Hearn**

VIII. INTERMEDIARY LIABILITY

45. *Zumba Fitness v. ABF Logistics, Inc.*, 2016 WL 4544355 (W.D. Ark. Aug. 30, 2016)

Facts: Zumba needed to move workout clothes and videos from its base in Hallandale Beach, Florida to Orlando for a convention and trade show. In collaboration with Ozburn-Hessey Logistics, LLC, Zumba hired ABF Logistics to arrange for the transportation of multiple trailer loads of Zumba goods. ABF Logistics in turn retained Oliva Delivery Corp. and Gemcap Trucking. ABF Logistics is part of a large transportation family that includes ABF Freight Services, Inc. and ABF Multimodal, Inc., among others. When Oliva advised that it did not have a truck for one of the trailers, ABF Logistics retained Quick Cool. The driver for Quick Cool was neither quick nor cool; his truck was stolen after he parked it where he should not have. Zumba made a claim against ABF Logistics for $464,874.94, which was denied by ABF Freight (the cargo claim processing agent for ABF Logistics), citing the $5.00 per pound/$100,000 per trailer limitation of liability. Zumba filed suit, seeking declaratory relief under the bill of lading and asserting claims for breach of contract and negligence against ABF Logistics and Quick Cool. Identifying that the question of the applicability of the Carmack Amendment would be a significant issue, the court invited motions on that issue.

Issue: Whether ABF Logistics was a broker, motor carrier, or freight forwarder for purposes of liability.

Holding: Analyzing the written record between the two companies, their actual conduct, and the representations made by ABF Logistics to the larger public, the court held that ABF Logistics was a broker not subject to Carmack liability.

Presenter: **David Schneider**

46. *Tryg Insurance a/s/o Toms Confectionery v. C.H. Robinson and National Refrigerated Trucking*, 15-cv-05343 (D.N.J. Nov. 22, 2016)

Facts: Plaintiff Toms Confectionery Group filed a Complaint against C.H. Robinson in the Federal Court in Trenton, New Jersey, alleging that CHR acted as a motor carrier, and not a broker, in arranging for the transport of chocolate from Pennsylvania to New Jersey. It was also alleged that the motor carrier, National Refrigerated Trucking who handled the transport as a subcontractor

was also responsible for damages in the amount of $124,034 as NRT's reefer unit failed.

Assured Packaging prepared the bill of lading and listed CHR as the carrier at the top and NRT as the carrier who signed as such at the bottom of the bill of lading. CHR's website lists them as a non-asset based transportation provider, meaning that they own no equipment to transport a customer's freight and they hire transportation providers for the delivery of cargo.

NRT, although sued as co-defendant, is of course out of business. CHR did not issue its own bill of lading and had no master contract with Toms, for whom they brokered 150 loads in a 7-year period.

Toms' customer service representative in Denmark, during his telephone deposition with the assistance of an interpreter (although he spoke perfect English), testified that he was never told that CHR was only a broker and had he known this, he would not have done business with them. There were no prior claims for damage during this 7-year period. The invoice to Toms stated that CHR was an agent for the customer and engages others to transport the chocolates.

CHR moved for summary judgment alleging that it was only a broker and not liable.

Issue: Can CHR avoid Carmack liability on the ground that it served only as a broker with respect to the shipment?

Holding: Per Barry Gutterman: "Judge Shipp requested oral argument, which was a sham as he asked me one question, one question to plaintiff's counsel, and then ten minutes later issued this Order which, fortunately, will not be a written opinion." The bench trial will proceed in March 2017.

Presenter: **Barry Gutterman**

47. ***National Union Fire Insurance Company of Pittsburgh v. All American Freight, Inc.***, -- F.Supp.3d --; 2016 WL 3787638 (S.D. Fla. July 7, 2016)

Facts: This is a follow-up to the previous decisions addressed on the June 2016 agenda.

Plaintiff National Union, as subrogee of plaintiff/shipper Coex Coffee International, filed a Carmack suit against a licensed transportation broker (Hartley Transport), a related licensed carrier (Hartley Freight) and the carrier retained by Hartley Transport (All American Freight) for the loss of 320 bags of green coffee en route from Miami to Houston. After Hartley Freight was dismissed from the case through summary judgment on the ground that plaintiff had no evidence to show that Hartley Freight was involved in any way with the shipment, the case was tried to a jury. Judgment was entered in favor of plaintiff

and against both Hartley Transport, the broker, who was found to have operated as a carrier of the cargo, and All American. Hartley Transport subsequently filed a Motion for Judgment as a Matter of Law, Motion for Relief from Judgment or, alternatively, Motion for a New Trial.

Issues: Before the court on the motion were Hartley Transport's claims that (1) plaintiffs failed to prove a prima facie case of liability under Carmack; and (2) as a matter of law, Hartley acted as a broker and not a carrier in the transaction.

Holding: The court denied the motion in its entirety. The court considered whether the jury's verdict against Hartley was against the "greater - not just the great - weight of the evidence," such that the verdict constituted a "miscarriage of justice;" and found that the facts as presented do not support such a conclusion. Evidence was presented at trial establishing that Hartley held itself out as a carrier through its website, all forms utilized to conduct business, an email exchange between Hartley and Coex regarding the transaction and its failure to notify Coex of All American's involvement in the transportation. Moreover, the jury's finding that Hartley was liable as a carrier under Carmack was supported by precedent in the Eleventh Circuit.

In addition, the jury's finding that plaintiffs established a prima facie case under Carmack was supported by the applicable facts and law. The good condition at origin element requires a less stringent standard of proof in unsealed container situations than in sealed container cases, simply requiring a "'recitation of good condition and contents of the bill of lading' for evidentiary purposes given that contents are readily visible and confirmable at the time of shipment." The court confirmed that the evidence introduced at trial regarding the handling of the coffee at origin was sufficient to establish cargo content and condition, supporting a finding that plaintiffs had satisfactorily established a prima facie case of liability.

The court therefore declined to disturb the jury's verdict against Hartley, holding that a new trial was not warranted.

Presenter: **Bob Rothstein**

48. ***New York Marine & Gen. Ins. Co. v. Estes Express Lines***, 2016 U.S. Dist. LEXIS 171676 (S.D. Cal Oct. 25, 2016)

Facts: This action arises out of damage to a shipment of batteries owned by XPO Logistics' customer, Transpower USA. Transpower hired XPO to arrange for the shipment of the batteries. Plaintiff New York Marine and General Insurance Company insured the cargo of batteries that had a wholesale value in excess of $100,000 and a declared value of $100,000. XPO retained defendant Exfreight Zeta to move the Cargo from Poway, California to its intended destination in New Jersey. The cargo was transported cross country by defendant Estes Express. Pursuant to the terms of the bill of lading, Transpower tendered the shipment directly to Estes. Damage was discovered upon delivery. N.Y. Marine paid

Transpower $84,511.23 for the damage to the Cargo on XPO's behalf and became subrogated to XPO and Transpower's rights and interests in the cargo.

N.Y. Marine then filed suit against defendants Estes and Zeta alleging violations of the Carmack Amendment and negligence. Both defendants filed summary judgment motions, Estes on the basis of the nine-month claim rule and Zeta on a "we were just the broker" basis.

Issues: (1) Is Zeta, who never had possession of the shipment, liable for the cargo damage under either Carmack or the negligence count? (2) Is NY Marine time-barred from pursuing Estes through failure to timely submit an adequate claim for damage?

Holding: Plaintiff NY Marine struck out as against both defendants, with judgment entered in favor of Estes and Zeta and the case closed.

With plaintiff having failed to file an opposition to Zeta's motion and having alleged that Zeta hired Estes to transport the cargo, the court accepted Zeta's representation that it acted as a broker and not a carrier with respect to the shipment. Zeta can therefore not be held liable under Carmack. Turning to the negligence count, the court recognized case precedent holding that a broker's only duty imposed by law is to arrange transportation with a reputable carrier. With no evidence presented by NY Marine that Estes was an unfit carrier, no liability attaches under a negligence theory either.

Estes similarly prevailed on its nine-month claim rule defense. The parties agreed that, pursuant to the tariff agreement and bill of lading, the shipper had to file a claim in writing within nine months of the deliver as a condition precedent to filing suit for loss or damage. The dispute was whether the purported claim submitted to Estes constitutes a legally-compliant claim. The court found that the submission, which notified Estes that the crates arrived damaged (but not that the contents were damaged) and which stated that the amount of damage was unknown, did not satisfy the requirements for a valid claim. Plaintiff was therefore barred from recovering damages from Estes.

Presenter: **Wes Chused**

49. ***Edelbrock v. TT of Naples, Inc.***, 2016 WL 4157426; 2016 U.S. Dist. LEXIS 103195 (M.D. Fla. Aug. 5, 2016)

Facts: Plaintiff Edelbrock arranged with an agent/employee of TT of Naples to have his Aston Martin vehicle transported from a dealership in Naples, Florida to a dealership in Troy, Michigan. Plaintiff tendered the vehicle to Defendant TT of Naples who, unbeknownst to Plaintiff, executed a bill of lading to Defendant Gulf Coast Auto Services, LLC to transport the car. During the transport, the carrier was involved in an accident causing $27,688.71 in repair damages, and approximately $30,000 in loss of value.

In the Plaintiff's amended complaint he alleged that Defendant TT of Naples should assume liability under the Carmack Amendment. Defendant disagrees and said it is not liable under Carmack because it is not a freight forwarder but instead a broker; and filed a Motion to Dismiss.

Alternatively, Plaintiff argues that Defendant is liable based upon a supplemental state negligence claim because defendant breached a duty to ensure that his Aston Martin would be transported in a reasonable manner, in accordance with the standards of care used by similar professionals in the industries under similar circumstances.

Issue: If Defendant cannot be held liable under the Carmack Amendment, can defendant be found liable based upon a supplemental state negligence claim?

Holding: Even if it is found that the Carmack Amendment does not apply to Defendant, because he is considered to be a broker, the Defendant may be held liable for the alleged supplemental negligent conduct. Plaintiff pled sufficient facts in the amended complaint to survive dismissal.

Presenter: **Beata Shapiro**

IX. FAAAA/ADA PREEMPTION – CARGO CLAIMS

50. ***Blanco v. Federal Express Corporation***, 2016 WL 4921437 (W.D. Okla. Sept. 15, 2016)

Facts: Plaintiff sued Defendant Federal Express Corporation d/b/a FedEx Express in state court for negligent investigation, and Defendants Justin Digby and Matthew Wainer for conversion of a package containing gold bars and coins shipped via FedEx. After Plaintiff's package did not reach its destination, FedEx allegedly failed to fully investigate and Plaintiff contacted the Secret Service, which did its own investigation. As a result of the Secret Service investigation, Digby admitted guilt and was convicted for theft of the package, and Wainer was alleged to be his accomplice. Defendant FedEx removed this case to federal court.

Issue: Whether the Court has subject matter jurisdiction, specifically federal question jurisdiction, over a claim for lost or stolen goods transported by a common air carrier.

Holding: The Court first determined that removal was proper on the basis of diversity jurisdiction, finding that the pleaded amount in controversy was in excess of $75,000, and the citizenship of all parties was diverse. The Court also found that removal was likewise proper on the basis of federal question jurisdiction. In considering the "narrow" issue of whether a claim for lost or stolen goods transported by a common air carrier was subject to federal question jurisdiction by preemption of federal common law, the Court relied on the Fifth

Circuit's holding in *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928-29 (5th Cir. 1997), in which the Court reasoned that because Congress did not clearly and explicitly repeal federal common law when deregulating airlines that Congress intended to retain the common law. The Court found that "the savings clause had the effect of preserving the clearly established federal common law cause of action against air carriers for lost shipments." Relying on this precedent, the Court found that causes of action for lost shipments have been found to be preempted by federal common law by several circuit courts, making federal question jurisdiction appropriate. The Court determined that federal question jurisdiction was appropriate, and that stolen shipments should be governed by the same law. The Court also found that it had supplemental jurisdiction over the claims asserted against Rigby and Wainer.

Presenter: **John Fiorilla**

51. ***ADD Enterprises, Inc. v. Kool Pak, LLC***, CV 16-1945-RSWL-RAOx (C.D. Cal. July 28, 2016)

Facts: Plaintiffs ADD Enterprises and Manning's Beef, LLC filed suit against Kool Pak, LLC, Kool Pak Logistics, LLC, Armando Salcedo dba Salcedo Transportation and Jorge Salcedo to recover an unspecified amount for damage allegedly suffered to two shipments of "slaughtered beef." The amended complaint made clear that the Kool Pak defendants brokered one of the loads and "assigned" the other load to a carrier for transportation. The Kool Pak defendants performed services for plaintiffs pursuant to the terms of executed Applications for Credit, which contain express forum selection clauses requiring that any suits be brought in Multnomah County, Oregon.

Kool Pak moved to transfer the case to Oregon; and, as a fallback, asked that the state law counts against both Kool Pak entities other than breach of contract be dismissed as preempted by the FAAAA. Plaintiffs' late opposition was rejected by the court.

Issues: (1) Is transfer proper based on the forum selection clause in the credit applications? (2) Are plaintiffs' negligence, bad faith and negligent interference causes of action against the broker defendants preempted by the FAAAA and therefore subject to dismissal?

Holding: Kool Pak's only victory on its alternative motion was to bar plaintiffs from submitting an opposition after the applicable deadline. Notwithstanding the lack of opposition, the court ruled against Kool Pak on both requests for relief.

Though acknowledging that the credit applications contain forum-selection clauses, "it is clear from the face of the Complaint that the Bill of Lading, is the relevant contract by which Plaintiffs contracted with Kool Pak Defendants for the transport of Plaintiffs' slaughtered beef to their customer" and not the credit applications. Because the bill of lading does not contain a forum-selection

clause, the court engaged in an analysis of the judicially-recognized factors for transfer under 28 U.S.C. § 1404. Finding that the factors weigh against transfer or are neutral, the court denied Kool Pak's motion to transfer the case to Oregon.

Turning to the FAAAA preemption argument, the court identified the issue as whether plaintiffs' non-contract claims are sufficiently related to Kool Pak's prices, routes, or services to be preempted; and stated that it cannot determine whether FAAAA preemption applies at this stage in the proceedings. "Additional arguments, and most likely additional evidence, is necessary to determine whether the effects of laws enforcing a duty of care and duty of good faith and fair dealing are more than tenuous on Kool Pak Defendants' 'prices, routes, or services.'" The motion to dismiss was therefore also denied.

Presenter: **Kevin Anderson**

X. FREIGHT CHARGES

52. ***Gordon Companies, Inc. v. Federal Express Corporation,*** 2016 WL 5409141 (W.D.N.Y. Sep. 2, 2016) and 2016 WL 5395493 (W.D.N.Y. Sep. 27, 2016)

Facts: Plaintiff Gordon Companies, an internet retail seller, used the services of the FedEx defendants to deliver packaged merchandise, using software provided by FedEx to enter delivery information. In 2011, the parties entered into a pricing agreement for FedEx's new SmartPost service, pursuant to which Gordon was purportedly entitled to receive discounts on shipments that qualified for the program. The software modification for the SmartPost program, though, was never installed in Gordon's system. When questioned about that, FedEx's agent assigned to Gordon's account stated that he had investigated the SmartPost program and determined that, with all the other discounts plaintiff was receiving, and after considering what plaintiff was doing in terms of its shipments, there would be no savings through the SmartPost program.

Plaintiff's Second Amended Complaint states two causes of action: (1) breach of the SmartPost agreement (asserting that Gordon made in excess of 500,000 shipments with FedEx that qualified for the SmartPost discounts under the agreement, but never received the discounts to which it was entitled); and negligent misrepresentation (claiming that the agent's statement that plaintiff would not benefit from the SmartPost program was untrue, and that plaintiff relied upon the misrepresentation in deciding not to demand that the SmartPost software be installed). Plaintiff Gordon seeks to recover $2,000,000 under each of its causes of action. On defendants' initial motion to dismiss, the misrepresentation count was dismissed. The FedEx defendants subsequently renewed its motion to dismiss the breach of contract count.

Issues: Whether plaintiff has satisfactorily alleged compliance with the applicable notice requirements sufficient to state a cause of action for breach of contract; and whether plaintiff's overcharge claim is preempted by the Carmack

Amendment.

Holding: The Magistrate Judge issued a report, recommending denial of defendant's motion to dismiss on both asserted grounds; and the district judge adopted that recommendation.

Defendants argued that plaintiff failed to allege that it complied with all of the notice and claim period requirements contained in the FedEx Service Guide. However, FRCP Rule 9 permits a plaintiff to generally allege that all conditions precedent have been met; and FedEx cannot impose stricter pleading requirements through its Service Guide. Therefore, though it remains to be seen whether Gordon can prove that all notice requirements have been satisfied, for pleading purposes, the allegations in the second amended complaint suffice to state a cause of action for breach of contract.

Furthermore, because the case does not involve any allegations of loss or damage to freight, but simply overcharge claims, the claims are not preempted by the Carmack Amendment.

Presenter: **Paul Mello**

53. ***Gotham Distributing Corp. v. United Parcel Service Co., Inc.,*** 2016 WL 4039642 (E.D. Penn. July 27, 2016)

Facts: Plaintiff Gotham, one of the largest music and movie mail-order companies in the US, sued two UPS entities, claiming, through breach of contract, unjust enrichment and misrepresentation counts, that UPS overcharged for the services performed. The parties had entered an agreement whereby UPS would charge Gotham based on package measurements and shipping classifications. All went according to plan for a period of time until defendants began reclassifying some of defendant's shipments and charging a higher rate without prior notice to Gotham.

Issues: Defendants' summary judgment motion raised issues regarding, among others, parent liability, application of the voluntary payment doctrine and a contractual time bar to plaintiff's overcharge claims.

Holding: The court denied defendants' motion in its entirety. With confusion between the identity and participation of the various UPS entities evident from the parties' communications, defendants failed to establish that the purportedly parent company had no involvement in the transactions and should therefore be dismissed.

When a plaintiff fails to discover an overcharge based on a misrepresentation by the defendant, the voluntary payment doctrine recognized in Pennsylvania (providing that, when one pays money to another without fraud or duress, it cannot later recover that money) does not apply. Finding that UPS' change of shipment classifications from those indicated by Gotham constituted a

misrepresentation, the court declined to apply the voluntary payment doctrine to relieve the defendants of liability.

The UPS defendants had no greater luck in enforcing the 180-day claim notice requirement in the shipment control forms. Though contractual suit limitations are generally recognized under Pennsylvania law, a factual dispute regarding the validity of the signatures on the shipment forms precluded entry of judgment on that issue as well.

Presenter: **Kevin Andris**

54. ***Midwest Direct Logistics, Inc. v. Twin Cities Tanning Waterloo, LLC***, 2016 WL 4014680 (N.D. Iowa July 26, 2016)

Facts: Midwest is a transportation intermediary and Defendant TCTW was a contract tanner who processed raw hides. Kraft Foods, Inc. purchased truckloads of animal hide trimmings through a purchasing service, Atlantic Trading Corporation). TCTW would contact Atlantic and tell them a shipment was ready and Atlantic would then contact Midwest and arrange for shipment from TCTW to Kraft. TCTW would prepare bills of lading, but would never sign them. Midwest paid the third party trucking companies and would invoice Atlantic. The price of freight was negotiated solely between Atlantic and Midwest, and TCTW never participated in shipping arrangements or negotiating price. The bills of lading had a Section 7 which was never executed. Atlantic did not pay for 27 shipments. Only after Midwest saw that Section 7 of the bills of lading had not been signed by TCTW did it sue TCTW. Both parties filed motions for summary judgment.

Issue: Whether the shipper is also jointly liable for the freight charges.

Holdings: Midwest argued that because TCTW issued bills of lading without signing the non-recourse provision it created an express contract and assumed liability for the freight charges. TCTW argued that it was not the shipper and Midwest was not the carrier, that the bills of lading functioned only as receipts, that it had no interest in the freight, that the parties agreed that Atlantic would be solely liable for the cost of freight, and that Midwest was equitably estopped. As to all of the issues the Court found that there were material questions of fact and that summary judgment was inappropriate for either party. However, it did hold that the third party trucking companies were acting as the broker's agent; that because TCTW failed to endorse the non-recourse provision of the bills of lading it would be treated as presumptively liable for freight charges for the purposes of summary disposition; that the fact that TCTW drafted the bills of lading allowed the inference of a contract; and that a genuine dispute exists regarding whether Atlantic and Midwest had agreed that Atlantic would be solely liable for the shipments. Finally, the Court noted that once evidence rebutting the presumption of liability of the bills of lading is presented, the bills ceased to operate as agreements allocating liability, however, whether the bills of lading operated as a receipt is a question of fact.

Presenter: **Dirk Beckwith**

55. ***Dawn J. Bennett Holding, LLC v. FedEx TechConnect, Inc.***, -- F.Supp.3d --; 2016 WL 6602625 (Dist. D.C. Nov. 8, 2016)

Facts: Dawn J. Bennett Holding, LLC was a seller of sporting goods and apparel who sued FedEx TechConnect, Inc. ("FTI") for breach of contract and fraud after FTI allegedly improperly applied discount rates under a pricing agreement. The pricing agreement incorporated FedEx service guides which had a one-year contractual statute of limitations for "any cause of action arising from the transportation" and an 18-month statute of limitations for overcharges. In January of 2014, Plaintiff and FTI discussed the discounts, and Plaintiff began to withhold payments. On February 25, 2015, FTI filed suit to collect the unpaid fees; however, Plaintiff waited until June 6, 2016 to file its own action which was removed. FTI then moved to dismiss, citing res judicata, failure to comply with the pricing agreements' notice requirement, contractual statute of limitations, preemption of the fraud claim by Federal law and failure to allege breach of contract or fraud with particularity. Plaintiff opposed the motion but did not address the arguments about the contractual statute of limitations, preemption, or the failure of the complaint to state a claim.

Issue: Whether Plaintiff's claims were barred by the contractual statute of limitation.

Holding: The Court first ruled that Plaintiff had conceded the arguments that it failed to address in its opposition brief to FTI's motion to dismiss (Plaintiff did address the res judicata and contractual notice issues); and noted that each of these conceded arguments could form an independent basis to grant Defendant's motion to dismiss. The Court specifically discussed the statute of limitations, noting parties may shorten the statute of limitations by contract and held that FTI had done so in the service guides. Plaintiff's complaint asked for an accounting from April 2012 through March 2014; the complaint filed in June of 2016 was 22 months after March, 2014 and exceeded both of the contractual limitation periods. The Court held that the complaint was in fact time-barred and granted FTI's motion to dismiss.

Additional Information: Plaintiff was apparently a subsidiary of Dawn J. Bennett, a financial manager and cable television host who was suspended and fined by the SEC and has been sued by FINRA, those financial misdeeds being the subject of a recent December 16, 2016 Fourth Circuit Court of Appeals opinion.

Presenter: **Mike Tauscher**

56. ***Kelowna Flightcraft Air Charter Ltd. v. Kales Airline Services BV et al.***, 2016 ONSC8015 (Sup. Ct. of Justice, Ontario Dec. 20, 2016)

Facts: This is a case where an air freight broker group, Kales Airline

Services BV Et al., the defendant Broker, was sued by an air carrier, Kelowna Flightcraft Air Charter Ltd. for refusing to pay monies collected from customers for goods that had been shipped by the Air Carrier. In Ontario, monies owed to truck carriers are deemed by legislation to be trust funds. However, while the Air Carrier sought to implement this protection into its contract with the Broker -- it failed. This case teaches what provisions *must* be in a contract to protect air carriers from unscrupulous brokers who collect monies from customers, but refuse to pay.

The Air Carrier sought to compel the Broker to pay EURO 732,376.00 into Court prior to trial. The Broker is part of an air freight group which brokered international air freight pursuant to a General Sales Agreement (GSA) with the Air Carrier. The Air Carrier notified the Broker it would be terminating its air cargo service. The Broker then refused to pay the cargo sales revenues for goods already shipped; importantly, the Broker admitted in its defence and counterclaim that it was holding those cargo sales revenues as a set-off to $6 million in alleged damages sought for counterclaims alleged against the Air Carrier.

Issue: Where the contract fails to identify funds owing to an air carrier as being trust funds, does the admission by the Broker that it holds cargo sales revenues as set-off for alleged damages create a fund, equivalent to a trust fund, so that the carrier can successfully compel the funds be paid into Court pending the trial of the action?

Holding: No: Although the GSA did require the Broker to pay the Air Carrier regardless whether the customers had paid, the GSA failed to provide that the funds owed were to be held in trust, and failed to stipulate that the Air Carrier was entitled to specific funds. Therefore, the admission by the Broker that it had collected monies from customers but failed to pay those monies to the Air Carrier did not create a pre-trial right to the monies; instead, such monies are simply damages to be sought at trial.

Therefore, to protect a carrier generally one should include the following provisions in a contract:

1. The broker is required to pay the carrier regardless of whether the customer has paid;
2. Where a customer pays a broker that payment is to be treated as trust funds regardless whether it is paid in advance or after the goods have shipped;
    a. the broker shall act as Trustee, providing an accounting to the Beneficiary (carrier) including maintaining said funds in a separate trust account; and
3. The broker shall not have the right of set-off against the funds being held in trust.

Presenter: **Heather Devine**

57. ***Drive Logistics Ltd v. PBP Logistics LLC***, 2016 WL 3913709; 2016 US Dist. LEXIS 94393 (E.D. Mich. July 20, 2016)

Facts: This is a typical "double payment" situation (shipper pays broker who does not pay carrier and carrier seeks payment from shipper). The shipper, Lear Corporation, used a transportation broker, Ryder Integrated Logistics, who engaged broker PBP Logistics to transport or arrange the transportation of Lear's goods. In turn, PBP hired Drive Logistics, a Canada-based carrier, to transport Lear's goods. PBP and Drive signed a contract stating that Drive would be paid by PBP only, and that Drive is not to invoice any shipper, consignee or customer of PBP for Drive's services. Drive would invoice PBP, PBP would secure payment from shipper Lear and then PBP would pay Drive. At some point, PBP stopped paying Drive's charges, although PBP received payment from Lear. Owed over $1 million, Drive sued PBP and Lear. PBP defaulted and Lear defended, asserting that, based on its payment to PBP and the terms of the agreement between PBP and Drive, it is not liable to the carrier for its freight charges.

Issue: Is the shipper that paid all charges billed by the broker required to pay again to the carrier where the carrier agreed to seek payment only from the broker?

Holding: The court declined to make a decision at the summary judgment stage, denying both parties' motions. If Drive's promise to seek payment from PBP only is valid, then Drive cannot pursue Lear for payment. However, the validity of the contract is disputed, as it was signed by the carrier only (by a lower level employee who purportedly lacked authority to bind Drive) and not by the broker PBP. Drive further argued that shipper Lear has no right to enforce the contract to which Lear was not a party. The discovery period was subsequently reopened; and the matter continues.

Presenter: **Jeff Simmons**

XI. OTHER TRANSPORTATION-RELATED CASES YOU MAY WANT TO KNOW ABOUT

58. ***Griffin v. Sirva Inc.***, 835 F.3d 283 (2nd Cir. Aug. 30, 2016)

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 District Court 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 SIRVA and Allied obtained 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 all 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 factors. The statute does not mandate hiring any particular kind of convict-applicant for any specific job. The law gives an employer discretion not to hire an applicant if the employer concludes that either (1) there is a direct relationship between the criminal offense 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. Neither the District Court nor the Second Circuit has yet addressed SIRVA's and Allied's defense that application of the NYHRL to their CLP rules is FAAAA-preempted.

Holding: On the plaintiffs' appeal, the Second Circuit has certified the following questions to the New York State Court of Appeals for a ruling on the NYHRL's relevant provisions:

> (1) Is NYHRL liability for criminal conviction employment discrimination limited to a plaintiff's employer?
> (2) What is the scope of the NYHRL term "employer?" Is it limited to a "direct employer" or does it include a "joint employer" as that doctrine is applied by some federal courts in Title 7 cases?
> (3) What is the scope of NYHRL liability for "aiding and abetting" criminal conviction employment discrimination?

A ruling from the NY Court of Appeals is expected by late 2017.

Presenter: **George Wright**

59. ***PDX North, Inc. v. Wirths***, 2016 WL 3098176; 2016 U.S. Dist. LEXIS 70786 (D.N.J. May 31, 2016)

Facts: Plaintiff PDX North, Inc. is in the "business of facilitating, brokering and providing transportation delivery services" in interstate commerce, contracting with individuals to transport shipments on an "as needed" basis to meet customer demand on an often time-sensitive and unscheduled delivery

basis. Plaintiff asserts these individuals are independent contractors.

Based on audits conducted from 2006 through 2009, the New Jersey Department of Labor and Workforce Development assessed fines totaling nearly $1,000,000.00 against PDX. Those fines are under appeal in the New Jersey Office of Administrative Law. When the Department began another audit of PDX, PDX brought the instant lawsuit against the Commission of the Department of Labor and Workforce Development for a declaration and injunction that the Independent Contractor Statute and the Commercial Truck Drivers Exception are both barred and preempted by the FAAAA.

The Defendant Commission moved to dismiss the complaint and the Plaintiff PDX cross-moved for summary judgment.

Issues: Whether the FAAAA preempts a state's action to enforce its Independent Contractor Statute against an interstate motor carrier.

Holding: Both motions were denied.

New Jersey's Unemployment Compensation Law deems drivers to be employees "unless and until it is shown to the satisfaction of [the New Jersey Department of Labor and Workforce Development]" that the drivers satisfy the exception under the Independent Contractor Statute (also known as the "New Jersey Commercial Truck Drivers Exception").

Under the Commercial Truck Drivers Exception, the Unemployment Compensation Law does not apply to carriers which use trucks over 18,000 lbs., and which compensate their drivers either by a percentage of gross revenue for each job or by virtue of the weight and distance traveled.

The Defendant's motion to dismiss was based on Federal Abstention, the Eleventh Amendment and a lack of Preemption. The Court rejected all three arguments. Federal Abstention prevents Federal interference with state administrative proceedings (a/k/a Rooker-Feldman Abstention). The Court concluded Rooker-Feldman Abstention only applies to state judicial proceedings, not the administrative proceedings at issue. Another type of Federal Abstention is known as Colorado River Water Abstention which bars a Federal Court from interfering with a "parallel" state proceeding. The Court found Colorado River Water Abstention did not apply because the State Administrative proceedings did not involve allegations of Federal Preemption. Defendant also asserted Burford Abstention, which prevents a Federal Court from overturning a State law. That argument was rejected as well inasmuch as the Federal Court in the instant case was addressing an issue of Federal Law, i.e., the FAAAA, not an issue of State Law.

Defendant's Eleventh Amendment argument (i.e., that State cannot be sued in Federal Court without the State's consent) was also denied. The Court concluded Eleventh Amendment jurisprudence does not bar actions for an injunction against State offices such as the Commissioner of the New Jersey

Department of Labor and Workforce Development.

Defendant also argued that the Independent Contractor Statute and the Commercial Truck Drivers Exception are not "related to a price, route or service of any motor carrier" or "connected to the transportation of property." The Court denied that argument because there were questions of fact and because Massachusetts Delivery Association v. Coakley, 769 F.3d 11 (1st Cir. 2014) remanded a similar question to the District Court.

The Court denied the Plaintiff carrier's motion for summary judgment because the record was not fully established with facts to confirm whether the Independent Contractor Statute and the Commercial Truck Drivers Exception actually affected rates, routes, prices and/or services.

Presenter: **Tom Martin**

60. ***In re LMD Integrated Logistic Services, Inc.***, -- N.E.3d --; 2016 WL 4382638; 2016 Ohio 5385 (Ct. App. Ohio Aug. 16, 2016):

Facts: This is a preemption case favorable to motor carriers. The Ohio Court of Appeals has reversed a ruling by the Public Utilities Commission of Ohio (PUCO) against a motor carrier in a case involving hazardous materials regulations. Motor carrier LMD appealed from the PUCO's imposition of a civil forfeiture for transporting hazardous materials with a non-compliant shipping paper that had been prepared by the offeror, Panalpina. While one of LMD's vehicles was transporting a shipment containing the chemical ethylene chlorohydrin received with shipping papers from the offeror, the vehicle underwent inspection at an Ohio weigh station. The inspecting officers cited LMD's driver with failure to comply with the shipping paper disclosure requirements of 49 CFR §177.817(a) because the shipping paper did not indicate that the cargo was a poison-inhalation hazard. The case before the PUCO, and ultimately before the Ohio Court of Appeals, revolved around LMD's contention that the PUCO, in finding that LMD had violated 49 CFR §177.817(a), unreasonably interpreted and misapplied the provisions of 49 CFR §171.2(f) by assigning strict liability to the motor carrier.

Issue: The court addressed two interrelated issues in rendering its decision: (i) whether the PUCO erred in finding that it had considered 49 CFR §171.2(f) in reaching its conclusions of law; and (ii) whether the PUCO exceeded its authority and improperly applied 49 CFR §171.2(f).

Holding: 49 CFR §171.2(f) provides in relevant part, "Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material . . ., unless the carrier knows, or a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror . . . is incorrect." Citing with particular emphasis the recent similar case In re Transervicios, SA de CV, Docket No. FMCSA-2010-0043 (Mar. 23, 2015), the

court concluded that the PUCO was required to determine whether "a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by" Panalpina was incorrect; and concluded that the PUCO not only failed to make any such determination but instead decided that motor carriers are always required to verify the accuracy of shipping papers when transporting hazardous materials. Thus, the court agreed with LMD's argument that the PUCO's finding was unreasonable because it effectively eliminated the portion of §171.2(f) that permits a motor carrier to rely on information provided by the offeror. This case reinforces the appropriate legal standard afforded by §171.2(f) to the motor carrier industry.

Submitted and summarized by John Alden

61. ***Bowman v. Mounir Benouttas***, 2016 WL 4768922 (Ct. App. Tenn. Sept. 9, 2016): Vicarious liability of broker for acts of driver (personal injury)

62. ***Ramos-Becerra v. Hatfield***, 2016 WL 5719801 (M.D. Penn. Oct. 3, 2016): Liability of broker for personal injury

63. ***Jordan v. Blackwell Towing***, 2016 WL 7104867 (S.D. Ala. Oct. 27, 2016): FAAAA not a basis for federal subject matter jurisdiction

64. ***CRST Dedicated Services, Inc. v. Ingersoll-Rand***, -- F.Supp.3d --; 2016 WL 3638127 (W.D.N.C. July 6, 2016): FAAAA preemption – Trailer interchange claims

65. ***People Ex. Rel. Harris v. Delta Airlines***, 247 Cal.App.4th 884 (Ct. App. Cal. May 25, 2016): Preemption – Airline Deregulation Act (Delta's mobile app/privacy laws)