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Benton on the Jurisdictional Provisions of the Carmack Amendment

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Benton on the Jurisdictional Provisions of the Carmack Amendment

By Eric Benton

September 1, 2009

SUMMARY: Under NAFTA, shipments to and from the U.S. to Canada and Mexico are increasing. When a shipment is lost or damaged, the courts are faced with the question of whether the full liability provisions of the Carmack Amendment are applicable or whether the limited liability provisions of Mexico and Canada should be applied. This Emerging Issues Analysis by Eric Benton of Lorange & Thompson examines those questions.

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ARTICLE: Under the North American Free Trade Agreement the number of shipments to and from the United States to Canada and Mexico continue to grow. When a shipment is lost or damaged during these moves, the courts are often faced with the question of whether the full liability provisions that are contained within the Carmack Amendment are applicable or whether the limited liability provisions contained in the laws of Mexico and Canada should be applied.

STATUTORY PROVISIONS

Under the provisions of the Carmack Amendment, *49 U.S.C. § 14706 (a)(1)*, the shipper may bring an action against the receiving (origin) carrier, the destination carrier, or the carrier over whose line the property was transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

The liability provision of the Carmack Amendment, *49 U.S.C. § 14706(a)(1)*, which provides shippers recovery for the "actual loss or injury to the property," specifically states that only carriers "subject to jurisdiction under subchapter I and III of chapter 135" can be held liable under the Carmack Amendment. In five different locations in Section 14706, this section specifically provides that the Carmack Amendment is "subject to jurisdiction" of chapters I and III of chapter 135.

The jurisdictional provisions of the Carmack Amendment are contained in *49 U.S.C. § 13501*. In 1995 the jurisdictional provisions of the Carmack Amendment were amended. The 1995 amendments to *49 U.S.C. § 13501* changed the traditional Carmack Amendment application. Prior to the 1995 amendments, jurisdiction existed for international transportation "from or to" the United States to an adjacent foreign country. After the 1995 amendments, the jurisdictional requirement changed to international transportation "between" the United States and an adjacent

foreign country, to the extent the transportation was in the *United States*. *Berlanga v. Terrier Transp., Inc.*, 269 F. Supp. 2d 821, 826-827 (N.D. Tex. 2003).

CASE LAW

The Carmack Amendment and its statutory scheme apply only to the extent the Secretary of Transportation and the Board have jurisdiction over a particular matter. "The Carmack Amendment's reach is determined by reference to 49 U.S.C. § 13501, the provision of the Interstate Commerce Act that now establishes the regulatory jurisdiction of the U.S. Surface Transportation Board (formerly the Interstate Commerce Commission) with respect to the "transportation by motor carrier" of passengers and property." *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 74 (2d Cir. 2001).

In the *Project Hope* case, Project Hope contracted with Blue Ocean to ship a container of humulin (chemically synthesized insulin) from Virginia to Egypt. Blue Ocean contracted with Mill Transportation subject to a straight bill of lading. Mill Transportation was to pick-up the container, load it and take it to the dock to be loaded on a ship. Subsequently, the container was set at the wrong temperature and the humulin spoiled before ever being loaded on the ship.

The court found that the Carmack Amendment applied throughout the entire portion of the shipment that takes place within the United States on an international shipment. Whether the shipment originates in, or is destined to, the United States, the Carmack Amendment only applies to damage claims when damages occur within the United States.

This rule of law was also expressed in *Berlanga*. In *Berlanga*, the court determined that:

the Amendment's applicability turns on whether the Secretary of the STB ("Surface Transportation Board") exercises jurisdiction over the shipment, not on the direction of the shipment. This, as noted above, depends on whether transportation is between two points, one of which is in the United States. This change in the Amendment's scope is also apparent in the phrase "*to the extent the transportation is in the United States*." This language did not appear in earlier versions of the statute. While the domestic leg of shipments between a place in the United States and a place in a foreign country are covered regardless of the point of origin, *it is now plain that the international leg of such a shipment is not covered by Carmack*.

Berlanga v. Terrier Transp., Inc., 269 F. Supp. 2d 821, 827 (N.D. Tex. 2003) (emphasis added; citations omitted).

Clearly, satisfying the jurisdictional requirement of 49 U.S.C. § 13501 ("to the extent the transportation is in the United States"), is a condition precedent to the application of 49 U.S.C. § 14706(a)(i). The *Berlanga* Court provides a well-written and well-reasoned explanation of the impact of the amendments to the Carmack Amendment. Formerly, the applicability of the Carmack Amendment depended on the direction of the shipment. If the shipment was going from an adjacent foreign country to the United States, then the Carmack Amendment apparently did not apply. However, if the shipment was going from the United States to an adjacent foreign country, then the Carmack Amendment apparently did apply. Now, the direction of the shipment does not matter, and the Carmack Amendment applies to an international shipment to the extent the transportation is in the United States. *Berlanga* clearly found that "the Amendment's applicability turns on whether the Secretary of the STB exercises jurisdiction over the shipment, not on the direction of the shipment." *Id.* at 827.

Notwithstanding the above, most cases have held that the Carmack Amendment is applicable when freight traveling on a through bill of lading is lost or damaged in Canada or Mexico when the origin is the United States. *Berlanga, supra*; *Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029 (7th Cir. 2000); *Arkansas Aluminum Alloys, Inc. v. Emerson Elec. Co.*, 2007 U.S. Dist. LEXIS 95350 (W.D. Ark. 2007).

Inconsistent opinions are beginning to crop up as courts wrestle with this issue. A good example is two recent decisions from the *Southern District of Texas*. In *Apparel Prod. Servs., Inc. v. Ind. Transp., S.A. de C.V.*, 2009 U.S. Dist. LEXIS 25746 (S.D. Tex. 2009), Judge Kazen finds the Carmack Amendment is not applicable to a shipment

damaged in Mexico unless a through bill of lading has been generated. The language of the decision leads one to believe that if a bill of lading had been issued, Judge Kazen would have held the Carmack Amendment to be applicable. A couple of months later, however, Judge Ellison, also in the Southern District of Texas, finds the Carmack Amendment is not applicable in *Northern Marine Underwriters, Ltd. v. FBI Express, Inc.*, 2009 U.S. Dist. LEXIS 45353 (S.D. Tex. 2009). In this unpublished decision, Judge Ellison utilizes a two-prong approach to determine whether the Carmack Amendment is applicable. First, he determined whether the shipment is covered by the Carmack Amendment. Second, he determined whether the carrier is covered by the Carmack Amendment. Judge Ellison found that the Carmack Amendment applied to the shipment; however, he found that the carrier was not subject to the Carmack Amendment. Finding other decisions not persuasive, including Judge Kazen's decision in the same district a couple of months earlier, Judge Ellison correctly noted that these earlier cases did not consider the jurisdictional requirements of Section 13501.

COMMENTARY

Very few courts have found that the Carmack Amendment does not apply based on the statutory language found in Section 13501. The majority of courts have incorrectly found that the Carmack Amendment was applicable to shipments on a through bill of lading that were initiated in the United States even when the loss or damage occurred in Mexico or Canada. The question arises then how these courts reconcile their decisions with the statutory language above. For whatever reason, it appears many of these courts have failed to consider the jurisdictional limitations contained in the statutory language. Maybe the jurisdiction of the court was not raised by counsel in these cases or the courts were reluctant to apply the limited liability provisions of the laws of Canada or Mexico.

An argument exists, however, that the jurisdictional provision of Section 13501 must be read with the liability provisions of Section 14706. The liability provisions contained in 14706(a) arguably expands the carrier's liability under Carmack: "The liability imposed under this paragraph is for the actual loss or injury to the property caused by ...(C) another carrier over whose line or route the property is transported...from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.." *Id.* Accordingly, reading the plain language of 49 U.S.C. §§ 13501 and 14706 together, the 1995 amendments maintained the carrier's traditional liability for damage in international transportation to an adjacent foreign country under a through bill of lading. Arguably, Congress would have deleted this language had it desired to change the carrier's traditional liability under a through bill of lading, but it did not do so. *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (reenactment of statute given consistent judicial interpretation includes the settled judicial interpretation). Furthermore, if Carmack applied only to transportation in the United States even under a through bill of lading to an adjacent foreign country, the quoted language of 49 U.S.C. Section 14706 would be meaningless. *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997) (repeals by implication are not favored, and courts must make every effort to read statutes in harmony with one another).

Since the 1995 amendments, the Carmack Amendment for the first time applies by law to the United States leg of a shipment from an adjacent foreign country to the United States. Because the amendments use "between" instead of "from/to," if read literally, US carriers could be responsible for all parts of an international shipment "between" the United States and an adjacent foreign country even without issuing a through bill of lading. Accordingly, the amendments included the limitation "to the extent transportation is provided in the United States" for two reasons: (1) traditional US carrier non-liability for cargo damage originating from and occurring in an adjacent country is maintained; and (2) traditional US carrier non-liability for cargo damage originating in the US and occurring in an adjacent foreign country is maintained, with the traditional exception that liability for cargo damage is imposed when the carrier issues a through bill of lading to an adjacent foreign country, no matter where the damage occurs. 49 U.S.C. § 14706(a).

CONCLUSION

As cross-border shipments between the NAFTA countries continue to grow, the different interpretations regarding

the applicability of the Carmack Amendment will need to be resolved. While there are decisions finding the Carmack Amendment is applicable to these shipments, the Courts did not take into consideration the 1995 amendments to the jurisdiction of the Surface Transportation Board. In fact, only a few Courts ever addressed the Surface Transportation Board's jurisdiction until the cases cited above.

Canada and Mexico limit the liability of carriers for lost or damaged cargo by statute. The Carmack Amendment generally offers full liability. Thus, plaintiffs are encouraged to file their suits in the United States. Often the evidence surrounding the loss or damage is in the adjacent country. Thus, judicial economy is not served by encouraging such increased litigation in the U.S. Courts. Motor carriers and their customers are accustomed to having a foreign's country's limitation of liability applied to their shipments. Limitations on a carrier's liability is the norm around the world whether by the air a sea modes of transportation. A limitation of liability also facilitates commerce as both carriers and shippers are able to ascertain the cost and account for the risk associated with lost or damaged freight.

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n1 *Berlanga* involved a through bill of lading from Mexico to the United States in which the U.S. carriers did not issue their own bills of lading. The US carriers defended on the basis that since they did not issue their own bill of lading, they had no Carmack liability for the United States portion of the shipment. The *Berlanga* court held that under the 1995 amendments Carmack now plainly applied to a northbound shipment to the extent the transportation was in the United States even if a separate bill of lading was not issued.

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ABOUT THE AUTHOR(S):

Eric R. Benton is a member of Lorance & Thompson, P.C. Prior to joining Lorance & Thompson, Mr. Benton served as in-house counsel to a multi-billion dollar international transportation corporation for nearly 15 years. He has experience representing carriers in all modes of transportation, has assisted clients around the world, and has provided advice on all aspects of international and domestic transportation. Mr. Benton has been designated as a "Super Lawyer" in the area of Transportation by Texas Monthly magazine, an honor extended to only the top 5% of Texas lawyers. He is a frequent lecturer and writer on transportation issues. Mr. Benton received his J.D. from Washburn University School of Law where he served as the Comments Editor for the *Washburn Law Journal*, and received his Bachelor of Science in Political Science and History from the University of Kansas. He is admitted to practice in the following jurisdictions: Texas; Kansas; Ohio; U.S. Court of Appeals, Fifth Circuit; U.S. District Court for the Northern, Southern, Eastern, and Western Districts of Texas; U.S. District Court for the District of Kansas; U.S. District Court for the Northern District of Ohio; U.S. District Court for the District of Colorado; United States Court of International Trade.

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Benton on Jones v C.H. Robinson Worldwide

2009 Emerging Issues 3450

Benton on Jones v C.H. Robinson Worldwide, 558 F. Supp. 2d 630 (W.D. Va. 2008)

By Eric Benton

March 18, 2009

SUMMARY: In this analysis, Eric R. Benton of Lorance & Thompson, P.C. examines the District Court for West Virginia's decision in *Jones v. C. H. Robinson Worldwide* that exposes brokers to liability for a motor carriers or drivers negligence and creates a new cause of action against brokers for negligent entrustment of an activity.

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ARTICLE: In *Jones v. C. H. Robinson Worldwide*, 558 F. Supp. 2d 630 (W.D. Va. 2008), the United States District Court for the Western District of Virginia exposes brokers to liability for a motor carriers or drivers negligence and creates a new cause of action against brokers for negligent entrustment of an activity. Even though a motor carrier under federal law is responsible for its equipment and driver, the court allows the jury to determine if a broker is responsible for negligently entrusting the motor carrier and its driver with an activity that results in personal injury.

Facts. This case involves the head-on collision of two tractor trailers which resulted in serious injuries to the Plaintiff. Kristina Mae Arciszewski was employed by AKJ Enterprises, Inc. ("AKJ") which owned the tractor and trailer that Arciszewski was driving when she crossed the center line and struck the Plaintiff. AKJ was under contract as a motor carrier with a broker, C.H. Robinson Worldwide, Inc. ("C.H. Robinson"). The Plaintiff claimed Arciszewski was an employee of both AKJ and C.H. Robinson and was acting in the course and scope of her employment at the time of the accident.

The Plaintiff sued for negligence, negligent hiring and supervision of AKJ, negligent entrustment, violations of the Federal Motor Carrier Act and violation of the Federal Motor Carrier Regulations. The Plaintiff never served and voluntarily dismissed all the defendants except for C.H. Robinson.

Both parties filed cross-motions for summary judgment. Previously when considering the motion to dismiss, the Court found that Arciszewski was negligent and that her negligence was the proximate cause of the accident.

Notably, that the Court stated that the parties did not dispute the incompetence of AKJ or Arciszewski, or that C.H. Robinson conducted any investigation into AKJ's safety and fitness as a carrier other than determining it had a conditional safety rating and a valid operating authority from the Federal Motor Carrier Safety Administration ("FMCSA"). Instead the Court followed the parties focus as to the duty of inquiry that is required of C.H. Robinson

under the facts of this case. C.H. Robinson claimed there was no evidence that would cause them to believe that AKJ was likely to be involved in a collision such as that involved in this case. Plaintiff, on the other hand, argued that if C.H. Robinson would have investigated AKJ's safety program and safety ratings, it would have know that AKJ was a carrier likely to be involved in an accident.

Important to the facts of this case was a requirement contained in the Contract Carrier Agreement that AKJ maintain a "satisfactory" safety rating with the FMCSA. There are three levels of safety rating under the FMCSA SafeStat program: satisfactory, conditional and unsatisfactory. The FMCSA gave AKJ a conditional safety rating because the FMCSA did not believe AJK had adequate safety management controls. The Court also noted internal documentation wherein C.H. Robinson had noted previous problems with AKJ's performance.

The Court looked to the decision in *Schramm v. Foster*, 341 F. Supp. 2d 536, 644645 (D. Md. 2004), which permitted a negligent hiring claim against C.H. Robinson to go to the jury. The Court in *Schramm* found a common law duty of third party logistic providers to use reasonable care in the selection of carriers. The *Schramm* court even went so far as to delineate the duties of a third party logistics company: 1) to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMCSA, and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings.

To determine whether C.H. Robinson owed a duty to the Plaintiff, the Court examined the conflicting testimony of the Plaintiff and the Defendant. C.H. Robinson argued that the finding of a duty in *Schramm* was incorrect and it offered as expert testimony the head of the FMCSA to explain the purpose of SafeStat. The Court found that because C.H. Robinson was a third party logistics provider and interjected itself into exercising more control over the shipment, the Court found that C.H. Robinson did have a duty to investigate the fitness of AKJ prior to hiring the carrier. The Court found that whether C.H. Robinson reached the appropriate duty of inquiry in selecting a competent carrier was a question for the jury.

Commentary. After recognizing the general rule that "one who employs an independent contractor is not liable for injuries to third parties resulting from the contractor's negligence," the Court gets caught up in non-legal titles to send the case to the jury. Further the Court imposes on the broker responsibilities neither intended by Congress nor imposed by common law upon principals that arrange for the transportation of freight.

There is no legal entity known as a "third party logistics provider." A third party logistics provider is an industry term that brokers use to describe their value added services to the shipper or consignee. Not only is there is no legal definition of third party logistics provider but also the contractual services vary by each company and range from arranging transportation to synchronous manufacturing and beyond. Following the lead of *Schramm*, this Court imposed a higher burden on property brokers for undertaking services that are a creature of contract and assume that all third party logistic providers are the same or provide similar services. The Court presumes that a third party logistics provider exercises more control over a shipment than a broker and this control lessens the independence of the contractor.

A broker has been defined in 49 C.F.R. § 371(a) as a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. The federal regulation goes on to recognize that a broker may provide additional value added services (non-brokerage service) that are performed by a broker on behalf of a motor carrier, consignor, or consignee. 49 C.F.R. §§ 371(b), (c).

The Court presumes that C.H. Robinson, as a third party logistics provider, retained control of the manner and means of doing the work that is subject to the contract of carriage. Further, the Court is quick to presume that AKJ was an incompetent carrier and Arciszewski was an incompetent driver because C.H. Robinson did not elect to dispute their competency in its briefs. Based upon these presumptions, the Court finds the general proposition that one who employees an independent contractor is not liable for that contractor's negligence is not applicable to C. H. Robinson's selection of AKJ.

As in *Schramm*, the Court relied on the information on the SafeStat website despite a disclaimer issued by the FMCSA against using the information for other than its intended purposes. Incredibly, the agency charged with the responsibility for determining the qualifications for operating a motor carrier specifically warns not to use the information for the purpose in which the Court wants it used. To its credit, the Court does state that the causal connection between the conditional rating and the accident are not strong, but sufficient to withstand a motion for summary judgment.

The FMCSA has been given the authority to determine whether a motor carrier is fit to operate on the nation's highways. If the carrier is not fit to operate on the nation's highways, it shall be given an "unsatisfactory" status by the FMCSA and its operating authority is revoked. To determine if a carrier is fit, the government has given the FMCSA a broad range of powers to inspect and audit a carrier. In addition, the carrier under 49 U.S.C. § 385.15 is permitted to have an administrative review of an unsatisfactory rating. Placing this burden on the broker requires it to make these decisions concerning a carrier's fitness without the benefit of similar investigatory powers and it must evaluate the differences in state laws in which the transportation may take place. In addition, forcing the broker to make such a determination effectively takes away the carrier's right to an administrative review of an unsatisfactory rating.

Conclusion. A string of cases, including *Schramm* and the decision at hand, has started the trip down the slippery slope of allowing a state law claim of negligent hiring and now negligent entrustment to be alleged against a broker for the acts or omissions of a motor carrier or its driver. *See also Clarendon National Ins. Co. v. Johnson*, 666 S.E.2d 567 (Ga. App. 2008). Brokers, however, are regulated by the federal government, as is the activity entrusted. The morass of differing state laws will certainly paralyze a vital piece of the nation's transportation puzzle if left to the states to impose requirements on brokers that may conflict with the federal regulatory scheme. Moreover, a motor carrier with any negative information in their SafeStat report may be effectively put out of business when brokers are reluctant to assign the carrier moves. Certainly, such a result was neither intended nor condoned by the FMCSA.

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Furman on Certified Cargo Screening Program

2008 Emerging Issues 2905

Richard L. Furman on Certified Cargo Screening Program; Real Cargo Security or Unnecessary Burden on Commerce?

By Richard L. Furman

September 11, 2008

SUMMARY: The 9/11 Commission Act of 2007 mandates that the TSA establish procedures for physically screening all cargo carried on passenger aircraft. In this commentary, Richard L. Furman examines the Certified Cargo Screening Program ("CCSP") and questions its efficacy and value versus the impact on the economy at large.

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ARTICLE: I. Introduction

In the fall of 2008, Congress passed the 9/11 Commission Act of 2007 (the "Act") [Pub. L. No. 110-53, *121 Stat.* 266 (Aug. 3, 2007).] which, among other provisions, mandated that the Transportation Security Administration ("TSA") establish procedures for physically screening all cargo carried on passenger aircraft. The Act calls for 50% of such cargo to be subject to the screening procedures by February 2009 and 100% by August 2010. [*Id.* § 1602 .]

Arguably, the Act fixes an omission in the Aviation & Transportation Security Act of 2001 ("ATSA"), which required 100% screening of explosives for checked baggage on passenger planes. However, the ATSA did not address cargo carried in the bellies of passenger aircraft or passenger carry-on baggage. In response to this oversight, and the continuing concern over securing every conceivable vector that might enable terrorists or others to pursue their goals of killing Americans and wrecking havoc with the U.S. economy, Congress passed the Act.

Exercising authority delegated by the Act to the Secretary of Homeland Security, TSA's parent agency, the Transportation Security Agency ("TSA") formulated the Certified Cargo Screening Program ("CCSP").

Passenger and Cargo Security is, like the emperor's new clothes, something of a sacred cow and one must be judicious in critiquing such measures. In this instance, though, one has to question whether the ambitious security goals required by the Act are unrealistic and pose a potential for a costly burden on the air cargo industry and the U.S. economy disproportionate to the potential benefit. In particular, many cargo handling and service companies, such as freight forwarders, indirect air carriers ("IACs"), truckers and warehousemen, the majority of which are small businesses, will not have the resources to meet the requirements of the Act. As a consequence, such companies may lose business to competitors with better resources or be forced out of business altogether.

II. The Certified Cargo Screening Program

What follows reflects the current outline of the CCSP. This is a dynamic situation however, and subject to change as the program moves into high gear. If what follows seems more conceptual than substantive, it is because TSA has yet to provide a more specific set of practices and procedures which will enable participants to confidently implement the CCSPs goals and requirements. This despite the looming February 2009 deadline for 50% screening of air cargo.

For now, participation in the CCSP is voluntary as to shippers and IACs but not voluntary as to airlines. Once in though, a participant becomes a regulated party and must adhere to increased TSA-directed security standards, share responsibility for supply chain security, employ chain of custody practices, and permit on-site validations, among other oversight procedures. [See TSA Certified Cargo Screening Program: Information Bulletin, *available at* <http://www.airforwarders.org/documents/LAX,%20DFW,%20JFK,%20EWR%20Outreach.pdf>; *see also* H.R. 1-Summary: Implementing Recommendations of the 9/11 Commission Act of 2007, §§ 1601-1618 *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h110-1&tab=summary>.]

Once fully up and running, the CCSP will require compliance with security standards governing physical access controls, personnel security, procedural security, physical security, IT security, container and trailer security, and security training and threat awareness.

The CCSP requires screening of cargo at the piece level, originating in the U.S. and transported on passenger aircraft using TSA-approved methods. To ensure that every individual package in a shipment is properly screened, the CCSP eliminates current exemptions and alternative means of screening for bulk shipments which might be packed as shrink-wrapped, strapped, and banded shipper pallets.

It is the TSA's view that screening capacity at a single point in the supply chain is not sufficient enough to accomplish the examination of every piece of cargo. Therefore, the CCSP is designed to allow screening of cargo early in the supply chain by a trusted, vetted, and audited facility. Airlines are particularly supportive of this down-stream examination process, given the limited amount of space available at their airport facilities to receive freight to be loaded on aircraft. TSA believes use of such Certified Cargo Screening Facility ("CCSFs), the term of art describing participants in the CCSP, will better assure the integrity of a shipment through enhanced physical and personnel security standards set by the CCSP.

To increase the resources for the screening of air cargo, the CCSP authorizes CCSFs to screen cargo prior to delivery to a freight forwarder or air carrier. Shippers, manufacturers, third-party logistics providers, contract manufacturers, warehouses, distribution centers, freight forwarders, and others may avail themselves of CCSFs. Third-party logistics companies, manufacturing facilities, warehouse, and distribution centers may apply to become a CCSF, if their facilities directly tender cargo to a freight forwarder or air carrier, so that screened and sealed boxes would then be transported directly to the airport by certified personnel, where they would be delivered to an airline for stowage onboard an aircraft.

Supply chain participants are required to maintain chain of custody standards for Certified Cargo. Those standards cover "documentation", "application," and "authentication".

Information must be documented and must travel with the shipment. Tamper evident measures must be applied to cargo or means of transport prior to departure. Examples of acceptable technologies include tapes and labels, International Standardization Organization (ISO) compliant truck seals, and tamper evident shrink-wrap. Documentation must be authenticated upon receipt at each regulated party and processing point in the chain of custody.

It is TSA's opinion that the benefits of participating in the CCSP will be decreased delays and expedited supply chain flow, the ability to continue to ship cargo without potential invasive screening later in the supply chain, the ability to shrink-wrap consolidations and build bulk configurations (non-participants would have to deliver their cargo to the air carrier loose or, if palletized or otherwise packed in bulk be subject to the shipment being broken down for

screening), and avoidance of potential cargo screening fees by entities later in the supply chain.

The screening process will be conducted through physical inspections, X-ray equipment, K-9 inspections, explosive trace detection equipment, electro dermal screening equipment, and decompression chambers, among other TSA approved methods.

CCSP will be implemented through a phased rollout approach. Phase one involved limited groups of supply chain entities in a total of nine cities throughout 2008 in San Francisco, Chicago, Philadelphia, Los Angeles, Dallas, New York/Newark, Seattle, Atlanta and Miami, with full implementation in early 2009 to meet the February 2009 deadline.

III. Pros and Cons

Together with the benefits the TSA believes will be forthcoming from CCSP, the ultimate benefit would be, if successful, increased security against the misuse of airlines as a means of attacking United States citizens and interests. Not an insignificant benefit and one that cannot and should not be disregarded or minimized.

Of course, the benefits outlined above would not be necessary if cargo is not subjected to a minute screening process. Therefore, the benefits are merely self-justifying benefits, which only exist because of the necessity of coping with the CCSP. Consequently, the only real benefit is potential increased air cargo security.

The impact and price of achieving this increased security is not insignificant and may well counterbalance, if not outweigh, the security realized from the CCSP.

The equipment, resources, and manpower required to successfully participate in the CCSP come at a staggering cost. One estimate, by the Congressional Research Service (CRS), puts the figure at \$3.7 billion over the program's first 10 years.

TSA will supposedly reimburse CCSFs that are required to purchase their own screening equipment up to \$375,000.00, but it is not at all clear whether this would be sufficient to cover the cost of the equipment. By one estimate, there would be approximately 12,000 CCSFs which could seek such reimbursement. In such event the cost to the government would be on the order of \$4.5 billion for equipment alone. This is clearly more than the cost estimated by the CRS.

At present, the foregoing figures are speculative at best as the TSA has yet to decide which technologies are acceptable to meet its screening standards, nor has the funding for the reimbursement been authorized.

It is not a given the reimbursement will be forthcoming or would be sufficient to cover the real cost to prospective CCSFs should it be made available. Therefore, CCSFs face the possibility they will still have to incur a significant cost on their own towards the purchase of screening equipment. In addition, CCSFs would have to incur the continuing and added cost for additional personnel to perform the handling and screening of the cargo, training, and other ongoing costs of implementing and maintaining the screening equipment and procedures. There are no figures available on what such cost might be annually but it will likely be significant.

It has been reported that should there be no or inadequate funding for the purchase of screening equipment, a significant percentage of IACs would opt out of volunteering to become a CCSF. Forwarders that made such a choice would face delays at the airlines that would have to screen the cargo in place of an IAC CCSF, causing the shipments to miss flights and lose revenue and possibly drive them out of business. [See Press Release, Airforwarders Association of America, *available at* <http://www.reuters.com/article/pressRelease/idUS194872+15-Jul-2008+BW20080715>.] This in turn would reduce the competitive environment for such services leaving shippers at the mercy of fewer available shipping agents charging more for their services.

There would also be significant cost that would have to be absorbed in preparing the CCSFs facility including

upgrading the available electrical service to support the screening equipment, possibly having to install or improve the air-conditioning system to accommodate the screening equipment, organizing the space where shipments are to be staged for screening, screened, packed and secured pending delivery to the air carrier, internal security fencing and adequate access for trucks delivering and picking up the goods.

The expense to CCSFs of implementing and maintaining the screening process will increase the cost of shipping air cargo, already generally a more costly means of transport when compared to truck, rail, or ocean transport. Ultimately, this would trickle down to the consumer, with the inevitable increase in the cost of living on top of the skyrocketing increase over the past several years.

If the freight is not screened by the shipper or IAC it will have to be screened by the airlines. In many instances, airlines do not have the sufficient space to handle their current needs, let alone available real estate to provide the additional space needed to accommodate the screening of significant amounts of cargo. Nor do air carriers have adequate financial or personnel resources to meet this challenge.

If the air carriers find themselves having to screen significant volumes of cargo, while still having to maintain their customary and necessary handling procedures for receipt, documenting and loading aircraft, additional unwanted consequences could result.

Cutoff deadlines for closing out of flights would move delivery times up, which would not only shrink the window within which goods could be delivered for a flight but result in significant backups at the airlines terminals and increase traffic on the access roads leading to the terminals. In addition, in the face of such backlogs there could be significant delays in screening with the risk of cargo missing the flights they are booked on, or the flights being delayed, creating additional security concerns as goods pile up in the carriers terminals or outside on the aprons of the airfield. This circumstance would also lead to increased risk of loss or damage to goods, especially delicate or perishable commodities or those of high value.

Finally, there is the very real concern as to the ability of the TSA to effectively oversee and enforce the program, thus reducing or negating its goals and value as a security device. At present, even with plans to increase inspection personnel and outsource some functions, TSA is still probably not fully equipped to fulfill its oversight duties.

IV. Conclusion

This is a commentary on a situation for which no advice can be offered as to how to represent the interests of clients affected by this program. Various trade and industry associations are lobbying with the goal of obtaining as much funding as possible to cover reimbursement for the cost of purchasing screening equipment. Beyond that, the CCSP is inevitable and the TSA has no discretion to defer its implementation in light of the myriad concerns and pitfalls the program may create.

Like most things in life, the worst we imagine may happen usually doesn't, and the rest seems to sort itself out over time. Even so, the potential bottleneck and cost, and its impact on companies without the resources of major competitors like Federal Express or UPS, will, in this writer's opinion, have long-term economic consequences for the transportation service companies that have to deal with the CCSP, as well as the shipping public. It is only a question of degree.

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Benton on REI Transport Inc., v C.H. Robinson Worldwide

2008 Emerging Issues 2774

Benton on REI Transport Inc., v C.H. Robinson Worldwide, 519 F.3d 693 (7th Cir. 2008)

By Eric R. Benton

September 10, 2008

SUMMARY: In *REI Transport Inc., v C.H. Robinson Worldwide, 519 F.3d 693 (7th Cir. 2008)*, the Seventh Circuit held that the Carmack Amendment was violated by a contract provision in a broker/carrier agreement that limited the carriers liability to damages only when the cargo is in the carriers possession.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *REI Transport Inc., v C.H. Robinson Worldwide, 519 F.3d 693 (7th Cir. 2008)*, the Seventh Circuit held that the Carmack Amendment was violated by a contract provision in a broker/carrier agreement that limited the carriers liability to damages only when the cargo is in the carriers possession.

I. Facts

Circuit City hired C.H. Robinson, as a property broker, to move a shipment of DVD players from California to Illinois. C.H. Robinson brokered the load using three different carriers for the journey: Patriot Logistics, Union Pacific Railroad, and REI Transport. The motor carrier/broker agreement between REI Transport and C.H. Robinson permitted the broker to withhold compensation to satisfy cargo claims. The motor carrier/broker agreement further provided that the motor carriers liability was limited only to damage occurring when the cargo was in the motor carriers possession.

Patriot Logistics delivered the sealed container to Union Pacific Railroad. During transport, Union Pacific noted that the seal had been broken and items had been taken. When REI Transport picked up the container from Union Pacific, it mistakenly reported that the seal was intact. n1 And some of the portable DVD players were missing when REI Transport made final delivery.

C.H. Robinson paid Circuit City the cost of the DVD players and received an assignment of its claim. C.H. Robinson withheld monies owed to the drayage carrier, REI Transport, to set off the amount it paid to Circuit City.

II. District Court Decision

REI Transport sued in the United States District Court for the Southern District of Illinois alleging conversion, unjust enrichment, and breach of contract. C.H. Robinson counterclaimed for money paid to the shipper. The District Court found for C.H. Robinson and denied REI Transports claim.

III. Seventh Circuit Decision

REI Transport appealed the District Courts decision to the Seventh Circuit. REI Transport claimed its agreement with C.H. Robinson limited its liability to only those goods damaged while in its custody or control. C.H. Robinson claimed that this provision limiting the carriers liability was prohibited by the Carmack Amendment to the ICC Termination Act of 1995, more commonly known as the Carmack Amendment, 49 U.S.C. § 14706(a)(1).

The Court held under the Carmack Amendment, the person entitled to recover can sue either the delivering or originating carrier for the actual loss or injury to the property caused by any carrier. The Court cited *Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029, 1030 (7th Cir. 2000) (A shipper may look to its chosen carrier, which then bears the responsibility for seeking compensation from another carrier actually responsible for the loss.).

A *prima facie* case under the Carmack Amendment requires showing of: (1) delivery in good condition; (2) arrival in damaged condition; and (3) the amount of damages. If established, the burden shifts to the shipper to show that it was free from negligence and that the damage was due to one of the excepted causes relieving the carrier of liability.

REI Transport did not dispute that the goods arrived in a compromised condition, which concedes the second and third elements. REI Transport only disputed that the goods were delivered to the first transporter in good condition. The court used circumstantial evidence to establish that the DVD players were delivered in good condition. An affidavit from a Circuit City employee stated that the standard procedures were used and confirmed the number of DVD players shipped by the first transporter. This was some evidence that the shipment was received in good condition. Therefore, all three elements were met and C.H. Robinsons motion for summary judgment was granted. Thus, the Seventh Circuit affirmed the District Court decision.

IV. Commentary on REI Transport

The Court takes the general proposition that the Carmack Amendment preempts state-law causes of action by a shipper against a carrier, and it turns that proposition on its head and examines whether state law claims by a carrier against a shipper also are preempted. The Court finds that the Carmack Amendment does not preempt all claims by a carrier against a shipper or person entitled to recover but does limit claims where loss or damage to cargo is involved.

REI Transport tried to limit its liability by contract to only loss or damage when the cargo was in its custody. The Court, however, found such a limitation to be directly in conflict with the Carmack Amendment and thus void. To reach this conclusion, the Court looked at the public policy in enacting the Carmack Amendment. The Court noted that in enacting the legislation, Congress desired to prevent a patchwork of regulation that would result in each state enacting its own legislation. The Court further found that in exchange for having one nationwide legislative scheme, Congress also agreed that the person entitled to recover under the bill of lading or receipt could elect to sue either the originating or delivering carrier.

Congress ensured the national uniformity of this scheme of liability in two ways: by preempting state causes of action against carriers for damaged or lost goods; and by placing substantive limits on the rights of carriers to contract away liability.

REI Transport, 519 F.3d 693, 697.

The Court states that except for one narrow exception not at issue in this case, carriers may not limit their liability below the actual loss or injury by contract.

While the District Court held that the Carmack Amendment preempts REI Transports breach of contract claim against C.H. Robinson, the Court thought this holding was too broad since it would preempt any claim if damage to the

goods were involved. Thus, the Court limited its holding to claims that affect a carriers liability for lost or damaged goods.

The Court found that C.H. Robinson had made its prima facie case; therefore, it was entitled to sue REI Transport as the delivering carrier and was justified in withholding payment and any attempt to limit its liability was preempted by the Carmack Amendment.

Missing from the discussion in this case is the effect of this holding when the parties waive the application of Carmack under *49 U.S.C. § 14101(b)(1)*. This section provides that the shipper and carrier may expressly waive in writing any or all rights under this part of Title 49 except for the provisions relating to registration, insurance, or safety fitness. Thus, parties may specifically waive in writing the application of the Carmack Amendment. The Court does not address why such a waiver if included in the contract between the broker and carrier or between the shipper and carrier would not be an effective waiver. Until that decision is rendered by a persuasive court, brokers and carriers should be advised that any such waiver may be ineffective.

V. Conclusion

To limit ones liability by contract to acts of its own negligence is common not only in the motor carrier industry but also as to all industries. This decision finds this common practice violates the Carmack Amendment. As part of the trade-offs for the implementation of the Carmack Amendment, Congress legislated that a shipper could sue the originating carrier, the delivering carrier, or the carrier upon whose line the harm occurred. Under this decision by the Seventh Circuit, the benefits or obligations of this trade-off can not be waived by contract. The Court does not address the statutory provision that allows the parties to a transportation agreement to waive the provisions of the Carmack Amendment. Thus, this decision seems to ignore the statutory right of expressly waiving the Carmack Amendment and finds the liability of a carrier can not be waived or limited. Therefore, after this decision, shippers and carriers need to be concerned with not only whether the parties specifically waived the provisions of the Carmack Amendment under *49 U.S.C. § 14101(b)(1)* but also whether the parities have the ability to waive the Carmack Amendment at all.

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n1 REI Transport acted as a drayage company moving the cargo intrastate within the state of Illinois.

RELATED LINKS: [Benton on REI Transport Inc., v C.H. Robinson Worldwide](#)
■ 519 F.3d 693

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Appeals, Fifth Circuit; U.S. District Court for the Northern, Southern, Eastern, and Western Districts of Texas; U.S. District Court for the District of Kansas; U.S. District Court for the Northern District of Ohio; United States Court of International Trade.



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Ravich on the Air Carrier Access Act

2008 Emerging Issues 2487

Timothy M. Ravich on the Air Carrier Access Act, 49 U.S.C. § 41705 et seq.

By Timothy M. Ravich

July 7, 2008

SUMMARY: Timothy M. Ravich discusses the Air Carrier Act, 49 U.S.C. § 41705 et seq., enacted by Congress to prohibit airlines from discriminating against disabled passengers. This commentary addresses the strategic decisions that practitioners should consider in interpreting, prosecuting, or defending claims arising under the Air Carrier Access Act.

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ARTICLE: Cite as: Ravich, Timothy M. The Air Carrier Access Act. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Travelers likely are familiar with the airline practice of boarding passengers who require special assistance in advance of other passengers. Less well-known is that it is discriminatory to pre-board qualified handicapped individuals as a matter of policy. Indeed, it is unlawful for an airline to require an individual with a disability to accept special services, including pre-boarding not requested by the passenger. This is so because Congress enacted the Air Carrier Access Act to prohibit airlines from discriminating against disabled passengers. This commentary, written by Timothy M. Ravich, an aviation lawyer and professor of aviation law, discusses strategic decisions that practitioners should consider in interpreting, prosecuting or defending claims arising under the Air Carrier Access Act.

The Air Carrier Access Act of 1986 (ACAA) prohibits air carriers from discriminating against individuals with disabilities. 49 U.S.C. § 41705. Applicable regulations Title 14, Part 382 of the Code of Federal Regulations define an individual with a disability as any individual who has a physical impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. 14 C.F.R. § 382.5. Physical or mental impairment includes any psychological disorder or condition and major life activities include functions such as caring for ones self, performing manual tasks, walking . . . and working. *Id.*

Best practices dictate that practitioners handling ACAA claims familiarize themselves with Title 14 of the Code of Federal Regulations. In addition to general rules prohibiting discrimination against disabled passengers, the regulations governing air carrier access are extensive, among other things, relating to aircraft accessibility, a prohibition against refusal of transportation, a prohibition against requiring advance notice of travel by a handicapped person, a prohibition

against (with certain exceptions) a handicapped person from traveling with his or her own attendant, seating assignments, seating accommodation, provision of certain services and equipment (e.g., wheelchairs, etc.), boarding assistance on small and large aircrafts, assistance in stowage of personal equipment, treatment of mobility aids and assistive devices, passenger information (e.g., seating locations, lavatory information, etc.), accommodations for those with hearing impairments, security screening, prohibiting the refusal to provide transportation to those with communicable diseases (except where the health and safety of others would be endangered), prohibiting the requirement that handicapped persons have medical certificates, and prohibiting the charging of a fee to accommodate handicapped persons. *See 14 C.F.R. §§ 382.31 to 382.57.*

Counsel also should note that carriers also are prohibited from refusing travel to a qualified disabled person solely because the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers. *14 C.F.R. § 382.31(b). See generally Deterra v. America West Airlines, Inc., 226 F. Supp. 2d 298 (D. Mass. 2002).*

Does the ACAA Support a Private Right of Action? At the outset, counsel should recognize a split in authority as to the question whether the ACAA creates a private right of action in federal district court. There is no question that the ACAA does not expressly provide a private entitlement to sue in district court. *Shinault v. American Airlines, Inc., 936 F.2d at 800 (5th Cir. 1991)* (The ACAA does not provide for a private right of action.); *Tallarico v. Trans World Airlines, Inc., 881 F.2d at 568 (8th Cir. 1989)* (The ACAA does not expressly provide for a cause of action to enable private citizens to seek a remedy for a violation of the Act.). Whether the ACAA *impliedly* provides a private right of action is less settled, however.

In particular, *Shinault* and *Tallarico* represent at least two decisions by federal courts of appeal interpreting the ACAA as conferring an implied private right of action in federal district court. *See also Adiutori v. Sky Harbor Intl Airport, 103 F.3d 137 (9th Cir. 1996)* (Although [the ACAA] does not expressly provide for a private right of action . . ., we are persuaded by the reasoning of other circuits which have held that [it] implies a private right of action . . .). *Cf. Bower v. Fed. Express Corp., 156 F. Supp. 2d 678 (W.D. Tenn. 2001)* (considering application of ACAA to all-cargo carrier).

Counsel prosecuting claims under the ACAA may argue in favor of a private right of action under the ACAA by emphasizing the fact courts may imply private remedies after considering the four factors articulated by the United States Supreme Court in *Cort v. Ash, 422 U.S. at 78 (1975)*, namely: (1) whether the plaintiff is one of the class of persons whom the statute was intended to benefit; (2) whether the legislature intended to create a private remedy; (3) whether a private remedy is consistent with the underlying statutory scheme; and (4) whether the contemplated remedy traditionally has been relegated to state law. In *Shinault*, the Fifth Circuit Court of Appeals evaluated the factors set forth in *Ash* and reasoned that the legislative history of the ACAA indicates that Congress intended to provide a private cause of action, that such an action would be consistent with the statutory scheme, and that private remedies for discrimination by airlines traditionally emanated from federal legislation, including the Federal Aviation Act of 1958. *Shinault, 958 F.2d at 800.*

Oppositely, counsel defending against an ACAA claim may find support in a decision by the Eleventh Circuit Court of Appeals, *Love v. Delta Air Lines, 310 F.3d 1347 (11th Cir. 2002)*. In *Love*, a passenger aboard an Alabama-to-Colorado flight who advised the airline of her special needs when making reservations, became ill onboard her flight and had to be carried to the restroom by her son. *Id.* The passenger ultimately sued, asserting claims under the Americans with Disabilities Act of 1990 and the ACAA. *Id.* She alleged that the airline engaged in discrimination by not ensuring that its facilities were accessible to a disabled person, and failed to provide an accessible call button to page a flight attendant, an aisle chair to assist her in accessing the restroom facilities, a restroom large enough to accommodate her, privacy in the restroom, or adequately trained flight personnel. *Id.* The federal trial court determined that the ACAA permitted private litigants to obtain declaratory and injunctive relief.

The Court of Appeals reversed, however, on the ground that several enforcement mechanisms written into the

ACAA strongly undermine[] the suggestion that Congress also intended to create by implication a private right of action in a federal district court but declined to say so expressly. *Id.* at 1357. Specifically, the *Love* court observed

the ACAA and its attendant regulations provide three separate enforcement mechanisms. First, the [Department of Transportation] is required to investigate ACAA claims and is given broad powers to sanction air carriers for ACAA violations. Second, air carriers themselves are required to establish ACAA dispute resolution mechanisms. Finally, once the DOT has acted in response to an alleged ACAA violation, an individual with a substantial interest in that action may seek review in a court of appeals.

Id. Therefore, the *Love* court opined that the legislature instead [of creating a private right of action] opted to create an elaborate administrative enforcement scheme, augmented only by a *limited* form of judicial review of the DOT's actions in the court of appeals. *Id.* (*italics in original*). See also *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391 (S.D.N.Y. 2004) (no private right of action under ACAA); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263 (10th Cir. 2004) (same).

Is the ACAA Preempted by Federal Law? Practitioners also should be aware that courts are divided on the preemptive effect of the Federal Aviation Act and the Airline Deregulation Act of 1978 on state law tort claims brought for alleged ACAA violations. Specifically, in enacting the Airline Deregulation Act Congress sought to foster an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services. H.R.Rep. No. 95-1779, at 53, *reprinted in* 1978 U.S.C.A.N.N. 3737. It follows logically then that Congress preempted any state regulation related to a price, route or service of any air carrier. 49 U.S.C. § 41713(b). See *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Whether a particular claim arising under the ACAA relates to a price, route, or service is an open question.

Plaintiffs counsel will benefit by noting that some courts have found that claims arising under the ACAA are not preempted because an award of damages would not contravene the goal of economically deregulating the nations commercial airline industry and Congress did not intend to shield airlines from common law negligence claims. *E.g.*, *Rowley v. American Airlines*, 875 F. Supp. 708 (D. Ore. 1995); *Jamerson v. Atlantic Southeast Airlines*, 860 F. Supp. 821 (M.D. Ala. 1994); *Moore v. Northwest Airlines, Inc.*, 897 F. Supp. 313 (E.D. Tex. 1995). As one court noted, [p]ermittting state law claims which seek to enforce provisions of the Air Carrier Access Act neither interferes nor conflicts with federal law. *Price v. Delta Airlines, Inc.*, 5 F. Supp. 2d 226 (D. Vt. 1998).

Meanwhile, defense counsel will be served by characterizing particular claims under the ACAA as relating to services to passengers as that term is defined under the Airline Deregulation Act. For example, in *Howard v. Northwest Airlines, Inc.*, 793 F. Supp. 129 (S.D. Tex. 1992), a wrongful death claim arising out of an airlines alleged failure to meet and assist an elderly passenger was adjudged preempted because the claim related to an airline service. Similarly, a federal court concluded that federal law preempted a false imprisonment claim by a passenger who alleged that he was falsely imprisoned by several airlines when he was prevented from boarding his flight when he was left in an immobile aisle chair for a substantial time. *Williams v. Express Airlines I, Inc.*, 825 F. Supp. 831 (W.D. Tenn. 1993). Moreover, courts have held that discrimination claims under the ACAA are preempted under applicable treaties governing international carriage. *E.g.*, *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001) (applying the Warsaw Convention); *Waters v. Port Authority of New York & New Jersey*, 158 F. Supp. 2d 415 (D.N.J. 2001) (same).

Damages under the ACAA. Finally, counsel should recognize that Congress did not provide a remedial scheme in the ACAA. Therefore, putting aside preemption issues and assuming that claims are brought in a jurisdiction allowing a private action to enforce violations of the ACAA, counsel should note that even courts that recognize private enforcement of the ACAA have acknowledged no significant evidence in the legislative history and the circumstances surrounding the passage of the ACAA to indicate what types of remedies Congress intended to provide for private litigants. *Shinault*, 936 F.2d at 804. Indeed, one court that allows private lawsuits involving the ACAA has concluded that injunctive relief is not necessary because the DOT secures prospective relief through administrative remedies. *Id.*

Counsel should be aware, however, that some courts have concluded that compensatory damages including emotional distress damages are necessary and appropriate under the ACAA. Id. Punitive damages have not been recognized in ACAA claims, however, even by courts that find private suits cognizable under the ACAA. Id. *See generally Nader v. Allegheny Airlines, Inc.*, 512 F.2d at 549 (D.C. Cir. 1975), *revd on other grounds*, 426 U.S. 290 (1976) (standard for award of punitive damages for violation of Federal Aviation Act provision prohibiting discrimination by air carriers is proof of conduct evidencing evil motive, actual malice, deliberate violence or oppression.). On the other hand, practitioners are cautioned to evaluate the precedent established by *Americans Disabled for Accessible Public Transp. v. Skywest Airlines*, 762 F. Supp. 320 (D. Utah 1991), which dismissed claims for emotional distress damages and punitive damages alleged under the ACAA. *See also DeGirolamo v. Alitalia-Linee Aeree Italiane, S.p.A.*, 159 F. Supp. 2d 764 (D.N.J. 2001) (declining to award punitive damages for misinformation provided by airline in connection with ticket purchased by wheel-chair bound passenger).

For further information on application of the Air Carrier Access Act, *see* Kristine Cordier Karnezis, *Recovery for Discriminatory Conduct under Air Carrier Access Act*, 49 U.S.C.A. § 41705, 188 A.L.R. Fed. 367 (2003); Curtis D. Edmonds, *When Pigs Fly: Litigation under the Air Carrier Access Act*, 78 N.D. L. Rev. 687 (2002).

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Ravich on Airline "Bumping" Claims

2008 Emerging Issues 2493

Timothy M. Ravich on Airline "Bumping" Claims

By Timothy M. Ravich

July 7, 2008

SUMMARY: Timothy M. Ravich discusses the legal rights of commercial airline passengers who have been bumped from their flight.

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To account for cancellations or no-shows airlines frequently sell more tickets than there are seats on an airplane. However, as too many airline travelers know, bumping of an unlucky passenger occurs when more confirmed passengers arrive for a flight than the number of seats available on a given flight. The United States Supreme Court addressed bumping in the mid-1970s when consumer advocate Ralph Nader was bumped from a flight, describing overbooking as a common industry practice, designed to ensure that each flight leaves with as few empty seats as possible. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 293 (1976). Whatever the business rationale underlying the practice of overbooking, airline passengers often are unaware of their rights in the event they are bumped. This commentary, written by Timothy M. Ravich, an aviation lawyer and professor of aviation law, discusses the legal rights of commercial airline passengers in bumping claims.

Imagine two passengers--Business Bill and Traveler Ted--are flying from New York to San Francisco. Traveler Ted purchased his \$300 roundtrip ticket months ago, while Businessman Bill paid \$1500 for his ticket yesterday. Once in San Francisco, Traveler Ted will embark on a weeklong ocean liner cruise which costs \$2000 and Businessman Bill will head immediately to the city for a meeting. At Kennedy Airport, they arrive to find their flight overbooked and the airline offering \$400 for anyone willing to wait for the next flight, six hours later. Which passenger should get to fly to San Francisco and why? Assuming neither accepts the offered compensation and the airline bumps one of them, how much should that passenger be entitled to in damages? Under current federal regulations and prevailing industry practice, whoever arrived at the gate first would get to travel, and the other passenger would receive \$400 (plus travel on the next available flight).

Elliott Blanchard, Notes, *Terminal 250: Federal Regulation of Airline Overbooking*, 79 *N.Y.U. L. Rev.* 1799 (2004).

As a matter of definition, [o]verbooking is the selling of more confirmed tickets than available seats. This practice allows airlines to reduce the number of empty seats on a flight, while still maintaining passenger flexibility and liberal reservation policies. *Id.* (citing Priority Rules, Denied Boarding-Boarding Compensation Tariffs and Reports or Unaccommodated Passengers, 41 *Fed. Reg.* 16, 478 (Apr. 19, 1976).) Counsel may be surprised to know that the United States Department of Transportation (DOT) has recognized that airline overbooking is not illegal. (*See* <http://airconsumer.ost.dot.gov/publications/flyrights.htm#overbooking>, at 4.)

Airlines may bump passengers voluntarily or involuntarily. In the case of voluntarily bumping, airlines are required to request passengers with flexible travel schedules to give up their seats for some compensation before bumping. Specifically, at the check-in or boarding area, airline employees will look for volunteers when it appears that the flight has been oversold. *Id.* If passengers are not in a rush to arrive at their destination, they can give their reservation back to the airline in exchange for compensation and a later flight. *Id.* Before doing so, however, passengers should address the following issues:

- . When is the next flight on which the airline can confirm a seat? If an airline puts a bumped passenger on standby on another flight that is full, the passenger could be stranded.

- . Will the airline provide other amenities such as free meals, a hotel room, phone calls, or ground transportation? If not, the passenger might have to spend the money the airline offered on food or lodging while the passenger waits for the next flight.

- . Because DOT has not said how much an airline has to give voluntarily bumped passengers, carriers may negotiate with their passengers for a mutually acceptable amount of money or perhaps a free trip or other benefits. Airlines give employees guidelines for bargaining with passengers, and they may select those volunteers willing to sell back their reservations for the lowest price. If the airline offers a passenger a free ticket, the passenger should ask about restrictions, including: How long is the ticket good for? Is it blacked out during holiday periods when the passenger might want to use it? Can it be used for international flights? Most importantly, can the passenger make a reservation, and if so, how far before departure is the passenger permitted to make it?

Id.

In the circumstance that passengers are bumped involuntarily, federal regulations require airlines to offer compensation. 14 C.F.R. § 250. Counsel should be particularly aware that the regulations governing compensation for passengers denied boarding involuntarily were recently amended. Effective May 18, 2008, commercial airlines are obligated to compensate passengers denied boarding involuntarily from an oversold flight at the rate of 200 percent of the fare (including any surcharges and air transportation taxes) to the passengers next stopover, or if none, to the passengers final destination, with a maximum of \$800. 14 C.F.R. § 250.5(a) (2008). The careful practitioner will note that the compensation shall be one-half of [this amount], with a \$400 maximum, if the carrier arranges for comparable air transportation that arrives at the passengers final destination within 2 hours of the passengers originally-planned arrival time for interstate flights, or within 4 hours in the case of foreign air transportation. *Id.*

Counsel should recognize that the compensation rules governing oversales applies only to a passenger who actually is bumped from a flight because of overbooking. For example, a passenger removed from an airplane because of intoxication was not bumped. *O'Carroll v. Chaparral Airlines, Inc.*, 490 U.S. 1106 (1989). Moreover, a passenger who declined a coach seat when a first class seat was not available was not bumped. *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745 (Tex. 2003).

Contract Damages in Domestic Bumping Cases. While the airport ticket counter may be the best place to resolve oversales-related issues, a bumped passenger may decline an airlines offer for compensation and is entitled to seek to recover damages in a court of law or in some other manner under *14 C.F.R. § 250.9(b)*. Litigants should note that this regulation is universally regarded as permitting a claim for contract damages that may exceed the amount of compensation offered by an airline. *E.g., Stone v. Continental Airlines, 804 N.Y.S.2d at 655 (Civ. Ct. N.Y. 2005)*. Accordingly, counsel and claimants also should be sure to review an airlines contract of carriage, as federal law requires every airlines contract of carriage to be consistent with federal law. *14 C.F.R. § 253.4 (2008)*.

A bumped passenger is entitled to contract damages by proving facts establishing (1) ticket purchase, (2) involuntary denial of boarding with tin the meaning of federal regulations, (3) non-acceptance of an airlines offer of compensation, and (4) damages. Claimants and litigants should be aware that a claim for contract damages is measured by state law. While relief is available, there are only a few cases on the matter, including:

. *Smith v. Piedmont Aviation, Inc., 567 F.2d 290 (5th Cir. 1978)*, where a court factored a passengers inconvenience and need to make alternative arrangements, including rental of a car to reach destination, in computing damages of \$1,051.80.

. *Lopez v. Eastern Airlines, Inc., 677 F. Supp. 181 (S.D.N.Y. 1988)*, where a federal district court awarded \$450 to a passenger who arrived at midnight instead of at a mid-evening hour, noting that inconvenience, delay and uncertainty are worth something even in the absence of out-of-pocket costs.

Meanwhile, counsel should recognize that a claim for emotional distress is not permitted for a contract-based bumping claim absent a duty upon which liability can be based, and there is no right of recovery for mental distress resulting from the breach of a contract-related duty. *E.g., 1978 Gregory G. Sarno, Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Breach of Service Contract, 54 A.L.R. 4th 901 (1987)*. Alternatively, because luggage typically is checked prior to a passenger being denied boarding privileges, counsel should be aware that bumped passengers may be entitled to provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passengers personal property, including baggage . . . to an amount less than \$3000 for each passenger.. *See 14 C.F.R. § 254.4 (2008)*. *See also Stone, 804 N.Y.S.2d at 657*.

Bumping in International Air Transportation. The negative consequences of bumping can be pronounced in the context of international air travel. For example, in 2004, Tobias and Gertrude Weiss arrived at New Yorks John F. Kennedy International Airport a little more than one hour before their flight to Jerusalems Ben-Gurion airport. *Weiss v. El Al Israel Airlines, Ltd., 433 F. Supp. 2d 361 (S.D.N.Y. 2006)*. After clearing airline security, the Weiss learned that they had been involuntarily denied boarding because their flight had been oversold by their airline, El Al. Their reserved seats were given to other passengers; they had been bumped. *Id.*

The Weiss were placed on a standby list for seats on future flights and they were charged an extra \$100 to upgrade their seats--if any became available. *Id.* The Weiss remained at the airport for two days. *Id.* They spent the time moving about the airport attempting to comply with the airlines procedures for standby passengers. During that period, [the Weiss] suffered physical fatigue and exhaustion from all the activity . . . [and they claim they] were treated in a wanton, oppressive, indifferent, and uncaring manner by the airlines employees, who shunt[ed] the passengers around from place to place. *Id.* After what must have seemed like an interminable amount of time, the Weiss finally departed to Jerusalem. They flew on a different airline. After El Al refused them a refund, they sued.

Practitioners are cautioned that passenger claims arising from international travel are remediable exclusively under the Montreal Convention. *El Al Israeli Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. at 161 (1999)*. Litigants either have claims under the Warsaw Convention (for claims before 2003) or Montreal Convention (for claims after November, 2003) or no claims at all. As to delay, Article 19 controls, providing:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Under this provision, the *Weiss* court determined that bumping claims are not cognizable under the Montreal Convention as claims for delay, but rather as claims for complete nonperformance of the contract between the passenger and the airline. *Id.* at 366. *See also Wolgel v. Mexicana Airlines*, 821 F.2d 442 (7th Cir. 1987); *Paradis v. Ghana Airways, Ltd.*, 348 F. Supp. 2d 106 (S.D.N.Y. 2004). Accordingly, litigants should be aware that the European Community has its own bumping rules that govern bumping in European Community countries.

For further information on airline overbooking, see Timothy M. Ravich, *Re-Regulation and Airline Passengers Rights*, 67 *J. Air L. & Com.* 935 (2002); Daniel H. Rosenthal, Notes, *Legal Turbulence: The Courts Misconstrual of the Airline Deregulation Acts Preemption Clause and the Effect on Passengers Rights*, 51 *Duke L.J.* 1857 (2002). *See also* http://www.miamiaviation.org/press_releases/2007/july/ravich-consumer-sense.htm; Department of Transportation, *Fly-Rights: A Consumer Guide to Air Travel*, available at <http://airconsumer.ost.dot.gov/publications/flyrights.htm>.

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Ravich on Airline Code-Sharing Lawsuits

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Timothy M. Ravich on Airline Code-Sharing Lawsuits

By Timothy M. Ravich

July 7, 2008

SUMMARY: Timothy M. Ravich addresses litigation involving code-sharing airline partners, advising counsel to be careful not to confuse code-sharing airline partners as alter egos of each other.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Strategic alliances, long a marketing tool in the tourism and hospitality industries, have gained prominence in today's airline business. According to an aviation industry consulting group, the number of domestic airline flights that are operated by one airline but sold by one or more other airlines -- code-sharing -- has grown from about 1.1 million in 2000 to 4.3 million by 2007. Code-sharing is a driving force of both domestic and international airline alliances, but passengers sometimes are unclear about the practical and legal operation of such arrangements. This commentary, written by Timothy M. Ravich, an aviation lawyer and professor of aviation law, addresses background and preliminary issues counsel should consider when instituting litigation involving code-sharing airline partners.

Federal law defines code-sharing to mean an arrangement whereby a carrier's designator code is used to identify a flight operated by another carrier. *See 14 C.F.R. § 257.3(c) (2008)*. A designator code, in turn, is a multiple letter character code that identifies a particular flight, for example, UA123 for United Airlines Flight 123. Code-sharing arrangements are smart business because they offer consumers what they want, namely one-stop service as opposed to interline connections. An interline itinerary involves travel on one airline from point A to point B and on a different airline from point B to point C. In contrast, code-sharing provides passengers one-stop shopping by allowing different airlines to offer one-stop service from point A to point C, with each airline independently setting the price for service between cities that it otherwise would not have served. After Congress enacted the Airline Deregulation Act of 1978 code-sharing arrangements quickly replaced interline service, which declined as a percentage of all trips with a connection from about 40 percent to a mere 5 percent. *See Gustavo Bamberger & Dennis Carlton, Airline Networks and Fares in HANDBOOK OF AIRLINE ECONOMICS*, at 269-88 (2003).

Several airline industry analysts have concluded that airline alliances have reduced fares by about five- to seven percent on certain city pairs while increasing total traffic by as much as six percent. *See Gustavo Bamberger et al., An Empirical Investigation of the Competitive Effects of Domestic Airline Alliances*, 47 *J. L. & Econ.* 195 (2004). When addressing Congress in 1998 about a proposed alliance with Northwest Airlines, Continental Airlines leader Gordon Bethune described the benefits and efficiencies of code-sharing and airline alliances this way:

The creation of new online options for the U.S. consumer is a key benefit of any alliance. Take a market like Madison, Wisconsin. Northwest is currently one of nine airlines flying to Madison. Continental does not fly to Madison at all. Now let's consider destinations like Panama City, Panama or Midland, Texas. The only online option currently available between Madison and these points is American [Airlines]. Continental does not serve Madison; Northwest does not serve Panama City or Midland. By linking these systems, both airlines now serve these cities and offer online connections between them. Competition and choice have been created.

Passengers also may benefit where code-shared flights operate as single carrier service, *e.g.*, accrual of frequent flier miles and coordinated baggage handling.

While code-sharing is a recent marketing and business strategy, airline alliances have existed well before airlines were economically deregulated in the United States. The first airline partnership may have arisen as far back as the 1940s when Air France helped to set up airlines in Africa, *e.g.*, Royal Air Maroc and Tunisair. *See* Ero Vaara et al., *Strategies as Discursive Constructions: The Case of Airline Alliances*, *Journal of Management Studies* (2004). In 1978 Pan Am and Air Afrique negotiated a blocked space agreement where one airline purchased a block of seats from the operating airline. *See* Atef Ghobrial, *A Perspective on Global Airline Alliances* (2003). Airline alliances have grown from simple reciprocal agreements between two parties to sophisticated international networks of dozens of airlines serving hundreds of destinations with thousands of daily flights, *e.g.*, OneWorld, Sky Team, and Star Alliance.

Does Code-Sharing Mean Blame-Sharing under Operative Law? Because of their expansiveness and capability of reshaping the marketplace, airline alliances raise serious legal issues. Government entities like the United States Department of Justice continually examine whether airline alliances violate antitrust laws, stifle competition, and/or create unfair competitive advantages. Meanwhile, alliances have not only joined airlines as business partners but also pitted airlines against each other as adversaries in lawsuits. For example, the case of *US Airways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482 (S.D.N.Y. 1997), involved a dispute arising out of an alliance between USAir and British Airways in 1992 and the subsequent decision by British Airways in 1995 to pursue an alliance with American Airlines instead.

Lawsuits and regulatory enforcement aside, airline alliances have proved to be effective, particularly in the regional or commuter airline markets. Regional carriers provide regional lift to major airlines by serving smaller markets and connecting them to larger cities, using aircraft seating less than 100 people. Most regional airlines operate to supplement the service of one or more larger mainline partners under joint marketing or code-sharing relationships. Regional carriers like Comair, a wholly-owned subsidiary of Delta Air Lines, are separately certificated air carriers that are responsible for the operation and safety of their own aircraft.

Counsel should be aware that the scheduling, pricing, and marketing of regional carrier flights are controlled by their mainline partners. Under a code-sharing arrangement, a major carrier permits a commuter carrier to use its service marks and logos for flights to and from hub airports, and it lists the connecting flights in its computer reservation system under its name, carrier code, and flight numbers. *See United Airlines, Inc. v. Sky West Airlines, Inc.*, 219 F.3d at 606 (7th Cir. 2000). This relationship is beneficial for airlines, but code-sharing can be confusing for some passengers. For example, the fact that consumers are often placed on aircrafts of partner airlines rather than their preferred airlines without prior notice has led to questions about deceit and potential damage to the brand image of airlines in the case of service failures. *See* Karin Weber, *Travelers Perceptions of Airline Alliance Benefits and Performance*, *Journal of Travel Research* (2005). A travel industry publisher suggested code-sharing was misleading, like putting Froot Loops in the Cheerios box. *See Airline Alliances: Decoding the Mysteries of the Code Share*, *New York Times* (Dec. 2006).

Indeed, counsel should be careful not to confuse code-sharing airline partners as alter egos of each other. *See Shirobokova v. CSA Czech Airlines, Inc.*, 376 F. Supp. 2d 439 (S.D.N.Y. 2005). A recent case decided by a court in California provides a good example why this is so. In the case of *Ramirez v. United Airlines, Inc.*, 416 F. Supp. 2d 792 (N.D. Cal. 2005), the plaintiff paid United Airlines for travel from San Francisco to Mexico City. The passenger was booked on United Flight 4747 from San Francisco to Los Angeles and on Mexicana Airlines Flight 905 from Los

Angeles to Mexico City. The Los Angeles to Mexico City leg was listed jointly as United 4747/Mexicana 905. United 4747 was uneventful, but Mexicana 905 encountered turbulence during which the passenger claimed to have endured injuries to left hip, left leg, left foot, left arm, low back, neck, bilateral shoulder pain, and head and TMJ as a result of being pitched up and down, and thrown violently around. The passenger sued both airlines in federal court, claiming confusion respecting the airlines code-sharing arrangement.

United argued the case against it should be dismissed. The court agreed, determining that the affiliate airline (Mexicana Airlines), and not United Airlines, was the carrier for purposes of determining liability. The court made its decision by evaluating the Warsaw Convention, a comprehensive international treaty signed in 1929 that establishes liability for international air carriers for harm to passengers. The Warsaw Convention does not speak of dual or multiple carriers, but rather only permits an injured passenger to obtain relief from one carrier. The *Ramirez* court concluded that although the term carrier is not defined by the Warsaw Convention, the term means what it appears to mean the operator of the aircraft involved in an accident. Consequently, because the passenger flew an airplane painted MEXICANA, and her ticket stated please check in with Mexicana and indicated the Los Angeles to Mexico City flight was operated by Mexicana, United could not be sued under the Warsaw Convention.

In all, counsel is well-advised to heed *Ramirez*, which shows that code-sharing may be lawful, but frequently is wanting as a matter of customer service. For example, some passengers stand in long lines at the ticket counter of the airline on which they thought they were traveling only to be surprised to learn they must go to a different airline to complete their itinerary. Naturally this experience may generate a negative view of code-sharing. Airlines have an opportunity to eliminate code-sharing inconveniences, however. In order to develop and maintain passenger loyalty to both their brand and the alliances to which they belong, airlines are wise to design transparent code-sharing arrangements that provide passengers with as much information as possible at the point of sale.

As a legal matter, too, best practices dictate that counsel recognize that accidents arising on international code-share flights will be governed by the recently adopted Montreal Convention. Only five years ago, the United States adopted the Montreal Convention (November, 2003) in place of the Warsaw Convention, which was enacted in 1929. The Montreal Convention specifically states that [t]ransportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts . . . Article 1, 3. Consequently, while *Ramirez* shows that there is an opportunity to represent passengers in consumer practices actions, counsel should take care to assess the provisions of domestic regulations and international treaties applicable to particular airline travel if and when instituting suit.

For further information on the airline alliances and code-sharing arrangements, see Robert M. Hardaway, *Of Cabbages and Cabotage: The Case for Opening Up the U.S. Airline Industry to International Competition*, 34 *Transp. L.J.* 1 (2007); Harumi Ito & Darin Lee, *Domestic Code Sharing, Alliances, and Airfares in the U.S. Airline Industry*, 50 *J. L. & Econ.* 355 (2007).

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Furman on Developments Affecting Air Carrier Cargo Liability

2008 Emerging Issues 2438

Furman on Developments Affecting Limitation of Liability of International Carriers and Indirect Carriers of Cargo

By Richard L. Furman

June 30, 2008

SUMMARY: Despite changes in the law over the years, terms and conditions on air waybills remained static. Consequently, IATA deemed the standard contract of carriage on the reverse of air waybills outdated and issued a new set of recommended terms for use by carriers and indirect air carriers. Richard L. Furman discusses the impact of the recommended bill of lading terms governing the limitation of liability of air carriers and indirect air carriers.

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Generally speaking, international cargo transportation by scheduled airlines or indirect air carriers, *i.e.* entities that act like an airline by issuing their own air waybill but do not operate their own aircraft, (collectively carriers) is subject to a contract of carriage on the reverse of their air waybills which contain, among other terms, a limitation of liability.

The limitation is incorporated by reference to several multinational treaties, which in the case of the U.S. have been adopted as statutes, and include the Warsaw and the Warsaw as amended. The most notable amendment is known as Montreal Protocol No. 4. This amendment, among other things, changed the calculation of the carriers limitation of liability and made the limitation essentially unbreakable.

In addition, often the air waybill spells out the same limitation of liability terms as those incorporated by reference to Warsaw or the Montreal Convention, referenced below. As the air waybill is a contract of carriage, the limitation terms spelled out in the contract operate to protect the carrier in circumstances where those incorporated by reference may not be considered applicable, such as pre- or post-carriage loss, damage or delay to an air shipment.

In light of the numerous amendments of Warsaw, the changing air cargo industry and the interpretation of the law addressing carrier liability and other issues, a new convention was enacted known as the Montreal Convention. The intent of enacting the Montreal is to ultimately have it supersede the Warsaw. The Montreal Convention provides for the same limitation of liability as Warsaw as amended by Montreal Protocol No. 4. Montreal has been adopted as the law of the land by the U.S., although Warsaw can still apply to air cargo shipments to and from the U.S., depending on certain specific circumstances.

Due to the enactment of Montreal, the standard contract of carriage set forth on the reverse of carriers air waybills was deemed out of date and a new set of recommend terms was issued by the International Air Transport Association (IATA) for use by the carriers.

I. The Law. Under Article 22(2) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, (the Warsaw), carriers are entitled to assert a limitation of liability of 250 francs per kilogram. The equivalent of the limitation was established as \$9.07 per pound or \$20.00 per kilogram. This limitation remained in effect until 1998 when Montreal Protocol No. 4 became effective. n1

Under the Warsaw, the limitation could be avoided if certain circumstances were present in the case of a claim for loss damage or delay to goods. This spawned litigation addressing what factual circumstances would serve to void the limitation of liability. Over time the case law that interpreted Warsaw only muddied the waters rather than clarify them. Moreover, there was inconsistency in the interpretation of the statute in light of specific factual issues from jurisdiction to jurisdiction.

This situation, as well as the fixed limitation of liability, which ignored fluctuations in exchange rates and the increase in the value of goods, together with other circumstances, led to a series of amendments to the Warsaw intended to try to correct the confusion and any inequities affecting both the carriers and shippers.

Protocol No. 4 substituted a flexible standard for calculating the limitation of liability of 17 special drawing rights (SDR) per kilo, in place of the original fixed limitation. n2 The SDR currency fluctuates like any national currency and therefore provides a potentially more equitable basis for compensation of a loss or damage claim.

At the same time, Protocol No. 4 dispensed with any of the conditions under which the limitation could be voided and made it unbreakable, thus eliminating any doubt as to just whether or not the limitation would apply in a given case.

Prior to and in addition to Protocol No. 4, there were numerous other amendments to the Warsaw. Some were adopted by member nations and some not. This created a confusing landscape as to just which amendments to Warsaw applied in any given situation.

Simply put, for any one or group of amendments to apply to a air transport transaction, both the country from which the shipment departed and the country at which the transport terminated had to have adopted both Warsaw and the particular amendment upon which the parties could rely to determine their respective rights and duties.

As a consequence, the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) was enacted in 1999, in an effort to modernize what Warsaw had started, as well as to consolidate or update the numerous amendments that had been made to Warsaw.

The Montreal Convention has cleaned up the landscape. In particular it has preserved the unbreakable limitation of liability enacted by Protocol No. 4. n3

Unfortunately, not all the member nations have adopted the Montreal Convention as yet. Consequently, there exists a situation where in any given case the issue of liability of a carrier for loss damage or delay to cargo may be subject to the terms of the Warsaw as originally enacted, Warsaw as amended, and which amendment applies, or the Montreal Convention. Therefore, although a significant number of member nations have adopted the Montreal Convention, many have not. As a result, fulfillment of its purpose is going to be somewhat frustrated for the foreseeable future.

II. Revision of the Contract of Carriage. In order to reflect the fact that the Montreal Convention is now applicable to carriage of goods by air, together with Warsaw in its various forms as amended, as of March 17, 2008 a new IATA resolution, 600b, became effective. n4 The resolution sets forth the industry-preferred version of the IATA air waybill Conditions of Contract. Resolution 600b is the abbreviated and modernized Conditions of Contract that incorporates by reference both Warsaw and the Montreal Convention.

The Conditions of Contract set forth in Resolution 600b represent a number of important changes to those previously in effect. In particular, there is new language for the term relating to the carriers limitation of liability, Paragraph 4.

As discussed below, due to the phrasing of Paragraph 4 it is believed that the term exposes carriers that adopt the new Conditions of Contract to full liability in certain circumstances.

Under the old version of Conditions of Contract, there was a provision that addressed this issue that stated:

Except as otherwise provided in carrier's tariffs or conditions of carriage, in carriage to which the Warsaw does not apply, carriers' liability shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid.

However, this provision was changed by Resolution 600b, to read:

For carriage to which neither the Warsaw nor the Montreal Convention applies, Carrier's liability limitation shall not be less than the per kilogram monetary limit set out in the Carrier's tariffs or general conditions of carriage for cargo lost, damaged or delayed, provided that any such limitation of liability in an amount less than 17 SDR per kilogram will not apply for carriage to or from the United states. (Emphasis added.)

III. Not Necessarily a Good Idea. Not all scheduled airlines, if any, maintain tariffs that would protect their ability to assert a limitation of liability in circumstances where Warsaw or the Montreal Convention may not apply. Likewise it is highly unlikely that most, if any, IACs maintain a tariff.

This would potentially create a situation which would be a boon to claimants and a bane to the carriers seeking to limit their liability in all circumstances where they are prospectively responsible for loss damage or delay to a shipment within their care custody or control.

As an example, consider a situation where a carrier undertakes to provide door-to-door transport of a shipment. If the carrier had adopted the limitation of liability term of the new Conditions of Contract, it would be unable to assert a limitation of liability for pre- or post-carriage transport or handling of the shipment.

The carrier could only avoid such a consequence if it maintains a tariff, incorporated by reference in the revised Conditions of Contract, limiting its liability for pre- or post carriage loss, damage or delay to a shipment. Alternatively the carrier could maintain in the conditions of contract an express term extending the limitation of liability to pre- and post-carriage loss damage or delay.

In view of the foregoing, counsel responsible for protecting the interests of carriers must be on the alert for this prospective loophole by reviewing their clients contract of carriage and, where applicable, tariff, so as to ensure an express limit of liability is set forth in the contract of carriage or otherwise properly incorporated by reference to the clients tariff.

As a possible substituted limitation of liability term for that published by IATA, to protect the carriers ability to preserve their limitation of liability in circumstances where Warsaw or the Montreal Convention may not cover the shipment, we recommend the following:

If not governed by the Warsaw, the Warsaw as amended by the Hague Rules, the Warsaw as Amended by Montreal Protocol 4, the Montreal Convention, or any other international treaties, laws, other government statutes or regulations, orders, or requirements, Carrier's maximum liability for loss, damage, delay, shortage, misdelivery or nondelivery shall be 17 SDRs per kilo or the actual value of the loss, whichever is less, unless a higher value for carriage is declared on

the face hereof and an additional charge is paid for such declaration.

This may be amended in any way that a carrier or IAC wishes, but succinctly reflects what needs to be incorporated in such a term to ensure the carrier or IAC can extend its limitation of liability to cover the shipment from the point of origin to destination.

Return to Text

n1 . Protocol No. 4 was originally enacted in 1955. However, it was not until 1998 that the required number of member states adopted it that it became effective. Moreover, the U.S. did not accede to Protocol No. 4 until 1999.

n2

[2]. The SDR is an international type of monetary reserve currency, created by the International Monetary Fund (IMF) in 1969, which operates as a supplement to the existing reserves of member countries. Created in response to concerns about the limitations of gold and dollars as the sole means of settling international accounts, SDRs are designed to augment international liquidity by supplementing the standard reserve currencies. You can think of SDRs as an artificial currency used by the IMF and defined as a "basket of national currencies." The IMF uses SDRs for internal accounting purposes. SDRs are allocated by the IMF to its member countries and are backed by the full faith and credit of the member countries' governments.

n3

[3]. *See* Article 22 to the Montreal Convention.

n4

[4]. IATA is the governing body of the international air transport industry which almost every scheduled air carrier is a member of, as well as indirect air carriers. By becoming a member, an air carrier or indirect air carrier agrees to follow rules promulgated by IATA as a series of Resolutions. IATA cannot operate in the U.S. since some of the Resolutions would violate our antitrust laws. As a consequence, U.S. members adhere to the Resolutions, absent those offending the antitrust laws, through membership in IATA's U.S. affiliate, the Cargo Network Service (CNS).

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Furman on Amendment of N.Y. UCC Standard of Liability for Non-Delivery of Goods

2008 Emerging Issues 2009

Furman on Amendment of N.Y. UCC Standard of Liability for Non-Delivery of Goods

By Richard L. Furman

March 7, 2008

SUMMARY: With the amendment of New York UCC § 7-204, the New York Legislature reversed a trend in the case law as to the standard of liability applicable to a warehouseman that fails to deliver goods to a merchant where the loss cannot be explained. Rather than such non-delivery resulting in a presumption of conversion on the part of the warehouseman, the law shifts the burden of proof for establishing such a presumptive conversion to the bailor. Richard L. Furman discusses this change in the law and its impact on the liability of warehousemen, and offers some pointers for consideration by counsel for bailors and warehousemen when dealing with this issue and protecting their clients' position generally.

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ARTICLE: The New York Legislature recently passed an amendment to the law governing the burden of proof for establishing a warehouseman's liability for the unexplained loss of bailed goods.

I. The Law. Section 7-204 of the New York Uniform Commercial Code governs the contractual limitation of liability between the bailor and warehouseman when the warehouseman fails to deliver bailed goods when requested.

U.C.C. § 7-204(2) allows the bailor and warehouseman to contractually agree on a damages limit for the warehouseman's liability in case of loss or damage. The only exception to the contractually agreed-upon limit on liability is when the warehouseman converts the bailed goods to its own use. A warehouseman faces unlimited liability (that is typically not insurable) in cases of conversion.

II. The Amendment. On August 16, 2007, the New York State Assembly passed Bill Number A-6571A, which amended section 7-204 of the New York Uniform Commercial Code. The amendment provides that where a bailor is a merchant, the bailor has the burden of establishing that the warehouseman has converted goods to its own use. Merely establishing that the warehouseman failed to deliver the goods does not establish a *prima facie* case of conversion.

The impetus for the change in the law was a New York Court of Appeals decision that placed the burden of proof on the warehouseman to provide sufficient evidence that its failure to return the property is not a result of its conversion of that property to its own use. In such instances all the bailor needed to establish to satisfy its *prima facie* pleading was that it delivered the property to the warehouse and the warehouse failed to return the property upon a proper demand.

See I.C.C. Metals, Inc. v. Municipal Warehouse Co., 409 N.E.2d 849 (N.Y. 1980). n1

The application of the law to a "merchant" limits the effect of the revised standard of liability. Clearly, the amended statute is not intended to be applicable to warehousing of personal property of a consumer or other, non-commercial, parties. Goods that are used or bought for use primarily for the personal, family, or household purposes of the bailor would not be subject to the amended statute.

UCC § 2-104 defines *merchant* as a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. New York has a broad definition of *merchant*, which includes almost every person in business. A person is a *merchant* if they are so experienced and knowledgeable under the circumstances that they should be charged with the more substantial burden imposed upon a merchant. *National Microsales Corp. v. Chase Manhattan Bank, N.A., 1989 U.S. Dist. LEXIS 12189 (S.D.N.Y. 1989).*

III. Impact and Consequences of the Amendment. To fully appreciate the impact of the amendment, it should be understood that New York UCC § 7-204(2) allows the warehouseman and the bailor to enter into a warehousing agreement that limits the warehouseman's liability, provided the bailor has the opportunity to increase the warehouseman's liability at the time of signing the warehouse agreement or within a reasonable time after receiving the warehouse receipt. This scheme of limitation and increase of liability is very similar to that which is followed in various modes of transport of goods. n2

Notwithstanding the foregoing, the provision goes on to stipulate that the authority of the parties to a warehouse agreement to limit the warehouseman's liability is not effective in the event the nondelivery of the bailor's goods is the consequence of the warehouseman's conversion of the goods.

This proviso in the statute, together with the holding in *ICC Metals, Inc.*, had the effect of placing an unfair burden, and what amounted to strict liability, on warehousemen. It had a chilling effect on the willingness of the commercial warehousing industry to provide its services. In addition, the cost of warehousing commercial goods increased as a hedge against conversion claims and in response to higher premiums set by underwriters, as a consequence of this stricter, and more difficult to defend, standard of liability. Ultimately, it was the bailors who bore this increased cost of doing business on the part of the warehousemen.

In shifting the burden of proof back to the merchant bailor, the amendment is meant to encourage commercial parties to designate New York law as governing their warehouse agreements, encourage the establishment of warehouses in New York, and reduce the costs of business for warehousemen by placing the burden on the bailor to prove conversion before subjecting the warehouseman to unlimited liability.

In particular, the increased underwriting risk that existed under the law prior to the amendment has been obviated, and would be expected that premiums for warehouseman's liability policies would benefit. In addition, it would be hoped that the tendency of warehousemen to hedge their risk for conversion claims would result in a reduction of warehouse fees to merchants that use the warehouseman's services.

This is not to say that there is no continuing exposure of a warehouseman to a claim of conversion, or some other cause of action. For example, in the absence of the basis for pleading conversion, a bailor may still assert a claim for negligence. n3 However, under the present scheme, by shifting the burden of proof to the bailor, the warehouseman may start out defending itself on an equal footing with the bailor.

Therefore, the warehouseman will retain the potential benefit of any limitation of liability it sets forth in its warehouse receipt, applicable tariff, or agreement with the bailor. Only if the bailor satisfies the burden of proof for establishing conversion, and the warehouseman is unable to rebut the bailor's claim, will it be denied its limitation of liability defense Under New York UCC § 7-204(2).

In prosecuting a conversion claim, generally conversion is defined as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it" so that the party accused of the conversion should be held liable for the full value of the chattel. *See* Restatement of the Law, Second, Torts § 222A(1), The American Law Institute (1965) (the "Restatement").

To determine the seriousness of the "interference" with the chattel a number of elements can be considered, including "(a) the extent and duration of the actor's exercise of dominion or control; (b) the actor's intent to assert a right in fact inconsistent with the other's right of control; (c) the actor's good faith; (d) the extent and duration of the resulting interference with the other's right of control; (e) the harm done to the chattel; (f) the inconvenience and expense caused to the other." *Id. at* § 222A(2).

New York common law on conversion is substantially in line with elements required to prove conversion outlined in the Restatement. "Under New York common law, a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *State v. Seventh Regiment Fund*, 774 N.E.2d 702 (N.Y. 2002). Two key elements of conversion are: (1) plaintiff's possessory right or interest in the property (*Pierpoint v. Hoyt*, 182 N.E. 235 (N.Y. 1932)) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Employers' Fire Ins. Co. v. Cotten*, 156 N.E. 629 (N.Y. 1927))." *Colavito v. New York Organ Donor Network, Inc.*, 860 N.E.2d 713 (N.Y. 2006).

IV. Practitioners Perspective. From the perspective of counsel for the bailor, while having the benefit of a presumption of conversion made pleading and proving a claim against a warehouseman for the unexplained nondelivery of goods infinitely easier, the loss of that presumption has not significantly impaired the ability to obtain satisfaction for such a loss. There are still several causes of action available that offer a basis for a recovery. Counsel will just have to work a bit harder to satisfy the prima facie pleading for the several causes of action.

Of course, depending on the facts of the case, conversion may still be a viable cause of action. Negligence is another, as is breach of contract; although this latter issue must be considered in light of the existence of the applicable warehouse agreement entered into between the bailor and warehouseman, or the tariff the warehouseman may maintain, to the extent the bailor had adequate notice of the existence and terms of either. Fraud may also be a possibility. Given the pleading and burden of proof requirements for fraud however, it is less likely to be of use absent the requisite facts.

One thing that a bailor's counsel can do, if the bailor is sensible enough to consult with its counsel regarding warehouse agreements, is to be proactive in ensuring the client is not only aware as to the warehouseman's duties, but its rights as well, such as the ability to limit liability. Counsel should, as well, ensure the client bailor is aware of its right to declare a greater value for its stored goods. If an opportunity to make an excess value declaration is not afforded the bailor, and the worst occurs, it would be a sound ground for opposing the warehouseman's assertion of its limitation of liability.

In the event the bailor is a regular user of warehousemen's services, then serious consideration should be given to negotiation of a formal agreement that takes the terms of the bailor and warehouseman's relationship out of the common law, the standard form of agreement and/or tariff. Volume talks and the issues discussed can obviate in such circumstances.

From the perspective of counsel for the warehouseman, everything that is necessary to ensure that the client's ability to limit its liability should be done, such as ensuring that the bailor has adequate notice of the warehouseman's limitation of liability and the ability of the bailor to declare a higher value for a prospective loss. In addition, a good document trail, tracking goods in and out of the warehouse, signed for by parties with the right to store and take delivery of the goods, in good order and condition or with exceptions as to the condition properly noted, will go a long way to defending against a claim of conversion and, to some extent, negligence.

V. Conclusion. While arguably the failure of a warehouseman to delivery property to a bailor for unexplained reasons may satisfy some of the elements that may be considered to establish the existence of a conversion, the element of intent is likely to prove difficult. It is possible that this may have been somewhat in the Court's mind when it decided *ICC Metals*. Perhaps, the Court considered this troublesome element of the burden of proof too much of a burden. Whatever the reason, the Legislature has chosen to put the issue back on an even keel. Moreover, it does not appear that this will result in prejudice to the merchant bailor, as it will still have other causes of action to pursue as against the warehouseman. Further, the bailor need not be limited in the amount of its prospective recovery if it elects to declare a higher value for its stored goods when entering into the warehouse agreement with the warehouseman.

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n1 . In a Bill Summary published by the New York State Assembly, it was noted that the *ICC Metals* holding was followed by one other state and rejected by 10 states. Moreover, the National Conference of Commissioners on Uniform State Laws and the American Law Institute expressly rejected *ICC Metals* when in connection with the creation of a revised version of Article 7 in 2003, already enacted in 24 states.

n2

[2]. For the definitive treatise discussing carrier, transportation intermediary and warehouse liability in connection with the transportation of goods, *see generally*, Saul Sorkin, Goods in Transit (LexisNexis Mathew Bender 2002).

n3 . *See* Restatement of the Law, Second, Torts, § 224, The American Law Institute (1965), "One who does not intentionally exercise dominion or control over a chattel is not liable for a conversion even though his act or omission is negligent." However, *see Id. at § 234*, "A bailee, agent, or servant who makes an unauthorized delivery of a chattel is subject to liability for conversion to his bailor, principal, or master unless he delivers to one who is entitled to immediate possession of the chattel.

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Richard L. Furman is a partner in the firm of DeOrchis & Partners, New York, New York. He specializes in providing legal advice and representation to international air and ocean freight forwarders, airfreight forwarders, NVOCCs, importers, exporters, warehousemen, truckers, insurance and surety companies offering cargo and trade related underwriting and bonds and trade finance institutions. Mr. Furman's areas of expertise include air, marine and motor carrier cargo law and claims defense, import and export trade regulation, corporate and commercial advice, representation and litigation. Mr. Furman is admitted to the bar of the State of New York, U.S. Court of International Trade, U.S. District Courts for the Eastern, Southern and Northern Districts of New York, the Northern District of California and the Eastern District of Michigan, and the U.S. Court of Appeals, Federal Circuit. He is Counsel to the Long Island Import Export Association and a member of the Maritime Law Association (Member, Carriage of Goods Committee); Customs and International Trade Bar Associations; Transportation Lawyers Association; Association for

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Eric R. Benton on KLS Air Express, Inc. v. Cheetah Transportation LLC

2008 Emerging Issues 1751

Eric R. Benton on KLS Air Express, Inc. v. Cheetah Transportation LLC

By Eric R. Benton

January 7, 2008

SUMMARY: Teaser: Eric R. Benton on KLS Air Express, Inc. v. Cheetah Transportation LLC. The Eastern District of California has recently shed light on the issue of liability for loss or damage to multiple brokered shipments. This commentary, written by Eric R. Benton, examines the decision and offers insight as to its practical import.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *KLS Air Express, Inc. v. Cheetah Transportation LLC*, 2007 U.S. Dist. LEXIS 62161 (E.D. Cal. 2007), the United States District Court for the Eastern District of California addresses the difficult area of determining liability for a damaged shipment that has been handled by several carriers or brokers.

(1) Factual Background. KLS instructed Cheetah to ship a load of flat panel monitors from Pennsylvania to California. A dispute arose as to whether Cheetah was instructed to transport the shipment or was allowed to broker the shipment to a motor carrier. Cheetah had operations as both a motor carrier and a broker. Cheetah contracted with Sonko Trucking, a motor carrier, to transport the shipment of monitors. Sonko then brokered the shipment to Hemi-Express. Hemi picked up the shipment and was in possession of the monitors when they were stolen.

KLS claimed that it required Cheetah to have insurance covering the shipment in the amount of \$250,000. (Note: Cheetah's cargo insurance had a deductible of \$250,000 on a policy with \$250,000 limits, thus there is an issue of whether Cheetah had any insurance as allegedly required by KLS.) Cheetah only required \$100,000 in cargo coverage from Sonko; the level of insurance coverage held by Hemi-Express is not indicated in the Courts opinion. KLS filed a cargo claim with Cheetah for \$275,540.00, which Cheetah denied and forwarded to Sonko.

(2) Commentary. This case represents a common business practice in the transportation industry. A shipper can, either with or without the shippers knowledge, tender a load of freight to a motor carrier or a broker who will then tender the freight to another motor carrier or broker. A transportation entity can operate as both a motor carrier and a property broker. A *motor carrier* is defined by 49 U.S.C. § 13102(14) as a person providing commercial motor vehicle transportation for compensation. A *broker* is defined as a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation. 49 U.S.C. § 13102(2) (2007).

Motor carriers and brokers must be licensed by the Federal Motor Carrier Safety Administration. Motor carriers and brokers, however, are subject to different liability regimes for loss or damage to cargo. When a motor carrier damages cargo in interstate transportation, its liability is controlled by 49 U.S.C. § 14706, commonly referred to as the Carmack Amendment. This federal statute's liability provisions preempt state law claims against the motor carrier for damage to an interstate shipment. The Carmack Amendment is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. *Adams Express Co. v. Croninger*, 226 U.S. 491, 505 (1913). See also *Missouri P. R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964), *affg Missouri P. R. Co. v. Elmore & Stahl*, 368 S.W.2d 99 (Tex. 1963) (liability of a carrier for damage to an interstate shipment is a matter of federal law controlled by federal statutes and decisions); *Tallyho Plastics, Inc. v. Big M Constr. Co.*, 8 S.W.3d 789 (Tex. App. 1999) (no writ) (state law claims against a motor carrier, including attorneys fees, are not allowed under the Carmack Amendment).

A broker's liability is determined under state law negligence or, if a contract is present, breach of contract claims. See *Chubb Group of Ins. Cos. v. H.A. Transp. Sys.*, 243 F. Supp. 2d 1064, 1071 (C.D. Cal. 2002), citing *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993) (action for negligence requires a showing that (a) Defendant owed the Plaintiff a legal duty, (b) Defendant breached that duty, and (c) the breach was a proximate or legal cause of the injuries Plaintiff suffered.). The Carmack Amendment is not applicable to the duties undertaken by a broker. See *CGU Int'l Ins. v. Keystone Lines Corp.*, 2004 U.S. Dist. LEXIS 8123 (N.D. Cal. 2004). Generally, a broker's duties owed to the shipper are to arrange transportation with a reputable carrier. What constitutes a reputable carrier is subject to interpretation.

In practice, the determination of when an entity is acting as a motor carrier or a broker has proven to be problematic. The Court's opinion provides a good discussion of these problems. The Court first addressed the Carmack Amendment claim. The court noted that the Carmack Amendment distinguishes between carriers, freight forwarders, and brokers in that only carriers and freight forwarders could be liable to the shipper for damages that occur during transit. *KLS v. Cheetah at 9*, citing *Professional Communs., Inc. v. Contract Freighters, Inc.*, 171 F. Supp. 2d 546, 550 (D. Md. 2001).

The Court next addressed an important issue that is often overlooked by transportation professionals and the courts, especially when the entity is licensed as both a carrier and a broker by the Federal Motor Carrier Safety Administration. The Court noted that a carrier is not automatically considered a broker because it requests another carrier to perform the transportation. *KLS v. Cheetah at 12*. In fact, 49 C.F.R. § 371.2(a) states that motor carriers are not brokers when they arrange transportation of shipments which they have accepted and are legally bound themselves to transport. Similarly, 49 C.F.R. § 371.7(b) states that a broker can not represent itself to be a motor carrier and any advertising by the broker must show its status as such. See *CGU Int'l Ins. v. Keystone Lines Corp.*, 2004 U.S. Dist. LEXIS 8123, at *5 (N.D. Cal. 2004) (regarding the difference between carrier and broker, crucial distinction is whether the party legally binds itself to transport, in which case it is considered a carrier); *Tokio Marine & Fire Ins. Co. v. MegatruX, Inc.*, 2006 Cal. App. Unpub. LEXIS 6964, at *10*11 (Cal. Unpub. Ops. 2006) (courts are more lenient than the regulations; there is no rigid test to determine carrier status[i]t is necessary to examine the expectations of the parties and the circumstances of the specific transaction in each case for indicia of carriage and brokerage services).

In the present case, KLS offered evidence that Cheetah was licensed as a motor carrier and Cheetah's advertising did not state it was operating as a broker. This evidence coupled with the testimony that KLS believed Cheetah was acting as the carrier and was KLS's sole point of contact was enough to create a factual issue sufficient to defeat KLS's motion for summary judgment.

The Court next addressed the state law claims that could be brought against Cheetah as a broker in the event that it was found not to be a motor carrier. The more interesting state law claim is the claim KLS brought against Cheetah for negligent hiring of Sonko for failing to ensure Sonko had adequate insurance. n1 A broker's duty to hire a reputable carrier has often been presumed to mean the carrier was duly licensed, had a satisfactory safety record and was adequately insured. *CGU Int'l Ins. v. Keystone Lines Corp.*, 2004 U.S. Dist. LEXIS 8123, at *9 (N.D. Cal. 2004) (brokers standard procedure for qualifying a carrier was to verify transportation licenses and insurance status); see

Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004) (brokers agreement with carrier required carrier to have a Satisfactory U.S. Department of Transportation safety rating).

The Court found that brokers do not have a duty to hire a carrier with specific insurance coverage. It stated that the plaintiff failed to cite any case law that would establish or recognize a duty of the part of a broker to ensure that its carrier [had] adequate insurance to cover potential losses or damages to the cargo. The Court noted that it also was unable to locate any cases on point. *KLS v. Cheetah at 18*, citing *Chubb Group of Ins. Cos. v. H.A. Transp. Sys.*, 243 F. Supp. 2d 1064 (C.D. Cal. 2002) (noting that it seemed unlikely that shipper would have paid more for transportation so that its insurance company would be compensated in event of loss, court held broker did not have a duty to select carrier with insurance to cover loss).

The Court stated that when a broker has a duty to hire a carrier with a specific level of insurance, that duty arises from a contractual obligation. The Court granted Cheetahs Motion for Summary Judgment with respect to the negligent hiring claim because there was no evidence it had undertaken a specific duty to select a carrier with adequate insurance.

The transportation industry has struggled to sift through the differing roles and differing liability regimes in order to determine liability when a shipment is transferred from the shipper to entities that can operate as either a broker or a carrier or when the shipment is transferred to a variety of entities operating in a variety of capacities. This opinion sheds some light on how the courts are going to treat cargo loss or damage claims when the shipment is handled by a broker or brokers.

Proclaiming to be a broker is not sufficient if the entity has accepted the freight and is legally bound to transport it. Absent a contractual obligation, the issue of when an entity becomes legally bound to transport the freight requires further clarification by the courts. The Courts finding that there is not a duty to hire a carrier with a specific amount of insurance is significant to the transportation industry. How that lack of a duty is actually handled between shippers and brokers remains to be seen. Presumably, it is the duty of the shippers dock workers to determine the level of insurance held by the carrier that shows up to their docks to pick up the freight. Putting this type of responsibility on the person on the dock has been problematic in other areas, and presumably a similar problem will occur in determining levels of insurance held by the carrier. Therefore, shippers are well advised to enter into contracts with their brokers where this duty is addressed.

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n1 . Various cases have addressed broker liability in a personal injury action for the negligent hiring of a driver or carrier. *Compare, Jones v. D'Souza*, 2007 U.S. Dist. LEXIS 66993 (D. Va. 2007) (C.H. Robinson acting as a broker denied summary judgment on claims of negligent hiring of driver and negligent entrustment of freight in personal injury suit) with *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004) (C.H. Robinson acting as a broker only liable for drivers negligence in a master-servant relationship as principal not liable for negligence of agent who is not a servant).

ABOUT THE AUTHOR(S):

Eric R. Benton is a Managing Director of the Houston-based law firm of Lorange & Thompson, P.C. and serves as co-chair of the Transportation Practice Group. Mr. Benton has been involved in the transportation industry for over thirty years. His principal areas of practice are civil litigation and transportation law.

Prior to joining Lorance & Thompson, Mr. Benton served as in-house counsel to a multi-billion dollar international transportation corporation for nearly 15 years. He has experience representing carriers in all modes of transportation, has assisted clients around the world, and has provided advice on all aspects of international and domestic transportation. He is a frequent lecturer and writer on transportation issues.

Mr. Benton received his J.D. from Washburn University School of Law where he served as the Comments Editor for the Washburn Law Journal, and received his Bachelor of Science in Political Science and History from the University of Kansas. He is admitted to practice in the following jurisdictions: Texas; Kansas; Ohio; U.S. Court of Appeals, Fifth Circuit; U.S. District Court for the Northern, Southern, Eastern, and Western Districts of Texas; U.S. District Court for the District of Kansas; U.S. District Court for the Northern District of Ohio; United States Court of International Trade.



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Eric R. Benton on Emmert Industrial Corp. v. Artisan Associates

2008 Emerging Issues 1361

Eric R. Benton on Emmert Industrial Corp. v. Artisan Associates, 497 F.3d 982 (9th Cir. 2007)

By Eric R. Benton

December 5, 2007

SUMMARY: *Eric R. Benton on Emmert Industrial Corp. v. Artisan Associates, 497 F.3d 982 (9th Cir. 2007).* In this commentary, Eric R. Benton exams Emmert, a notable case in which the Ninth Circuit brought accessorial charges within the shortened statute of limitations for freight charges and quietly aligned with Transit Homes.

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ARTICLE: In *Emmert Industrial Corp. v. Artisan Associates, 497 F.3d 982 (9th Cir. 2007)*, the Court of Appeals for the Ninth Circuit utilized a broad definition of the term transportation charges to find expenses incurred for engineering, surveying and personnel are services rendered incident to providing transportation. As such, these charges are subject to the 18-month statute of limitations found in *49 U.S.C. § 14705*. The collection of freight charges, however, is not a federal question according to the Ninth Circuit. Therefore, a federal statute limits the time period in which a state law claim can be brought under this decision.

(1) Factual Background. Emmert is an engineering and transportation company that specializes in hauling loads in excess of 100,000 pounds. Artisan is a broker that was under contract to General Motors to arrange for the transportation of large industrial presses from Japan to the United States. Emmert submitted a bid to provide the transportation services and received a written notification that it had been selected as the primary carrier for a series of moves involving GMs large presses from Japan to various cities in the United States.

After performing several moves, Artisan received instructions from General Motors to stop using Emmert for the remaining moves. Emmert invoiced Artisan approximately \$4.9 million dollars for the services it had performed. Artisan objected to some of the charges and after protracted negotiations only paid \$4.2 million. The disputed charges included charges for Emmerts employees to travel to Japan to inspect the equipment and select the routes to take from the ports, as well as to pay a third party to evaluate the amount of strain placed on the bridges on the selected routes.

The last services performed by Emmert were in 1997; however, suit was not brought for the amount not paid until 2003. Emmert brought suit for breach of contract for not paying the amount invoiced, breach of contract for not allowing it to continue to haul additional shipments when the contract named it the primary carrier, and a quantum meruit claim for the services rendered. Emmert brought an action under diversity jurisdiction against Artisan in the United States District Court for the District of Oregon.

District Court Decision. The District Court granted a Motion for Summary Judgment in favor of Artisan under 49 U.S.C. § 14705 which limits the time in which a carrier may bring suit against a shipper for freight charges to 18 months. In addition, the District Court found that Emmert did not have a contractual right to any additional work.

Ninth Circuit Decision. On appeal to the Ninth Circuit, Emmert argued for the first time that 49 U.S.C. § 14705 applied only to a carriers charges that were owed under a filed tariff. Stating that Emmerts argument was a statutory interpretation question of first impression that would ultimately have broad impact, the Ninth Circuit decided to hear the argument.

After a thorough but brief discussion of the history of rate regulation under the Interstate Commerce Act and the ICC Termination Act of 1995, the Court relied upon the plain meaning of the language contained in 49 U.S.C. § 14705(a) to reject Emmerts argument. The statute provides that a carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues. n1

In addition to arguing that the charges must be contained in a filed tariff, Emmert argued that there was no federal question jurisdiction over a claim absent a filed tariff. The Court held that the 18-month period of limitations is not restricted to charges under a filed tariff or even to claims arising under federal law.

Emmert also argued that some of the charges were not for transportation, but for engineering, research and third party services. The Court examined the definition of transportation contained in 49 U.S.C. § 13501 and held such charges are within the statutory definition. Transportation is defined to include services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property. 49 U.S.C. § 13102(23)(B).

The Court of Appeals affirmed the judgment of the district court in part and remanded for further findings. Specifically, the Court found that Emmerts claims for payment were time barred under 49 U.S.C. § 14705. With respect to the breach of contract claim for Artisans refusal to award it additional work after being named the primary carrier, the Court remanded that claim back to the district court to determine what that designation entailed.

(2) Commentary. The Court noted that there are few reported decisions on how broad the term services is interpreted when determining what is included as part of a carriers transportation. The Court relied on the decisions rendered in the First Circuit and Fifth Circuit in reaching its holding. In *PNH Corp. v. Hullquist Corp.*, 843 F.2d 586 (1st Cir. 1988), the First Circuit, in dicta, determined that all of a motor carriers services were incident to the carriage and delivery. In this 1988 decision, the court found that if the shipment was in storage and not temporarily in transit, the storage facilities would be considered transportation as defined by 49 U.S.C. § 10102(26). (The court went on to find that temporary storage services to a single entity did not constitute motor vehicle transportation within the Carmack Amendment.)

In a similar case wherein the court considered if storage falls within the definition of transportation services, the Fifth Circuit in *Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dep't*, 415 F.2d 452, 456 (5th Cir. 1969), found that all services rendered by a common carrier in connection with transportation of goods shall be covered by the Act. In this case, contrary to the *PNH Corp* decision, the Court found that the storage company was a mere warehouseman and not a common carrier.

In spite of the weak precedent, the Ninth Circuit seems to have come to the correct conclusion. The Ninth Circuits definition of services is consistent with Congressional intent to define the term services broadly. *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U.S. 588, 36 S. Ct. 177, 60 L. Ed. 453 (1916).

The *Emmert* decision may be more important for what it does not discuss as it is for what it does discuss. Without

citing any case precedent, the Ninth Circuit in *Emmert* held that none of Emmerts affirmative claims presented a federal question. The Ninth Circuit evidently overlooked the decision in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S. Ct. 1343, 75 L. Ed. 2d 260 (1983), that reversed and remanded an earlier decision of the Ninth Circuit on this issue. In *Thurston*, the carrier sought review, by a writ of certiorari, of a Ninth Circuit decision that affirmed the district court judgment dismissing the carriers freight charge claim for lack of subject-matter jurisdiction. The Ninth Circuit had dismissed the suit as a simple contract-collection action, the court could not discern any proposition of federal law that a court need confront in deciding what, if anything, can be recovered. *Thurston at 533* quoting *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 682 F.2d 811, 812 (9th Cir. 1982). In a very terse holding, the Supreme Court stated [t]he Court of Appeals attempt to distinguish this most troublesome precedent is wholly unconvincing. n2 *Thurston at 535*.

The Supreme Courts decision in *Thurston* seemed to settle the issue of whether freight charges were allowed to be brought in federal court under federal question jurisdiction until *Transit Homes of America v. Homes of Legend, Inc.*, 173 F. Supp. 2d 1192 (N.D. Ala. 2001). In *Transit Homes*, the court dismissed a claim for freight charges arising under a contract when it found that it did not have subject-matter jurisdiction. The *Transit Homes* court held that a claim for freight charges does not arise under a federal statute when there is not an applicable filed tariff. The court went on to proclaim that [w]hen a carrier brings a claim to recover amounts owed under a federally required tariff, there is no question that original jurisdiction exists under 28 U.S.C. § 1337. *Transit Homes at 1195*.

The *Transit Homes* decision was followed by the United States District Court for the District of Maryland in *Mastercraft Interiors, Ltd. v. ABF Freight Sys.*, 350 F. Supp. 2d 686 (D. Md. 2004). In this decision, the court adopted *Transit Homes* and held that contracts between a shipper and carrier under 49 U.S.C. § 14101(b)(1) are controlled by state law. As such, freight charges arising under a contract are not to be decided under federal law because there is no federal question jurisdiction.

These cases were followed by a decision in the Eastern District of Michigan in 2005. In *Central Transport International v. Sterling Seating, Inc.*, 356 F. Supp. 2d 786 (E.D. Mich. 2005), the court while considering whether a freight claims case should be remanded to state court, found that even a tariff reference was not sufficient to confer federal question jurisdiction. Central claimed federal question jurisdiction existed because Congress has enacted an extensive federal statutory scheme that preempted state law claims and the freight charges were filed under a federal tariff.

The extensive federal statutory scheme *Central* alludes to is the ICC Termination Act of 1995 (ICCTA) which prohibited a state or political authority from enacting or enforcing a law or regulation that relates to price, route or service of any motor carrier. 49 U.S.C. § 14501(c). The court in *Central* found that bringing a state law claim for freight charges under a contract was not within the prohibition against bringing a claim that relates to price, route or service of a motor carrier.

The Central court also found that the *Transit Homes* decision was more decisive than the U.S. Supreme Courts decision in *Thurston Motor Lines*. Citing extensively from *Transit Homes*, the court outlined the filed-rate doctrine and its lead in to the demise of the Interstate Commerce Commission. The court noted that prior to the passage of ICCTA, a carrier was required to maintain a filed tariff. Therefore, since carriers are no longer required to maintain a filed tariff, the *Thurston* decision no longer has application to freight charge claims.

Emmert is now in the *Transit Homes* side of the ledger when considering whether freight charges present a federal question for purposes of jurisdiction. The Ninth Circuits adoption of this position without discussing the prior precedent to the contrary will not diminish it being cited as support to keep freight charge claims out of federal court. The federal district courts efforts to keep such cases off their dockets have picked up a powerful ally in the Ninth Circuit with this decision. State court judges, however, must now interpret federal law with respect to what services are within the scope of the term transportation services and when a claim is timely filed.

Return to Text

n1 . A shipper also must file its claim against a carrier within 18 months after the claim accrues under 49 U.S.C. § 14705. Shippers and carriers have 180 days from the receipt of the original bill to contest the charges or reissue a corrected invoice. 49 U.S.C. §§ 13710(a)(3)(A), 13710(a)(3)(B).

n2

[2]. In *Henslin v. Roaasti Trucking*, 69 F.3d 995 (9th Cir. 1995), the 9th Circuit found that because the product being shipped was commodities exempt from federal regulation, there was no federal question jurisdiction. In *C.A.R. Transportation Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 478 (9th Cir. 2000), the Ninth Circuit found federal question jurisdiction because any action between carriers and shippers arising from the filed rate presents a federal question.

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Daniel W. Raab on Eli Lilly do Brasil, Ltda v. Federal Express Corp.

2008 Emerging Issues 1279

Daniel W. Raab on Eli Lilly do Brasil, Ltda v. Federal Express Corp., 502 F.3d 78 (2d Cir. 2007)

By Daniel W. Raab

December 3, 2007

SUMMARY: *Daniel W. Raab on Eli Lilly do Brasil, Ltda v. Federal Express Corp., 502 F.3d 78 (2d Cir. 2007)*. In this Emerging Issues Analysis, Daniel Raab examines the Second Circuits conflicts of law analysis regarding whether U.S. or Brazilian law applied, and its subsequent decision to enforce a waybills limitation of liability under U.S. law.

PDF LINK: Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge

ARTICLE: *Eli Lilly do Brasil, Ltda v. Federal Express Corp., 502 F.3d 78 (2d Cir. 2007)*, involved an action by a shipper regarding pharmaceuticals that were to be shipped from Brazil to Japan that were alleged to be missing. The major issues addressed were: (1) whether U.S. federal law applied, and in turn, (2) whether FedEx waybill was enforceable, including its limitation of liability.

Claims Scope. A big part of the transportation industry involves shipments by way of air waybill. In this particular case the shipper, Lilly, contracted with Nippon Express do Brasil, who, in turn, subcontracted with FedEx to transport pharmaceuticals from the shippers factory in Brazil to Japan through FedEx hub in Memphis. FedEx received the cargo in Memphis and consigned it to Jumbo Jet Transportes Internacionais Ltda. for transportation by truck to Brazil. The truck was hijacked and approximately \$800,000 worth of cargo was stolen, thus the limitation of liability was a major issue. (This fact pattern sounds like a law school exam question for a transportation class.)

The waybill for the shipment limited FedEx liability for stolen goods to \$20 per stolen kilogram, effectively limiting FedEx liability to \$28,000; the value of the shipment was substantially higher. The waybill did provide that if a customer was dissatisfied with the limitation it had the option of securing additional liability by declaring a higher value and paying additional charges, however that was not done in this instance. The limitation of liability was actually on the face of the waybill and according to the court, was conspicuous. There was no evidence that Lilly elected to declare a higher value or to pay for additional coverage. The record was not clear about the circumstances of the theft. The limitation on the waybill stated the following: All goods may be carried by any other means including road or any other carrier unless specific contrary instruction are given hereon by the shipper, and shipper agrees that the shipment may be carried via intermediate stopping places which the carrier deems appropriate. The shippers attention is drawn to the notice concerning carriers limitation of liability.

Additionally, there was an opportunity to purchase insurance for the shipment through the carrier. This was not

done either.

The first is that issue that was raised by the shipper was that Brazilian law, not United States law applied. Obviously this was an attempt to get around the limitation of liability, although the Brazilian law cited was not overly convincing on its own merit.

The ruling in this case primarily had to do with what law would apply and therefore whether or not the limitation of liability would be valid. The lower court had ruled that U.S. federal law applied, not Brazilian law, and therefore the limitation of liability would be valid.

Appellate Court Ruling. The appellate court agreed that the federal common law of the United States applied. In so doing, the court referred to the Restatement Second of Conflict of Laws. The court in so finding felt that there was considerable interest on the part of the United States in applying its law, although the court did find that Brazil had an interest in the contract and its interest was not insignificant. The court also determined that FedEx's domicile was in Memphis. Although the court did find that Brazil had superior contacts to the shipment, the court found that U.S. law applied at least in part because the shipper chose to sue in a U.S. District Court. The court found it odd that someone would attempt to assert the law of Brazil, yet opt to sue in the United States. Interestingly enough, the cargo was never in the U.S.; it was stolen in Brazil, although it was routed through the United States.

Once the appellate court found that federal law applied, it had no problem applying the limitation in the waybill. A practical consideration in such application is whether the shipper can declare a higher value. In this case, the court did find that the shipper could have declared a higher value. Best practice dictates that if counsel is advising clients, counsel should inform them about the risks, although this situation would normally reach the practitioner after the fact. If your client has insurance, then this is not such a huge factor. In so ruling, the court did not find an affidavit by a Brazilian attorney to be persuasive. The affidavit from the attorney also attempted to show gross negligence. There was nothing in the record to support Lilly's claim of gross negligence which was really just an attempt to get around the limitation of liability.

The court therefore concluded that the limitation of liability was valid, despite a vigorous dissent from one of the judges based in part on the connection of the contract and activity to Brazil.

Conclusion. Limitations of liability are not unusual in air cargo cases either internationally or domestically. The Warsaw Convention, 49 U.S.C. § 40105 has a \$20 per kilogram or \$9.07 per pound limitation of liability. This was not an alien concept to the court. As a practical matter, when a shipper enters into a contract it should not ignore limitations of liability and should either seek to declare a higher amount or, if possible, have insurance for the shipment in order to be protected. There are not many circumstances where these limitations of liability can be overcome by the shipper if it has had an opportunity to declare a higher value. Counsel would need to show gross negligence or an intentional act.

Another practice point is that if a practitioner is seeking to apply the law of a foreign country and there is a question of the applicability of law, yet the decision is made to file in the United States, the court may have the discretion to go ahead and apply the law with which it is most comfortable.

As a practical matter, when a practitioner accepts a case of this nature, counsel should immediately review the airway bills that are involved in order to help analyze the case and should not assume that low levels of liability will not be enforced. If counsel fails to follow this practice, a seemingly large claim may be reduced considerably, which might then factor into the terms of representation.

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Raab on American Roll-On Roll-Off Carrier, LLC v. P&O Ports Baltimore, Inc.

2008 Emerging Issues 1281

Daniel W. Raab on American Roll-On Roll-Off Carrier, LLC v. P&O Ports Baltimore, Inc.

By Daniel W. Raab

December 3, 2007

SUMMARY: *Daniel W. Raab on American Roll-On Roll-Off Carrier, LLC v. P&O Ports Baltimore, Inc., 479 F.3d 288 (4th Cir. 2007).* In this commentary, Daniel Raab examines the issue of limitation of liability in a situation where a Himalaya Clause extended COGSA defenses to a stevedore.

PDF LINK: Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge

ARTICLE: (1) Claims Scope--Theories of Recovery and Defenses. In *American Roll-On Roll-Off Carrier, LLC v. P&O Ports Baltimore, Inc., 479 F.3d 288 (4th Cir. 2007)*, the issue of the limitation of liability has been litigated often. What makes this case interesting is that it is the steamship carrier going after the stevedore and issues of limitation of liability were raised against the steamship company. The typical situation is when the carrier raises the statute of limitation issue against the shipper. Usually it is the shipper or other cargo interest or subrogated insurance company making a cargo claim against the carrier.

American Roll-On Roll-Off (ARC) filed its complaint which included a claim alleging negligence on the part of P&O and a claim seeking indemnification for the amounts ARC paid to the owners of the damaged cargo. The district court granted summary judgment in favor of P&O, the stevedore, concluding that a one-year statute of limitation would have applied to a suit by the cargo interest against ARC and therefore barred ARC's action against P&O. It is from this decision that ARC appealed. ARC is a wholly-owned subsidiary of Wallenius Wilhelmsen.

The Carriage of Goods By Sea Act at that time was *46 U.S.C.A app. § 13001315*, and was determined to govern the bill of lading. (The Act has since been renumbered, *46 U.S.C. §§ 30701 et seq.*) This statute is involved in international carriage and is sometimes applied by virtue of the bill of lading. As a practical matter it is important for counsel to be aware that *46 U.S.C.A app. § 1304(5)* establishes a one-year statute of limitation for the filing of actions seeking recovery for lost or damaged cargo. While these limitations are typically upheld in an international ocean cargo case, this court ruled that this is different as it is an indemnity situation. ARC had paid \$2.7 million dollars to settle the claims. The lower court had granted a Summary Judgment Motion against the ship owner. The only claim that was before the appellate court was the indemnity claim. The court ruled that a maritime claim for indemnity does not accrue until the indemnities liability is fixed by a judgment against or payment to the indemnity, see *United New York Sandy Hook Pilots Assn v. Rodermond Industries, Inc., 394 F.2d 65, 75 (3d Cir. 1968)*; accord *Hercules, Inc. v. Stevens Shipping Co., 698 F.2d 726, 733 (5th Cir. 1983)*. This was found to apply under Maryland law. The court found that the

indemnification claim was filed within the period allowed under the terms of the stevedore agreement. P&O had contested this citing to the Himalaya clause (granting defenses available to those acting on behalf of the carrier). While the appellate court agreed that the Himalaya clause would apply in actions filed by a shipper, it did not agree that it would apply to an indemnification claim. The court found that the language in the contract did not support the construction urged by P&O the stevedore. It found that ARC was not suing P&O in its capacity as a cargo owner but instead, for recovery of damages. The court therefore held that the claim was not time barred.

(2) Conclusion. The court held that the one-year statute of limitation under the Carriage of Goods by Sea Act would not apply in this situation if an indemnity claim is involved. In practice this can happen where counsels client is brought into a case as a third party sometimes even after the one-year statute of limitations has occurred. The court seemed to find that whether you call the carrier an owner or not is not an important distinction. It is still good practice to be aware of the one-year statute of limitations when pursuing a claim under the Carriage of Goods by Sea Act for the normal international situation.

The last issue that was raised, but not litigated, was the \$500 per package liability limitation. This is a heavily litigated issue for ocean cargo law which can greatly affect the value of a claim.

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Daniel W. Raab on Mitsui Sumitomo Insurance Co. v. Moore Transportation, Inc.

2008 Emerging Issues 941

Daniel W. Raab on Mitsui Sumitomo Insurance Co. v. Moore Transportation, Inc.

By Daniel W. Raab

November 14, 2007

SUMMARY: Mitsui Sumitomo examines the definition of a claim and makes the point that when making a summary judgment motion, the movant will be held to a high standard of proof. This Emerging Issues Analysis, written by Daniel W. Raab, examines some of the concerns a practitioner should be aware of when pursuing a claim under the Carmack amendment.

PDF LINK: [Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge](#)

ARTICLE: *Mitsui Sumitomo Insurance Co. v. Moore Transportation, Inc.*, 500 F. Supp. 2d 942 (N.D. Ill. 2007) involved a claim for lost cargo filed under the Carmack amendment, 49 U.S.C. § 14706, as well as under common law against a freight broker (alleged to be a freight forwarder), a common carrier, and a truck driver. This case lays out very well some of the concerns a practitioner should be aware of when a claim under the Carmack amendment is pursued. The case addresses: (1) liabilities and potential liabilities of various entities in transportation by motor carrier under the Carmack Amendment, and (2) procedures that should be followed and burdens of proof that should be met when seeking a motion for summary judgment. This case nicely defines a "claim" and what the defenses are under the Carmack Amendment.

(1) Claim Scope Theories of Recovery and Defenses. An important area of transportation law affecting the recovery of damages and losses on domestic transportation cases is the Carmack Amendment. This case is a classic example of what claims can and cannot be filed against a motor carrier and a truck driver. Because of a lack of material filed with the summary judgment, the issue of whether or not one of the defendants constituted a freight forwarder or a freight broker was not fully defined. This case was brought as a subrogation claim by the insurer of the cargo--a common occurrence in cargo claims.

The insurer, as a subrogee of the shipper, sued for lost cargo under the Carmack Amendment and also under various state law remedies against a trucker/motor carrier, the trucker, and a freight broker. The Carmack amendment governs interstate motor carriers as to their potential liabilities. This case held that in order to prove a case under the Carmack Amendment the shipper or whatever party is assigned the cargo interest must make a prima facie showing under the Carmack amendment by proving: (1) the goods in question had been delivered to the carrier in good condition, (2) the goods had arrived at the final destination in a damaged or diminished condition, and (3) the damages specified. 49 U.S.C. § 14706. Even if there is a loss, the common carrier can defend under the Carmack amendment on

the basis that the damage was caused by acts of God, the public enemy, the shipper itself, or the the inherent vice or nature of the goods. 49 U.S.C. § 14706. In this case the insurer sued under both the federal statute and under several Illinois remedies to try to recover for the lost cargo. The underlying claim in this case resulted from the theft of 1500 CD tape audio units.

The rulings in this case had to do with various summary judgments. The plaintiff contended that it had a prima facie case and the defendants moved for summary judgments on the grounds that the state claims were not valid and that the driver and the freight broker where not liable under the Carmack Amendment or anything else and that the state remedies were not applicable.

(2) Court Ruling. The court ruled that the plaintiff did not prove a prima facie case because it was unable to definitively prove what was loaded into the container at the point of origin and what was in the container when it was received by the defendant motor carrier. Likewise, the court ruled that the defendant motor carrier was not entitled to a summary judgment motion since there were still facts being developed that related to whether or not, and if so, where, the container had been broken into. What is interesting about this aspect of the case is that the receipt of a sealed container by a motor carrier followed by the subsequent delivery of a sealed container by a motor carrier does not in and of itself exonerate the carrier from liability. Historically, there have been creative ways of getting into a container without breaking the seal, illustrating the marvels of modern technology and handywork.

The court did rule that the driver was not a carrier under the Carmack amendment. In the trucking industry, truckers very often operate as owner-operators for the motor carrier and often rely on insurance and other protections from the motor carrier.

The court did grant the motion for summary judgment as to various state court remedies that were filed against the motor carrier on the grounds that the Carmack amendment superseded state law. When filing such a claim (common for interstate commerce), practitioners should be cognizant of the Carmack Amendment and its various limitations on liability in pursuing the claim, such as filing a written claim within nine months with the motor carrier and if necessary, filing your lawsuit within 2 years and one day after the declination of the claim.

Conclusion. This court did hold that the Carmack amendment, where applicable, will trump a state court remedy. Practitioners must be careful to follow the guidelines in the Carmack Amendment in pursuing such a claim. When defending a claim under the Carmack Amendment, counsel should review the enumerated defenses and assert them if at all practical.

(3) Procedural Quagmires. Another best practice to take away from *Mitsui Sumitomo* is to tighten up your litigation. It appeared that in this scenario there were some memos that should have been more thorough on points of law and therefore were deemed inadequate by the court. While some judges and panels will pick up on certain issues and have their very able law clerks pursue an issue further, it is the responsibility of counsel to fully develop an issue. In this case the court quoted the Seventh Circuit, stating "Perfunctory or undeveloped arguments are waived." The court further noted that it had no obligation to consider an argument that was raised, but not developed in a parties brief.

Moore, the transportation broker, contended that it was merely a broker not a licensed carrier under the Carmack Amendment or a freight forwarder. Generally, a freight broker such as Moore is not a carrier for purposes of the Carmack amendment. Further facts needed to be developed in order for the freight broker to have been exonerated through a motion for summary judgment. The lesson to be learned is do not assume that the courts will make your argument for you.

The court also held the plaintiff to a fairly high standard as far as granting summary judgment as to the issue of whether or not the cargo was actually loaded into the original container. While the plaintiff came forward with some evidence, it was not deemed adequate for purposes of a summary judgment motion. In order to make a prima facie case and have summary judgment granted, practitioners should be aware that they need whatever evidence they can get, the

best of which would be the testimony of the people who actually loaded the contents. For purposes of trial, counsel can at least attempt to document what was loaded into the container and the shipper will be held to a lower standard than for a summary judgment.

Conclusion. Courts will usually demand very strict proof in order to obtain a summary judgment motion. Do not assume that something that is common knowledge--without asserting more--will be sufficient to sustain a summary judgment motion or for that matter any other legal proposition. It is also a possibility that even though a shipper in this situation might come forward with some substantial evidence regarding the loading of the container, some courts will require that this evidence be shown to a much higher standard than what might be required at the time of trial.

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Daniel W. Raab on Great Southern Wood Preserving v. American Home Assurance Co.

2008 Emerging Issues 931

Daniel W. Raab on Great Southern Wood Preserving v. American Home Assurance Co.

By Daniel W. Raab

November 13, 2007

SUMMARY: *Daniel W. Raab on Great Southern Wood Preserving v. American Home Assurance Co., 505 F. Supp. 2d 1287 (M.D. Ala. 2007).* In this Emerging Issues Analysis, Daniel W. Raab discusses a case from the District of Alabama dealing with warehouse-to-warehouse clauses in insurance policies and what law governs these types of insurance policies.

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ARTICLE: *Great Southern Wood Preserving v. American Home Assurance Co., 505 F. Supp. 2d 1287 (M.D. Ala. 2007)* involved an action by a shipper for breach of contract and bad faith after denial of coverage under a marine open cargo insurance policy. The items allegedly covered were imported lumber that had been offloaded at a domestic port and were destroyed by Hurricane Katrina in Gulfport, Mississippi while still in the warehouse. Two issues were addressed: (1) the meaning of a warehouse-to-warehouse clause in an insurance policy, and (2) what laws govern these insurance policies.

(1) Claims Scope. Because they are utilized by many people who ship cargo, insurance policies like the open cargo marine insurance policy are a fundamental part of the transportation industry. The open cargo policy allows an insured to buy insurance and obtain a certificate. Some freight forwarders sell insurance through their open insurance cargo policies to their various clients. In this particular litigation, the central issue was at what point in time the transit policy issued by American Home Assurance Company ended. The American Home Assurance Company policy had what is called a "warehouse-to-warehouse clause" covering the cargo until it reached the final warehouse.

The cargo at issue was destroyed during Hurricane Katrina while at a warehouse in Mississippi. The court determined that the case fell within the admiralty jurisdiction of the federal courts and thus federal law applied to the litigation. In insurance law, federal admiralty law will apply if there is controlling precedent. In referring to the United States Supreme Court case of *Norfolk Southern Railway Co. v. Kirby, 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004)*, this court held that when a contract is maritime and the dispute not inherently local, then federal law controls the contract interpretation. The defendants argued and the court found that the cargo had reached its final destination and coverage under the policy ceased. A warehouse-to-warehouse clause establishes that once the cargo is delivered to the insured and once it exercises dominion and control over the cargo treating it as its stock and trade, the final warehouse has been reached. In the case at bar, the undisputed facts demonstrated that Great Southern Wood exercised dominion

and control over the lumber after it was unloaded from the ships at the Gulfport warehouse. The evidence was convincing enough to grant a summary judgment motion.

Another interesting argument made by Great Southern was that a government hold on goods under its possession, custody, and control does not continue to keep the goods in transit for insurance purposes. The court did not go along with that argument.

Conclusion. The court concluded that a warehouse-to-warehouse policy is what it states it is. It goes from one warehouse to another warehouse and then coverage ceases. The plaintiff should have looked into an extended warehouse clause in order to extend the coverage beyond the time in transit. Best practice dictates that counsel inform their clients accordingly, suggesting, for example, the use of a marine extension clause.

(2) Bad Faith. Great Southern Wood also filed a claim stating that the insurance company acted in bad faith. This would be a hard action to sustain when the claim in chief was not sustainable. As the court pointed out, the plaintiff should show that it is entitled to prevail on the case in chief before going further. In Alabama, the standard is that the plaintiff would have to show that it is entitled to a directed verdict on the breach of contract claim for failure to pay under the policy. Practitioners should be aware that bad faith is a state creation and depending on where your claim is, you must check the bad faith statutes. For instance, in Florida there are specific guidelines under *Fla. Stat. § 624.155* that describe how counsel must go about making a bad faith claim. It is probably safe to state that in the vast majority of states, a valid underlying claim must exist before pursuing a bad faith claim. This Judge did not find an underlying bad faith precedent as a part of federal law and therefore looked to state law.

Conclusion. In order to pursue a bad faith claim you must have a valid underlying claim. You should also check what state you are litigating in because if you bring a bad faith claim without any validity, you could be facing Rule 11 sanctions. The bad faith laws vary from state to state.

(3) Abandoned Claims. What was also interesting in this case was that there were other defendants named who were probably related to American Assurance Company such as AIG, American International Underwriters Corporation, and American International Marine Agency, but were not the actual insurers. Great Southern Wood did nothing to pursue these defendants. It seems that the claims were abandoned and were not going forward. Again, in federal court counsel must be careful not to abandon any claims it intends to pursue. The plaintiffs' attorney most likely filed against these other defendants in an abundance of cautions.

Conclusion. The lesson to be learned is that if counsel files a claim in federal court and does not respond to various motions, counsel may lose that cause of action when it is deemed to be abandoned by the Court.

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Daniel W. Raab on Altadis USA, Inc. v. Sea Star Line, LLC

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Daniel W. Raab on Altadis USA, Inc. v. Sea Star Line, LLC

By Daniel W. Raab

November 12, 2007

SUMMARY: Despite the United States Supreme Courts decision in *Norfolk Southern Railway Co. v. Kirby*, a landmark case involving intermodal transportation, proper application of the Carriage of Goods by Sea Act remains an issue. This Emerging Issues Analysis discusses the significance of *Altadis*, an Eleventh Circuit case that follows the U.S. Supreme Courts decision in *Kirby* and will likely set further precedent in the Eleventh Circuit.

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ARTICLE: *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006), involved a claim by a shipper who sued an Ocean and Inland Carrier in Florida State Court for loss of cargo occurring on an overland leg of a shipment and was subsequently removed to the United States District Court for the Middle District of Florida. This case was decided after the United States Supreme Court Case of *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004), which was a landmark case involving intermodal transportation. The case at hand is important because it is a Circuit Court of Appeals case that follows *Kirby*, as opposed to the opinion that came out of the Second Circuit Court of Appeals in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad*, 456 F.3d 54 (2d Cir. 2006), which arguably may contradict the United States Supreme Court's decision in *Kirby*. *Altadis* does seem to follow the United States Supreme Court's decision and is likely to have set a further precedent in the Eleventh Circuit. It may be cited in contrast to the controversial decision arrived at by the Second Circuit.

Theories of Recovery and Defenses. It is common today in shipments to use different forms of carriage including ocean and motor carriage. In *Altadis*, Sea Star Line shipped 2,478 cartons of cigars and 20 cartons of bands from Puerto Rico to Florida. One Bill of Lading was issued in Puerto Rico to cover the entire shipment both by water to Jacksonville and over land from Jacksonville to Tampa by Sea Star Line. During the shipment, cargo was stolen from a container that had been left in a driveway of a gas station overnight.

The lawsuit was filed under various causes of action against both the ocean carrier Sea Star Line and the motor carrier American Trans-Freight (ATF), Inc. After the lawsuit was served, the defendant carriers moved for summary judgment on the basis that the one-year statute of limitations under the Carriage of Goods by Sea Act (COGSA) had been violated. The shipper, *Altadis*, claimed that the two-year and one day minimum statute of limitations under the Carmack Amendment, 49 U.S.C. § 14706, applied instead. This was important in view of what had happened in the Second Circuit Court of Appeals decision in *Sompo Japan*. Cross-claims were also filed by Sea Star Line against ATF

seeking common law contribution and indemnity and breach of contract as the loss occurred during the time that the container had been turned over to the motor carrier.

The Eleventh Circuit determined that COGSA was in fact controlling. Interestingly, since the shipment by Sea Star Line did not involve a foreign country (typically how COGSA is called into play), COGSA was instead incorporated through the Bill of Lading. The court ruled that both carriers were entitled to summary judgment. The court would not apply the Carmack Amendment and its longer statute of limitations without a separate Bill of Lading issued by ATF as the inland carrier.

In ruling for the motor carrier as well, the court referred to what is known as a Himalaya Clause that extended COGSA to others assisting the carrier, which in this case was the defendant motor carrier. The court felt that even though COGSA was incorporated contractually, it was insufficient to allow the Carmack Amendment to supersede the Himalaya Clause in the Bill of Lading or the language incorporating COGSA. Thus, this decision was more in line with the Supreme Court than the aforementioned Second Circuit decision.

Also interesting is the fact that the District Court did not grant summary judgment to Sea Star Line against ATF given that the loss occurred while the shipment was in the motor carrier's possession. Motor carriers typically sign interchange agreements making them responsible for cargo while in their possession. The Eleventh Circuit sent the cross-claim back to the trial court on the issue of contractual indemnification.

Conclusion. The lesson here is that when faced with a situation involving an ocean carrier and an inland carrier such as a motor carrier or railroad carrier, a practitioner should assume that the earlier statute of limitations is going to be applicable. In fact, it is prudent when handling any matter concerning transportation issues that practitioners be sensitive to short statutes of limitations. The Carmack Amendment itself provides for only a two-year and one day statute from the time of the declination of the claim by the carrier, and written notice must be given within nine months. Generally, counsel should look to Himalaya Clauses in the Bill of Lading in order to see what protections are afforded other carriers and players such as stevedores and steamship agents.

In *Altadis*, the appellate court felt that it was premature to effectively terminate the cross-claim filed by the ocean carrier against the inland carrier. In approaching these cases from the carrier's standpoint, practitioners will want to examine any contracts between the carrier and its subcontractors for issues dealing with indemnity by contract and clauses providing that the motor carrier provide insurance to the ocean carrier.

Future Prognostication. As previously mentioned, *Sompo Japan Insurance Co. of America v. Union Pacific Railroad*, 456 F.3d 54 (2d Cir. 2006), came down a month before *Altadis* and seemed to try to get around the Supreme Court decision. In that case the Second Circuit ruled that the requirements of the Carmack Amendment prevailed over the contractual provisions of the contract that extended the application of COGSA to the shoreside transit of an intermodal shipment, thus eliminating the \$500.00 per package limitation that had been asserted in that situation. (This case just went back to the trial court in *Sompo Japan Ins. Co. v. Union Pacific Railroad*, 2007 U.S. Dist. LEXIS 58162 (S.D.N.Y. 2007), for a judgment consistent with the Second Circuit's holding that COGSA did not apply.) In *Sompo*, it seems the Second Circuit judges were trying to craft their own interpretation of *Kirby*. It is good to be aware of both cases since *Sompo* gives an illustration of how a court might go in its own direction despite a ruling by the United States Supreme Court. Bottom line: The practitioner should be cautioned that courts are not always predictable; some courts do not like to apply strict limitations.

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