INTERMODAL CONTRACTING AND MULTIMODAL LIABILITY:
A View from Surface Transportation Attorneys

Steven W. Block

INTERMODAL CONTRACTING AND THE NEW LAW GOVERNING MULTIMODAL LIABILITY: SURFACE TRANSPORTATION ATTORNEYS OF THE TRANSPORTATION LAWYERS ASSOCIATION OFFER THEIR UNIQUE PERSPECTIVES

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A Day(s) in the Life of an Intermodal Shipment

By

Greg E. Summy[1]

During my 30 years of representing transportation companies in the United States, the most significant change I have witnessed in transportation is the growth of intermodal transportation. The reasons for this growth have been the subject of many articles, books, papers, discussions over the water cooler and at cocktail hour, and who knows where else. We all know why this growth has happened. The primary driver has been the migration of the production of goods from the United States to overseas locations. As the need for inland transportation of containerized products increased, surface transportation providers developed infrastructure, systems, organization and operations that were designed to service this growing market. For railroads and motor carriers, it was akin to the "follow the traffic" adage that many surface transportation attorneys steeped in a regulatory background found familiar. After seeing factories close and domestic traffic dwindle, but noticing that people were still purchasing from other sources the products these factories used to make, many surface transportation companies altered their business processes to capitalize on the intermodal market.[2]

Baby boomers will recognize the title of this paper from The Beatles song, "A Day in the Life." The titles of papers I write rarely are products of extensive thought or rumination. Rather, the titles just sort of come to me. This was no exception. In this paper, I want to give the maritime lawyer an idea of what happens to a containerized shipment when it leaves the cozy confines of the cargo deck of a massive steamship and makes the journey inland to the receiver. In addition, I want to give you an idea of the legal relationships the shipment encounters along the way. I had to add a plural to "day", since the journey usually takes more than a day. But then as I was beginning to think about the paper, I thought about the song. Remember…

> "Woke up, got out of bed
> Dragged a comb across my head
> Found my way downstairs and drank a cup

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[1] General Solicitor, Norfolk Southern Corporation. The views expressed in this paper are his, and not necessarily those of Norfolk Southern.

[2] For an interesting overview of containerized shipping, see *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, by Marc Levinson.

And looking up, I noticed I was late
Found my coat and grabbed my hat
Made the bus in seconds flat"[3]

So how many of the products mentioned in the song are made in the United States? Beds? Used to come from Michigan and North Carolina. Some still do. Now? Asia. Most mattresses are still made domestically. Combs? No question that those are made overseas. Coffee mugs? May be produced domestically if you have an individualized, artsy one. Otherwise, no. Coffee or tea? Maybe Hawaii for coffee, but highly likely to be imported. Clocks? Probably Asia. Watches? Europe and Asia. Coats and hats? I have some golf hats that claim to be made in the USA, but not many. Coats? I don't think so. A bus? Assembly, probably yes; components, of mixed origin.

What's the point of this little diversion? As you read this paper, look at the things around you, and think about how many of them spent some of their lives as products in an intermodal container.

I am sure most of you know more about what happens when a shipment arrives in port than I do. For this discussion, I'll skip the steps of how the shipment is unloaded from the ship, and go directly to how the shipment either exits a gate by truck or leaves by train.[4] In both situations, the transaction that takes place is an *interchange.* The shipment leaves the possession of the steamship line and enters the possession of a motor carrier or a railroad. If the port where the ship arrives has what is known as *on-dock rail*, the shipment is loaded by port labor onto a railcar (in this situation, almost always a *well car*). If the port and the railroad work well together, the port personnel load a particular car with shipments that have a final destination of the same rail terminal, and the railcars are coupled together in block order.[5] Railroad operating people get pretty cranky when a cut of cars[6] is received that is supposed to be properly blocked but instead is a hodgepodge of containers and cars with multiple destinations. If this happens too

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[3] THE BEATLES, *A Day in the Life*, on Sgt. Pepper's Lonely Hearts Club Band (Capitol Records, 1967)

[4] This paper will ***not*** discuss the steps needed to clear customs.

[5] This is also known as *blocking*, or having the train *properly blocked.* The railroad will tell the port the blocks that it wants and where it wants them, such as, for example, "I want the Columbus block at the head end, Chicago in the middle and Atlanta at the tail end."

[6] This is another railroad term. A *cut of cars* is a group of railcars that are received together.

frequently, expect the port to get a call from the local trainmaster or terminal superintendent[7] expressing displeasure about the situation, often accompanied by colorful language. In any event, after the cars are loaded and made ready for transportation, the railroad picks up the cars with a locomotive and travels, in all likelihood, to the origin terminal yard. I'll discuss what happens after that later in this paper.

If the shipment is to move by truck out of the facility, it might go to a railroad or it might go to the ultimate destination. Steamship lines provide both containers and chassis for the movement of their shipments. Two types of agreements should be in place in order for a shipment to exit the marine terminal by truck. First, the steamship line should have a transportation contract with its customer to move the shipment to destination. I am sure MLA members are familiar with such a document. This contract should cover the transportation service provided, the rates for such service, liability for claims and other matters typical to such relationships. My colleagues Bill Taylor and Eric Zalud will discuss these contracts as part of their respective presentations. The other agreement the steamship line should have in place is an interchange agreement. The interchange agreement, in this situation, would be between the steamship line and a motor carrier. This agreement allocates responsibility for the condition of the container and chassis while the container and chassis are in the possession of the motor carrier, and also covers liability while the motor carrier is on the premises of the facility operator. In addition, the agreement should provide for use charges if the equipment is not returned on a timely basis. About 85-90% of intermodal containers and chassis move under the terms of the Uniform Intermodal Interchange Agreement (the "UIIA"), which is administered by the Intermodal Association of North American ("IANA"). The UIIA itself is found very easily at www.uiia.org.

Several years ago, the UIIA provided that a motor carrier was responsible for virtually every phase of the operation of the equipment while the equipment was in its possession. After extensive negotiations between the motor carriers, railroads and steamship lines, the UIIA was amended, effective in early 2005, to provide that a motor carrier was not responsible for defects

[7] A terminal superintendent has overall responsibility for the smooth operations of a given terminal. A trainmaster's specific duties can be somewhat difficult to define, but in very general terms, he or she is responsible for assuring that trains get moved within a given territory. A sports analogy might be to a "slash" player in football (such as a defensive back/wide receiver/kick returner) or a 6th man in basketball who is capable of playing the two or three positions. A trainmaster is expected to have a number of skills and be good at all of them.

in the equipment other than those specified in an attachment to the UIIA. In essence, the defects listed in the attachment are of the type that the driver should see in the required "walk-around" inspection.[8] Defects not listed in the attachment are often referred to as latent defects or hidden defects, and are of the type that a driver would not be able to see during the walk-around inspection. The rationale for the amendment was that the motor carrier should be responsible for defects in equipment it does not own or lease that its driver is able to detect when it picks up the equipment at the terminal.

Federal law and proposed regulations have changed the landscape with respect to equipment condition and interchange even further. As part of SAFETEA-LU[9], the Federal Motor Carrier Safety Administration ("FMCSA") was charged with promulgating regulations covering the inspection, repair and maintenance of intermodal equipment. In accordance with the direction given to it by this law, FMCSA published a Notice of Proposed Rulemaking on December 21, 2006.[10] Comments from interested parties have been received, and the industry awaits FMCSA's determination on the final rule.[11] When effective, these new "roadability" regulations will affect the operations of all equipment providers of intermodal equipment. Thus, parties engaged in the interchange of equipment at an intermodal terminal will need to be conversant with these regulations.

If the shipment moved by rail to a destination yard, that shipment would leave the rail facility by truck, and the series of transactions and legal relationships described above would be essentially the same.

So what happens when the shipment moves inland by rail? Discussed before was how the shipment gets to the origin yard. At the origin yard, the various blocks are uncoupled and switched to outbound trains headed to the applicable destination yard or to an intermediate yard.

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[8] The Federal Motor Carrier Safety Regulations make a driver of a commercial motor vehicle responsible for being certain that a vehicle is safe to operate before taking it out on the road. See 49 CFR 392.7 and 396.13(a), among other pertinent safety regulations.

[9] Section 4118 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), which is now codified at 49 U. S. C. 31151. I sometimes wonder if more time is spent on making up the names of these laws to get catchy acronyms than on the substance of the laws themselves.

[10] Docket No. FMCSA-2005-23315, *Requirements for Intermodal Equipment Providers and Motor Carriers and Drivers Operating Intermodal Equipment.*

[11] FMCSA says this should occur in the spring of 2008. *Traffic World*, September 10, 2007.

The containers do not leave the cars until reaching the destination yard unless there has been has been a significant mistake in handling.[12]

When the shipment arrives at the destination yard, activity picks up from the legal perspective. The train arrives at the terminal and takes the cars to an unloading track. A contractor operating a crane will lift the containers off of the railcar and place the container on the ground or on a chassis. Placement on a chassis is known as a “live lift”. At the same time this activity occurs, someone in the yard office is notifying the railroad’s customer that a shipment is “available” for pickup, or the railroad’s information system may generate this notification automatically. When a customer is notified of shipment availability, the clock for “free time” starts. “Free time” is the time that a customer has to pick up a shipment before incurring storage charges. The amount of free time varies by terminal, and generally depends on the number of containers that move through the facility and the size of the facility. It is very important to keep an intermodal terminal fluid.

If the operations of the railroad and the customer are functioning smoothly, the customer notifies its dray carrier and the shipment is picked up shortly after it’s available. When the shipment leaves the facility[13] the same gate transactions and legal relationships discussed earlier occur.

One other possibility is worth mentioning. Scattered throughout the intermodal network are private facilities. These are intermodal yards that are not operated by a railroad or steamship line. When an intermodal train is delivered to a private facility, the rail carrier has accomplished delivery of the shipment when the cars are placed on the interchange track. If a customer uses a private facility, it will need to have an agreement of some sort with the private facility operator. This is different than when the destination yard is a rail facility, where the rail carrier’s responsibility ends when the shipment is outgated.

So this is a basic overview of what happens when an intermodal shipment moves inland. In order to provide a steamship line with thorough representation, an attorney should have a good

[12] Railroad employees switch cars at rail yards. Generally, contractors lift containers on and off of railcars at railroad intermodal facilities.

[13] When a shipment leaves the facility by truck, it is outgated. When it enters by truck, it’s ingated. Although railroad operations can be somewhat mysterious, the terms used usually aren’t (e.g., ingate, outgate, loading track, unloading track, interchange track and my personal favorite, the runaround track.

working understanding of how this process works, and the various legal relationships that are involved.

<u>The Evolution of a Transportation Law Practice --</u>
<u>One Lawyer's Perspective</u>

by

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I am honored to be part of the Transportation Lawyers Association ("TLA") group of member attorneys invited to share our experiences as practitioners serving a major part of our Country's domestic and international economy. I emphasize the word "transportation" as descriptive of a client base we all represent, without reference to specific modes of transit. The recognition of the overarching focus of this area of the law is no accident. Indeed, the transition is not a matter of semantics. The terminology reflects an evolution from a regulatory, to a deregulatory, and, finally, commercial reality that we serve a dynamic industry which consists of interconnecting facets, crossing all modes of carriage and services. Today, the membership of TLA mirrors and confirms this collective dynamic. We no longer refer to ourselves as "motor carrier" attorneys (actually, the term "surface transportation attorneys" is, on reflection, too narrow as well). Like you, we see ourselves as transportation lawyers, providing legal resources to a broad-based constituency. My role today is to give context to the transformation from a regulatory to contract environment, which permeates our transportation practices today, across all modes of commerce.

The Supreme Court gave recognition and credence to the aftermath of this fluid evolution. The business reality of intermodalism is firmly entrenched in the Supreme Court's decision in <u>*Norfolk and Southern Railway Co. v. Kirby*</u>, 543 U.S. 14 (2004) (a focus of today's presentation)[14]. I will leave it to David Maloof and Hy Hillenbrand to dissect <u>*Kirby*</u> and its progeny. My reference to this case is to emphasize that the Court was willing to fashion a result which acknowledged the attributes of and the need for commercial uniformity in the global economy, all of which is served through a network of transportation resources, from start to finish. We stand ready to provide legal counsel to memorialize such multimodal arrangements; not as representatives of the motor carrier sector, but as professionals with an expertise in

[14] This will no doubt spark enlightened and intense debate.

transportation and all that is encompassed in the stream of global commerce. The business relationships that sustain this distribution engine do not function in a vacuum. Instead, the so-called "seamless" transportation phenomenon requires coordinated effort of a number of transit modes, acting together in order to accomplish the delivery of a container, a piece of equipment, and other commodities, from origin to destination. This is the business process we are called upon to understand and represent.

In order to comprehend and articulate this process, we, as transportation lawyers, must have an appreciation for and an understanding of the nuances of the laws, regulations and treaties impacting maritime, motor carriers, railroads, freight forwarders, air cargo, and broker/third-party logistics companies. Today, the common bond between these entities is more often than not contractual in nature, developed to define and implement customer distribution arrangements, beyond the classic structure of bills of lading and other historical and collateral terms and conditions borne of the "old days" of regulation or common law. As lawyers, we have a universal goal to serve the diverse interests affecting the shipment of goods, without the artificial labels historically tied to certain segments of the industry. Our horizons are broader; our due diligence more complex.

Without dating those of us who witnessed first-hand the transformation from motor carrier attorneys to transportation lawyers, I will try to provide a perspective in terms of my own experience. My roots as a former "motor carrier" lawyer were nurtured early-on within a regulatory environment that was fairly consistent for both interstate and intrastate commerce, essentially built around the concept of satisfying or defending against the burden of proving "public convenience and necessity" ("PC&N") as the gateway to entry in the trucking industry. This evidentiary standard was the relic of a statutory and economic structure inherent in the *Act to Regulate Commerc*e *of 1887*, and its many successors, including, as particularly relevant to this discussion, the *Motor Carrier Act of 1935* ("MCA") and so forth.

The practice which emerged as a result of the MCA was driven by applications for operating authority and the related administrative and adversarial proceedings venued throughout the country. In recognition of this specialized practice, serving a specialized clientele, the early practitioners in this arena formed the Motor Carrier Lawyers Association ("MCLA") which necessarily branded the group of attorneys as representatives of the motor carrier industry, setting them apart from attorneys representing other modes of transit. It was indeed a nice, cozy legal club which I joined at the tail end of the regulatory cycle. We did battle at hearings during the day, socialized at night, only to return the next morning, ready to fight again as to whether an applicant should be allowed to encroach upon the services of existing motor carrier competitors. This type of regulatory advocacy was not unique to motor carrier counsel. Railroads and airlines operated within the conditions under the same "PC&N" evidentiary format. Not surprisingly, attorneys serving these industries formed their own professional bar associations to share common practice interests and war stories in the comfort of a regulatory environment. Thus, by virtue of regulated practices, attorneys were characterized by the modes they represented: motor carrier lawyers; railroad attorneys; air transit practitioners; and, of course, maritime lawyers.

Ultimately, the party ended and the MCLA, by necessity, transformed itself into the TLA. The organization's doors were opened to members beyond the "pure" motor carrier practitioner. Being astute and practical lawyers, the membership of TLA (although, not without some resistance) could readily see and appreciate that the march to agency and statutory deregulation would forever change the administrative practice landscape. It became a practical matter of either "sink or swim." Those who persisted on a regulatory track would soon learn that a practice limited to ICC advocacy would no longer prove viable.

Those of us who had a broader vision confronted to a very simple realization. Instead of seeing the *Interstate Commerce Act*, its regulations and the ICC's Rules of Practice and Procedures as the essence of our legal experience, we asked: "Why not pierce the 'statutory veil' and give recognition to the fact that we should represent the business needs of our transportation clients beyond an ICC or PUC hearing room?" In answer to this rhetorical question, we began to expand our horizons to become transactional transportation lawyers.

As practitioners began to accept the reality of change, industry groups such as the MCLA likewise faced a similar metamorphosis in its focus and membership. While preserving its historical quality for the highest levels of professionalism and camaraderie, always hallmarks of TLA, the over 700 attorney members of TLA now represent diverse practice interests not limited solely to trucking company clients, but all connected to "transportation." This diversity is well-represented here, given that Greg Summy, from the Norfolk-Southern, is the Immediate Past President of TLA, and Steve Block, a well-regarded maritime attorney, has been an active member of TLA, serving a term on its Executive Committee. In fact, to further emphasize the items of theme of this presentation, Steve will moderate a panel entitled: "Maritime Service

Contract Issues and Current Trends, Recent Legal Developments and How Developing Industry Practices Affect other Modes of Transportation" at the upcoming 40th Transportation Law Institute, co-sponsored by TLA, in Washington D.C. on November 2, 2007.

Like the MCLA, its attorneys could not ignore the signs of change. The push for deregulation was internal within and external outside the ICC. The gathering storm clouds were all around. With economist Alfred Kahn leading the way, deregulation became the economic buzz word of the late 1970's, leading to a movement for free enterprise and open competition within the transportation and other business sectors, at both federal and state levels. Ultimately, as a result of a combination of factors, fueled by the economic, political and social realities of this era, and beyond, the regulatory attorney was faced with an eroding practice base attributable to influences beyond our control.

The full force of the move away from a regulatory environment was evident in the late 1970's as appointees to the ICC brought to the agency a philosophy intended to implement and enforce a form of administrative deregulation. For example, the ICC issued decisions which broke down the barriers to contract transportation by permitting railroads and motor carriers to serve shippers under such arrangements for selective services. Fast on the heels of the *Motor Carrier Act of 1980*, the agency released its decision in *Dixie Midwest Express, Inc. Extension*, 132 MCC 794 (1982), which allowed brokers to arrange for transportation services directly with a motor carrier as contract shippers, forever altering the classic shipper/carrier hierarchy. In fact, *Dixie Midwest* was a principal factor in the birth of the broker industry which, as we all know, has matured into the logistics market that dominates transportation today.

The ICC's own activism did not go unnoticed by Congress. In an effort to "rein-in" the Commission and set its own deregulatory agenda, Congress launched a progressive and intentional strategy to change the regulatory landscape. Congress first passed the *Airline Deregulation Act of 1979* (air), the *Motor Carrier Act of 1980)* (motor carrier), and, finally, *The Staggers Rail Act of 1980* (railroads) ("Staggers"). These laws were the predecessors of similar legislative efforts to deregulate other specialized transit services (such as buses).

While restructuring the jurisdiction of the ICC, Congress used the MCA and Staggers to deliver a statutory mandate that contract relationships would be permissible in transportation industry, in lieu of a regulatory format to determine the rights of the parties to motor carrier or railroad services. No longer were such arrangements deemed to be illegal as contrary to the principle against discrimination in public services (the foundation for the original *1887 Act).* Instead, Congress openly invited the users and providers of transportation services to enter into written agreements to define the elements of their joint business undertakings, outside of administrative oversight. Congress sent a clear message that the industry should think in commercial, rather than regulatory, terms.

For the most part, in the beginning, shippers and carriers were slow to heed Congress's mandate. The initial use of the freedom to contract was restricted, represented by modest, short-form agreements. Things changed dramatically when shippers where hit with undercharge claims during a period defined as the "undercharge crisis," fueled by the post-MCA influx of new carriers, the recession of 1982-1984, and aggressive bankruptcy attorneys who charged that shippers had underpaid motor carriers in violation of the Filed Rate Doctrine ("FRD" retained in the MCA of 1980 demonstrating that Congress was unwilling to fully implement a deregulation strategy by that statute). The shipping community looked for safe-harbor defenses to defeat millions of dollars in claims arising from the inconsistency between rates they paid and tariff provisions legally mandating higher charges (by virtue of the FRD). Ultimately, the U.S. Supreme Court and various lower courts came to the rescue in the form of a judicially created contract defense.

In a line of decisions addressing the "undercharge crisis," the Supreme Court sanctioned a "contract defense" to the Filed Rate Doctrine. Realizing that contract arrangements could now be used to defeat the use of tariff rates, and the terms and conditions thereof, shippers were eager to take advantage of Congress's alternative to common carrier arrangements. Contracts came into vogue.

At the same time, and in order to create a further distance from potential undercharge exposure, shippers also turned to brokers as a resource to handle their shipments. As a result, and given the *Dixie Midwest* case, the third-party logistics industry was legitimized in a big and significant way, leading to today's logistics market.

In addressing a business need, shippers, carriers, and brokers (or third-party intermediaries) joined together to create and nurture the dominant logistics industry, the existence of which is dependent on sophisticated and complex written agreements between all of the parties to such arrangements. The gradual evolution of this industry through the greater use of contracts provided a much needed practice opportunity for transportation lawyers as an alternative to the “old” regulatory days. Ironically, in promoting a deregulatory agenda, Congress, at the same time, created the contract environment in which we all operate today. Congress’s outreach in this regard has been extended to the maritime industry as well. *The Shipping Act of 1984*, and its aftermath, created contract opportunities for ocean carriers and, later NVOCCs, and their customers.

As transactional lawyers, we now play a pivotal role in negotiating, drafting, construing and, at times, litigating the terms and conditions agreed upon to meet distribution requirements. While the ICA, particularly given certain provisions of the *ICC Termination Act of 1995* (namely, 49 USC Section 14101(b)(1), which has created the so-called "waiver issue") still has some relevancy in the overall scheme of due diligence, contractual formation requires a greater comprehension not only of the dichotomy of each mode of transit integral to the service, but also the rules of the road, the sea, and the air that often dictate the negotiation strategy of each party to the agreement.

As a result, the due diligence process tests our basic contract skills, industry knowledge and the appreciation for how all of the elements in a single source or multi-modal shipment come together to accomplish the delivery of product. To demonstrate the extent of the substantive subjects which are frequently “deal points” in the transaction, please see the attached Appendix 1 consisting of:

1. Appendix 1A - Bob Spira's[15] paper entitled *"Trends in Contract Logistics Agreements"* which summarizes a survey sponsored by the Association for Transportation Law, Logistics and Policy ("ATLLP") as to the use of and trends in documentation "defining outsourced logistics transactions." Although the research is a few years old, it is still relevant to show developing interest in and strategies driving contract logistics arrangements.

2. Appendix 1B - Gerry Smith's[16] contract checklist which identifies the multiple issues which may be part of the negotiating process to reach terms of a final agreement between the parties.

3. Appendix 1C - A copy of the Table of Contents taken from a comprehensive shipper/carrier contract drafted by me which serves as an "issue-spotting" due diligence outline.

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[15] Reprinted with the permission of Robert M. Spira, Esq., Benesch, Freidlander, Coplan & Aronoff LLP

[16] Reprinted with the permission of Gerald F. Smith, Esq., Pezold Smith Hirschmann & Selvaggio, L.L.C.

4. Appendix 1D - A copy of the Table of Contents taken from a Logistics Service Agreement prepared for a client 3PL which, again, identifies substantive contract terms reached by the parties to such a service.

These materials provide exemplars of the practical considerations which come into play in the contract development process.

The extent to which contract transportation dominates our practices is further evidenced by the focus on this subject at TLA's various educational and professional programs. Moreover, several industry groups, such as the American Trucking Association ("ATA"), the Transportation Intermediaries Association ("TIA"), and the Transportation and Logistics Council ("TLC") have published their own model, "off-the-shelf" form of contracts geared to the particular needs of the constituency of each organization.

Of course, the ultimate terms used by the parties will reflect the various expectations and interests of the parties. In today’s transportation environment, the first challenge is to decide “who’s doing what to whom” in terms of functionality and the legal consequences arising therefrom. I will leave it to Eric to sort through and provide guidance in characterizing the contract players and the significance of the obligations and duties they may accept in any transactions.

Overall, I can safely say that each day in my practice I am called upon to address a contract-related matter. I suspect that this is true for all of you. I know that among TLA lawyers, contracts are an integral part of every day practice. Over time, we have leveraged our expertise in this industry to adjust to changing practice demands, emerging as major resources for the diverse interests of our clients by adhering to a macro, rather than a micro, approach to meeting the contractual needs of transportation users and providers in whatever form, no matter how complex the requirements might be, and notwithstanding interstate and international boundary lines, all to the benefit of our clients who, like us, must appreciate, as the Supreme Court did in *Norfolk Southern*, that freight does not move in vacuum.

Appendix 1A

TRENDS IN CONTRACT LOGISTICS AGREEMENTS

Robert M. Spira*

Contract logistics arrangements have become a popular service option for shippers. Industry experts estimate that these arrangements currently generate approximately $25 billion in annual revenues to logistics service providers and that revenues from these contracts will grow to $100 billion a year within the next ten years.[17]

Third party logistics arrangements reflect a change in the way transportation services are purchased and sold. Under a contract logistics agreement, the shipper no longer deals directly with its service providers, but "outsources" its requirements to a logistics specialist who creates and manages an integrated network of distribution and logistics services. When the shipper signs a logistics contract, the shipper is relying on the expertise of the logistics specialist to improve the efficiency of the shipper's distribution system. Legal documentation describing and regulating the relationship between the shipper and the logistics service provider creates challenges for all parties to the arrangement.

I. The Survey

Although more shippers are taking advantage of the services offered by logistics specialists, there has been little research into the nature of the contractual arrangements being used among the parties to these agreements. To help answer some questions regarding the nature of these contractual arrangements, the Association for Transportation Law, Logistics and Policy (ATLLP) sponsored a survey on contract logistics agreements. The survey results are attached as Appendix I.[18]

Using the results of the survey, we can answer several fundamental questions regarding the legal documentation defining outsourced logistics transactions. What service offerings are covered? Who participates

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The author would like to acknowledge Tom Foster, Dr. Brian J. Gibson and the staff of ATLLP for their support and assistance with the research on which this article was based.

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[17] Even these estimates fail to describe the full potential market for service providers. At an address to the Association for Transportation Law, Logistics and Policy's Annual Meeting in June, 1997, Joseph Nicosia, President of GATX Logistics, Inc., estimated current "outsourceable" logistics costs to be in excess of $400 million per year.

[18] The survey is the result of the work of members of ATLLP who work in the field of logistics. Tom Foster, Editor at Large at Logistics Management & Distribution Report, and I began drafting the survey in August of 1996. The concepts covered by the survey and the format for the survey questions were reviewed with logistics specialists and academics.

The survey was mailed to approximately 1,800 shippers, logistics service providers and carriers. The survey results are based on the 111 surveys returned to us with answers. The majority of the businesses responding (sixty percent) were sellers of transportation and logistics services. Forty percent of the respondents were buyers of these services (e.g., shippers).

Statistically analysis of the survey results is the work of Dr. Brian J. Gibson, the Director of the Southern Center for Logistics and Intermodal Transportation at Georgia Southern University.

The attached survey results in Appendix 1 are the "raw numbers" developed by Dr. Gibson and material extracted from answers to the "essay questions" that were included as part of the survey.

in the negotiations? Which issues are negotiated most often? Which issues are the most difficult? How are the parties resolving these issues?

The information contained in the survey results will be a valuable resource for persons involved in the preparation and negotiation of a contract logistics transaction. Although the survey will not produce the right answer for any specific transaction, it reveals trends, benchmarks, and standards applicable to the logistics industry and to logistics contracts. A person familiar with the results will be better prepared to anticipate the important issues that will need to be resolved in a contract and some possible resolutions to those issues. In some cases, the survey also describes the relative popularity of contract provisions included in agreements in response to those issues.

The survey results provide access to the collective experience of the shippers, carriers and logistics specialists who provided us with their answers to survey questions. Their answers are based on hundreds of different contract logistics transactions.

The discussion that follows is based on the results of the survey. It focuses principally on differences between the responses of (1) shippers and providers, (2) survey participants who signed a few contracts and survey participants who signed many contracts, and (3) survey participants from smaller business organizations and survey participants from larger business organizations. In this discussion, except where otherwise indicated, the terms "provider" or "providers" include all survey responses given by persons identifying themselves as a "logistics service provider" or other similar term, or as a "carrier."[19]

II. Services

A. Services Purchased.

Comments from survey respondents:

Shippers rarely, without assistance, know exactly what they expect and wish the third party to do.

Full disclosure of expectations by shipper, accurate and complete information as well as communications between shipper and provider is most important. A provider must be honest and able to back up the services they offer and perform.

Both parties require a complete understanding regarding service, cost and meeting deadlines.

Some providers view development of a clear definition of the scope of the services as the most difficult challenge in the preparation of a successful contract arrangement. A clear definition of the services is necessary for the shipper to know what to expect from the provider, for the provider to develop a fair and accurate price for the services, and for both parties to evaluate the performance of the arrangement.

Shippers use contract logistics agreements principally to arrange for truckload and less than truckload motor carrier services. Eighty percent of shippers responding to the survey indicated that they had included truckload services in at least one of their contract logistics agreements covered by the survey: seventy-two percent indicated they had included less than truckload services.

Shippers used other services as well. For example, forty percent used ocean services, thirty-eight percent used rail services, and thirty-six percent used air freight services. Therefore, contract logistics provides a convenient way for shippers to purchase a variety of transportation and distribution services.

[19] The survey results reflect some differences in the way the shippers view the service providers from the way the service providers view themselves. Although thirty-two percent of the shippers describe the providers as "shipper's agent," "property broker" or "forwarder," only eight percent of providers describe themselves using those terms. Most providers use the term "Contractor" or "Logistics Service Provider" to identify themselves in their contracts.

Almost without exception, shippers purchased a wider range of services than any single provider offered. For example, as indicated above, eighty percent of the shippers purchased truckload motor carriage. Only sixty-seven percent, however, of the providers responding to our survey provided truck-load carriage services. This trend demonstrates the role performed by providers who act as logistics "integrators." Integrators buy a variety of services at "wholesale" and bundle them into a single package.

B. Service Standards.

Comments from survey respondents:

For those agreements having a "shared savings" clause, the parties must define the base line from which savings will be gained.

Problems include lack of clarity in customer expectations; inaccurate data upon which assumptions (and therefore scope o/work) are built; lack of openness regarding a customer's true and long term financial objectives.

Establishing the standards by which the service provider's performance is measured can be even more difficult than describing the services themselves. The standards are necessary to support incentive arrangements and rate adjustment mechanisms that may be included in the contract. Although viewed as a difficult issue in the negotiations by only fifty-six percent of the survey respondents, service standards were considered one of the most difficult" issues to resolve in the . negotiations, one of the "most important issues to resolve in detail, and an issue that has caused the most disputes after the agreement has been signed.

Survey data tell us that the question of service standards is often ignored or avoided in contract negotiations. Shippers and providers who treat their contracts carefully, however, realize that the issue must be fully resolved for the arrangement to be a success over an extended period. The issue is a difficult one. The parties will duck it if they are not sophisticated, if there is pressure to implement the services quickly, or if the contract is relatively unimportant.

Of the contracts that included service standards, the most popular standards were on time delivery (thirty-seven percent) and on time pick up (twenty-six percent). Other standards employed by survey respondents included "overall system cost reduction" (10.8 percent) and "customer satisfaction surveys" (10.8 percent). The difficulty is not in selecting the standard, but in establishing a proper measure for that standard and in keeping track of performance to determine if the standard has been met.

III. Document Preparation

A. The Drafting Process.

Comments from survey respondents:

Generally, larger more complex arrangements involve outside legal counsel representing the shipper. This fact' sometimes lengthens the process unnecessarily.

Most corporate attorneys are not familiar with outsourcing contracts. They forget the contractor is not in the insurance business and want him to be 100 percent responsible. Yet, time after time they could buy insurance for less than the contractor who adds his premium. to his cost of covering 100 percent.

The party providing the first draft of the contract documentation has a significant advantage because that party can control the agenda to be discussed and the details of the contract language. Logistics contracts are no exception to this traditional rule of the lawyering game. Consequently, in significant transactions, lawyers play "capture the draft" during the preliminary stages of each negotiation. The survey results revealed that, most of the time (fifty-four percent), the game is won by a service provider. The shipper furnished the first draft only twenty-nine percent of the time.

For a shipper, controlling the drafting process can be an uphill struggle. A provider can produce a first draft quickly because it is likely to have "standard" documentation prepared or access to a series of transaction documents that can be used as the basis for a first draft. Under those circumstances, only the largest and most experienced shippers can insist on taking the lead in the contract preparation.

B. The Negotiating Process.

Comments from survey respondents:

Negotiations should result in a complete understanding of both parties regarding service, cost and meeting deadlines.

When the contract is pending but the operation is running, negotiation of or enforcement of a contract agreement is extremely difficult – there is no direct recourse as the contract is technically nor in effect.

One important area of inquiry in the survey related to the identity of. the persons actively involved in the contract negotiations. The level of management involved with a problem can reveal much about the attitudes of a business toward that problem. As described in Table 1, senior management of shippers and service providers is directly involved in the negotiations approximately one half of the time. Table 2 illustrates that shippers involve their "highest ranking logistics executive" (*e.g.*, Traffic Manager, Vice President of Purchasing) in the negotiations almost eighty percent of the time. On the other hand, less than half (forty-eight percent) of the service providers usually involve their highest ranking sales executive in the negotiations. The difference may be that the service providers handle a large number of negotiations in the ordinary course of their business. Therefore, the highest ranking executive may serve more as a coordinator and manager than as an active participant.[20]

TABLE 1

SENIOR EXECUTIVES IN NEGOTIATIONS		
	Shippers	Providers
Usually Involved	46%	53%
Hardly Ever Involved	34%	30%

TABLE 2

HIGHEST RANKING LOGISTICS OR SALES EXECUTIVE IN NEGOTIATIONS		
	Shippers	Providers
Usually Involved	78%	48%
Hardly Ever Involved	9%	19%

We were particularly interested in how often shippers and providers were represented by counsel in the preparation and negotiation of logistics contracts. Survey statistics indicate that, in general, twenty-four percent of the survey respondents usually use staff counsel, and eleven percent usually use outside counsel. As indicated by Table 3 and Table 4, there was little difference in the use of attorneys between shippers and providers.

[20] These results should be analyzed in light of the relative size of the business organization of the survey respondents. Forty-five percent of the survey respondents had less than $10 million in revenues. Management of businesses of that size may not be deep or specialized.

TABLE 3

STAFF COUNSEL IN NEGOTIATIONS BY TYPE OF ENTITY		
	Shippers	Providers
Usually Involved	29%	33%
Hardly Ever Involved	63%	55%

TABLE 4

OUTSIDE COUNSEL IN NEGOTIATIONS BY TYPE OF ENTITY		
	Shippers	Providers
Usually Involved	16%	14%
Hardly Ever Involved	84%	78%

There were some differences in the use of attorneys based on the number of logistics contracts signed by the participant. As demonstrated by Table 5 and Table 6, survey participants who signed only a few contracts were substantially more likely to be represented by counsel. For example, thirty-seven percent of the survey participants who signed only one or two contracts a year usually used staff counsel in the negotiations as opposed to nineteen percent of the participants who signed more than ten contracts per year. Twenty percent of the participants who signed one or two contracts a year usually used outside counsel in the negotiations. Only eight percent of the participants who signed ten or more contracts a year usually used outside counsel in the negotiations.

TABLE 5

STAFF COUNSEL IN NEGOTIATIONS BY NUMBER OF CONTRACTS		
	One or Two Contracts a Year	More Than Ten Contracts a Year
Usually Involved	37%	19%
Hardly Ever Involved	56%	73%

TABLE 6

OUTSIDE COUNSEL IN NEGOTIATIONS BY NUMBER OF CONTRACTS		
	One or Two Contracts a Year	More Than Ten Contracts a Year
Usually Involved	20%	8%
Hardly Ever Involved	73%	82%

Table 7 and Table 8 demonstrate utilization of attorneys based on the revenue of the survey participant. According to the survey results, the larger the business organization, the more likely that staff attorneys "will be involved. Forty-five percent of survey participants with revenues of more than $30 million a year usually used staff counsel for their logistics contracts. Twenty-five percent of survey participants with revenues of less than $10 million a year usually used staff counsel. On the other hand, there was almost no difference in the utilization of outside counsel based on the revenues of the survey participant. Fifteen percent of the participants with annual revenues of less than $10 million usually used outside counsel for these negotiations. Seventeen percent of the participants with annual revenues of more than $30 million usually used outside counsel for these negotiations.

TABLE 7

STAFF COUNSEL IN NEGOTIATIONS BY REVENUES		
	Less Than $10 Million	More Than $30 Million
Usually Involved	25%	45%
Hardly Ever Involved	67%	45%

TABLE 8

OUTSIDE COUNSEL IN NEGOTIATIONS BY REVENUES		
	Less Than $10 Million	More Than $30 Million
Usually Involved	15%	17%
Hardly Ever Involved	82%	78%

C. Issues Addressed.

Comments from survey respondents:

Issues that should be addressed in negotiations include an inventory limit of liability – what is the common standard for an inventory variance, and therefore, the liability that the provider/vendor should assume.

The parties should negotiate frequency and method of payment for logistics services.

Agreements should include remedies for failures of vendors used by logistics service providers, in terms of performance and service standards.

The survey identified the issues that are considered a significant pan of the contract negotiation. In general, the respondents as a group viewed the following issues to be important: method of determining compensation (eighty-one percent), insurance and indemnification (seventy-eight percent), and liability for loss and damage to cargo (seventy-seven percent). Issues considered less important included benchmarks for gain sharing (eighteen percent), shipper obligations on termination (twenty-six percent), and software protection (twenty-nine percent).

For the most pan, there was very little difference in the issues that shippers and providers believed are significant. Table 9 describes the issues in which differences of more than ten percent were recorded.

TABLE 9

ISSUES USUALLY ADDRESSED BY TYPE OF ENTITY		
Issue	Shippers	Providers
Insurance and indemnification	89%	77%
Cargo liability	86%	75%
Termination obligations	41%	21%
Rate adjustment	44%	66%

Analysis of results based on the number of contracts signed also revealed only a few differences among survey participants. The issues in which differences of more than ten percent were recorded are set forth on Table 10.

TABLE 10

ISSUES USUALLY ADDRESSED BY NUMBER OF CONTRACTS		
Issue	One or Two Contracts a Year	More Than Ten Contracts a Year
Personal injury and property damage	48%	70%
Service standards	61%	44%
Confidentiality	53%	63%
Benchmarks for gain sharing	25%	13%

Analysis of the survey results based on the size of the business organization revealed several issues that were viewed differently depending on the size of the survey respondent. Based on these results, it appears that the larger business organizations are entering longer term, more sophisticated, arrangements. As a result, their contract negotiations address issues, such as data standards and protection of confidential information, that become more relevant in these types of arrangements. The issues where differences of more than ten percent were recorded are set forth on Table 11.

TABLE 11

ISSUES USUALLY ADDRESSED BY REVENUES		
Issue	Less Than $10 Million	More Than $30 Million
Minimum term	64%	92%
Cargo liability	75%	88%
Compensation method	75%	96%
Rate adjustment	43%	59%
Service standards	57%	69%
Data standards	21%	63%
EDI	24%	38%
Confidentiality	49%	70%
Software protection	23%	35%
Benchmarks for gain sharing	13%	26%

IV. Other Issues

Comments from survey respondents:

Problems in logistics contracts include the overall limited knowledge of agreements and contractual issues to address when employing contract trucking services, freight forwarders and customs clearance agents.

There must be a willingness to examine the process to introduce changes that reduce the overall cost of logistics activity; too many fiefdoms within corporations (purchasing, sales, operations, etc.) care only for selfish interest; a holistic approach is imperative to long-term success.

Many providers examined promised "seamless" start-up; "we'll take the won)' out of the start-up process for you." The chosen firm was not prepared, depended heavily on displaced staff and team, brought little to the party. We canceled the contract within six months - bad experience.

Shippers seem slow to involve the customer services/sales management in logistics agreements (and negotiations); there is subsequently a "disconnect" that surfaces after implementation. Most agreement failures that I've seen involve after-the-fact involvement/intervention by these departments.

You cannot do a contract and leave it at that. There must be ongoing communications and analysis of daily operations. This prevents disputes.

By its nature, the contract logistics. survey could address only a limited range of issues. As indicated by the comments of survey respondents set forth above, there are issues not addressed by the survey that are important to the success of a contract logistics arrangement. Most of these issues are management and people issues that cannot be solved by contract language. These comments, however, reinforce the importance of a commitment on the part of management to examine and reevaluate the arrangement and to make changes based on circumstances.

V. Conclusion

Analysis of the survey results provides a substantial amount of information regarding the environment in which contract logistics agreements are negotiated and implemented. Some generalizations can be drawn from the survey results:

1. There are few significant distinctions between shippers and providers regarding the preparation of contract logistics agreements.

2. Businesses that sign only one or two logistics contracts a year are likely to devote substantial time and resources toward the contracts in which they are involved.

3. Business organizations with revenues greater than $30 million per year are more likely to be involved in contract negotiations that deal with a wide range of sophisticated business and legal issues.

The survey reveals much useful and interesting information regarding logistics contracts. The logistics executives who participated presented an accurate reflection of a dynamic industry that is just beginning to reach maturity.

APPENDIX I

ATLLP SURVEY ON CONTRACT LOGISTICS AGREEMENTS

Results

In this survey, when we refer to a "contract logistics agreement," we are referring to a written contract signed by the parties that is intended to cover the terms and conditions under which a logistics service provider agrees to assume responsibility for a defined-portion of a shipper's logistics system. Transportation or distribution services mayor may not be included as part of the agreement.

When we refer to the "Survey Term," we are referring to the time period between September 1, 1994 and August 31, 1996.

In questions 1 through 4, we are trying to find out more about the companies who are entering into contract logistics agreements. We are also seeking some general information regarding the agreements covered by the survey.

1. Please estimate the number of contract logistics agreements negotiated by your organization during the Survey Term. *(Answer is percent of all respondents)*:

1 to 5	6 to 20	21 to 50	51 to 100	more than 100
39.6	33.3	18	6.3	2.7

2. Please estimate the annual aggregate revenue (in millions) expected to be realized by the logistics service provider from the agreements described in Question 1. above *(Answer is percent of all respondents)*:

$0 to 10	$10 to 30	$30 to 50	$51 to 100	in excess of $100
45.0	27.9	9.0	8.1	7.2

3. Please indicate each capacity in which your organization signed a *contract logistics agreement* during the Survey Term (check all that apply) (*Answer is percent of all respondents*):

32.4	Shipper	42.3	Carrier
14.4	Shipper's agent	15.3	Consultant
9.0	Property broker	17.1	Freight Forwarder
53.2	Logistics Service Provider (or similar designation)	37.8	Warehouseman
		8.1	Other

4. Please indicate the legal term used most often to describe the role and responsibilities of the logistics service provider in the contract logistics agreements in which your organization participated during the Survey Term (*Answer is percent of all respondents*):

8.1	Shipper’s Agent	16.2	Warehouseman
3.6	Property Broker	17.1	Contractor
3.6	Freight Forwarder	1.7	Other
18.9	Carrier	20.7	No response

5. Please indicate all of the services that have been covered in the *contract logistics agreements* in which your organization participated during the Survey Term (check all that apply) (*Answer is percent of all respondents*):

65.8	LTL Services	26.1	Ocean Services
72.1	TL Services	25.2	Customs
31.5	Rail Services	64.9	Warehousing
34.2	Air Services	23.4	Other

6. We would like to know who controls the drafting process. On a scale of 1 to 5, with 1 designating "never" and 5 designating "always," please estimate how often the first draft of a contract logistics agreement was provided by the following (*Answer is percent responding "4" or "5"*):

28.8 a shipper
37.8 a logistics service provider
15.3 a carrier
2.7 a consultant
8.1 other

7. We would like to identify the issues addressed in the negotiations. On a scale of 1 to 5 with 1 designating "never" and 5 designating "always," please estimate how often the following issues were a substantial part of the negotiations (*Answer is percent responding "4" or "5"*):

72.1 Length of the minimum term (*i.e.*, the period of time that the agreement cannot be canceled) .
78.4 Insurance and Indemnification
57.7 Liability for personal injury and property damage
77.5 Liability for loss or damage to cargo
81.1 Method of determining compensation (*e.g.*, fixed fee, cost plus)
49.5 Method for adjusting the rates
56.7 Specific service standards to be met by the logistics service provider
47.7 Minimum standard for the volume and quality of data provided by the shipper (*i.e.*, data provided before the contract is signed on which the system and rates are based)
26.1 Shipper obligations upon termination (*e.g.*, equipment buy back, assumption of real estate lease)
25.2 Terms and conditions regarding electronic data interchange
56.7 Terms and conditions to protect against disclosure of confidential information
28.8 Terms and conditions to protect against improper or unauthorized distribution or use of software
18.0 Benchmarks for gain sharing

8. We would like to know more about who participates in the negotiations. On a scale of 1 to 5 with 1 designating "never" and 5 designating "always," please estimate how often each of the following actively participated in the negotiations on behalf of your organization (*Answer is percent responding "4" or "5"*):

45.9 Senior level corporate executive
66.6 Highest ranking logistics executive (for shippers)
55.8 Highest ranking sales executive (for providers)
44.1 Other logistics executive (for shippers)
36.9 Other sales executive (for providers)
24.3 Staff attorney
10.8 Outside attorney
9.9 Other

9. We would like to know more about the negotiating process. *Please rank, in the order of frequency*, the number of negotiating sessions (*e.g.*, phone calls, face to face negotiations) needed to produce a final agreement (complete the blank with the appropriate ranking from 1 to as many as may apply) (*Answer is percent ranked "1" or "2"*):

18.0 No negotiations required (first draft or standard form acceptable)
27.9 One or two negotiating sessions
41.1 Three or four negotiating sessions
36.0 More than four negotiating sessions

10. We would like to know more about how the parties resolved some of the significant issues that arise in the negotiations. *Please rank, in the order of frequency* in which they were used in an agreement signed during the Survey Term, the following contract provisions (complete the blank with the appropriate ranking from 1 to as many as may apply) (*Answer for all pans of question 10 is percent ranked "1" or "2"*):

(a) the length of the minimum non-cancelable term of the agreement:

13.5 No term specified
18.9 Less than one year 40.5 One 10. three years 23.4 Three to five years
3.6 Other

(b) the method of determining the compensation to be received by the logistics service provider:

38.7 Fixed fee per shipment, per trip, etc.
25.2 Fixed fee per week, per month, etc.
16.2 Cost plus
5.4 Gain sharing
15.4 Rate per mile
14.4 Other

(*Please rank the following contract provisions in order of frequency in which they were used:*)

(c) service standards to be met by the logistics service provider:

7.2 No standards
26.1 On time pick up.
37.8 On time delivery
7.2 Cycle time reduction
2.7 Guaranteed backhaul
10.8 Overall system cost reduction
13.5 Loss and damage
10.8 Customer satisfaction survey
4.5 Other

(d) remedies for failure of the logistics service provider to meet the specific service standards:

15.3 No remedy
29.7 Financial penalty
12.6 Default and legal damages
43.2 Termination of the agreement
8.1 Other

(e) remedies for failure of the shipper to meet minimum volumes specified:

22.5 No remedy
33.3 Right to adjust rate
15.3 Right to redesign system
22.5 Right to cancel agreement
6.3 Other

(*Please rank the following contract provisions in order of frequency in which they were used:*)

(f) remedies for failure of the shipper to meet the minimum standard for data regarding the transportation system on which the system and rates are based:

21.6 No remedy
27.0 Right to adjust rate
25.2 Right to redesign system (with new rates)
19.8 Right to cancel agreement
2.7 Other

(g) commitments on the part of the shipper to assume obligations of the logistics service provider upon termination of the agreement:

38.7	No commitments
11.7	Equipment buy back
11.7	Equipment lease assumption
12.6	Real estate lease assumption
3.6	Pension withdrawal liability
5.4	Employee liability (*e.g.*, accrued vacation expense)
2.7	Other

11. From among the issues described above, please identity (*Answers for all parts of question 11 are most frequent responses*):

(a) the issue most difficult to resolve in negotiations:

pricing issues
liability and insurance issues
compensation and gain sharing issues
service standards
performance measurement

(b) the issue that you believe is the most important to discuss and resolve in detail:

service standards/expectations
pricing issues
contingency planning – dealing with change or problems
insurance and liability
gain sharing

(c) the issue that has caused the most disputes after the agreement is signed:

actual performance vs. standards
liability and claims issues
lack of promised volume
rate adjustments

APPENDIX 1B

CHECKLIST OF LOGISTICS MANAGEMENT[21]

- / / Access to Premises
- / / Accessorial Charges
- / / Accounting
- / / Acquisition of Additional Fixed Rates
- / / Advancing Charges
- / / Advertising
- / / Affirmative Action
- / / Allowances - Rebates
- / / Amendments and Supplements
- / / Amendments and Waiver
- / / Appointment of Mediator
- / / Arbitration of Disputes
- / / Assignment
- / / Attorney Fees
- / / Backhaul Considerations
- / / Bankruptcy
- / / Benchmarks
- / / Benefit of the Agreement
- / / Bonds and Undertakings
- / / BMC 32 Coverage
- / / Budget and Remuneration Procedures

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/ / Cancellation

/ / Captions and Titles

/ / Change of Control

/ / Claims Procedures

/ / Combination Orders

/ / Compliance with Law

/ / Commodities (Classifications, Mix)

/ / Communications

/ / Complaints

/ / Confidentiality

/ / Conflict Resolution

/ / Consultation with the Client

/ / Continued Provisions

/ / Cost of Negotiations

/ / Credit

/ / Currency

/ / Dedicated Movements

/ / Default and Cure

/ / Definitions

/ / Definition of Provider

/ / Delivery Schedule

/ / Delivery Location(s)

/ / Delivery Procedure

/ / Detention-Furnished,
Not Used

/ / Discounts on Collect Shippers

/ / Distribution Services

/ / Diversion and Reconsignment

/ / Documentation-Contract

/ / Documentation-Bill of Lading

/ / Documentation-Invoicing

/ / D.O.T./O.S.H.A./E.P.A. (Gov't. Regu.)

/ / Effect on Court Proceedings

/ / Emergency Charges

/ / Employees of ____________

/ / Entire Agreement (Integration)

/ / Environmental Representations, Obligations and Indemnity

/ / Equal Opportunity

/ / Equipment Supply

/ / Equipment Type

/ / Exclusivity

/ / Exclusive Use of Vehicle

/ / Escalation and De-Escalation

/ / F.O.B. Terms

/ / Forced Majeure

/ / Further Assurances

/ / Governing Publications

/ / Hazardous Materials

/ / Identity of Parties

/ / Indemnification

/ / Indemnification Procedure

/ / Indemnity by the Client

/ / Independent Contractor

/ / Initial Term

/ / Injunctive Relief or Anti-Injunctive Relief

/ / Inspection and Testing

/ / Insurance by ___________

/ / Insurance by the Client

/ / Interest

/ / Lease and License

/ / Legal Relationship

/ / Length of Contract

/ / Liabilities and Claims Procedures

/ / Liability - Cargo

/ / Liability - Consequential Damages

/ / Liability - Freight Charges of other Carriers

/ / Liability - Time Limitations

/ / Liability - for Loss and Damage

/ / Liability - for Loss Excess

/ / Limitation of Liability

/ / Liquidated Damages

/ / Maintenance of Providers Personnel at the Premises

/ / Material Breach

/ / Meet and Confer

/ / Meeting Competition (Most Favored Nation)

/ / Modification

/ / Multiple Trailerload Shipments

/ / Mutual Indemnification

/ / Negotiation

/ / New Business Operations

/ / Non-Payment by Client

/ / Non-Payment of Carriers

/ / Non-Solicitation

/ / No Third Party Beneficiary

/ / Notices

/ / Notice of Accidents, etc.

/ / Offset of Accounts

/ / Options

/ / Origins of Shipment -
Source Locations

/ / Other Termination

/ / Other Procedures Applicable To Termination

/ / Overcoming Force Majeure

/ / Packaging

/ / Pallets-Interchange

/ / Pallets-Return

/ / Payments - C.O.D

/ / Payment and Credit Terms

/ / Payments-Freight Collect

/ / Payment - Prepaid

/ / Payment - Repayment

/ / Payment - Repayment

/ /	Performance Bond

/ /	Performance Guarantees

/ /	Permits (Other than those Affecting Capacity to Contract)

/ /	Physical Counts and Other Systems

/ /	Parol Evidence Rule

/ /	Price Schedule-Rates

/ /	Procedures on Termination

/ /	Proof of Insurance

/ /	Proper Law of Contract

/ /	Protective Services

/ /	Public Notices

/ /	Rate - Alternative

/ /	Rate - Application

/ /	Rate - Full Value

/ /	Rate - Increases

/ /	Rate - Minimum Charge

/ /	Rate - Released Value

/ /	Reconsignment

/ /	Records - Inspection

/ /	Records - Retention

/ /	Reference Rule

/ /	Renegotiation

/ /	Renewal Including Evergreening

/ /	Representations and Warranties Regarding Products

/ /	Requirement to Disclose

/ /	Responsibility for Failure of Contract (Including Labor)

/ / Resolution of Budgeting and Variance Issues

/ / Return of Damaged Products

/ / Return of Shipment - Undeliverable

/ / Right of Rejection-Carrier

/ / Right of Rejection-Consignee

/ / Risk of Loss - Insurance

/ / Round-Trip Fully Loaded Routes

/ / Routing

/ / Salvage

/ / Sanitation Standards

/ / Sealing Trailers

/ / Security Matters

/ / Services to be Provided from the Premises

/ / Severability

/ / Scope of Contract Motor Carrier Services

/ / Schedules

/ / Shipment Frequency

/ / Software (Ownership: Injunction, etc.)

/ / Sorting of Segregating

/ / Specific Performance

/ / Shortage-Over and Astray

/ / Status of Service Freight Forwarder-Broker, Carrier, etc.

/ / Stop-Off Privileges

/ / Subcontracting

/ / Subrogation

___/ /___ Surcharges

___/ /___ Taxes

___/ /___ Term

___/ /___ Terminal Services

___/ /___ Termination

___/ /___ Termination at End of Term

___/ /___ Termination for Failure to Meet Performance Criteria

___/ /___ Termination by Either Party

___/ /___ Transportation Services

___/ /___ Time-In-Transit

___/ /___ Time of Delivery

___/ /___ Trade Relations and Joint Advertising

___/ /___ Trade Secrets

___/ /___ Transit Services (i.e., storage in transit)

___/ /___ Unsafe Goods

___/ /___ Volume Commitment

___/ /___ Volume Incentives

___/ /___ Volume Penalties

___/ /___ Waiver - (ICCTA)

___/ /___ Warehousing

___/ /___ Warranties

___/ /___ Weights - Gross and Dunnage

___/ /___ Weights - Minimum Factor, Overflow

___/ /___ Weights - Minimum Factor

APPENDIX 1C

Comprehensive Outline Of The Terms and Conditions of a Working Contract Carrier Transportation Agreement

By William D. Taylor, Esq.

1. DEFINITIONS

1.1 Collateral Contract Documents
- A. Manifest
- B. Bill of Lading
- C. Tariff/Schedule/Classification or Similar Document

1.2 Contract Motor Carrier
1.3 Contract Shipper
1.4 Customer(s)
1.5 Product
1.6 ICCTA
1.7 US DOT
1.8 ICC
1.9 STB
1.10 Waiver
1.11 AAA
1.12 TLA
1.13 IDR
1.14 Qualified Drivers
1.15 Hazmat/Hazardous Materials
1.16 Transportation Services or Services
1.17 Safety Rating
1.18 Material or Materially
1.19 Laws and Regulations
1.20 Expedited or Time-Sensitive Delivery
1.21 Currency
1.22 Headings
1.23 Extended Meanings
1.24 Appendices
1.25 Indemnification Procedures
1.26 Change of Control
1.27 Operating Authority(ies)
1.28 Billings

<u>The Evolving Rule of Freight Intermediaries in Multimodal Transport: the Logistics Spokes that Spin the Wheels of Commerce</u>

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Some of the most frequently asked, and frequently litigated, questions in this new era involve freight intermediaries. Issues arise both in litigation, and in the negotiation of transactions and contracts, as to what exactly *is* the entity involved, in terms of its role in the shipping sequence and potential liabilities. Whose agent is the intermediary? What liability regime applies to it? What are its registration requirements? These, and a panoply of other questions are often raised, and often litigated. This paper discusses some of those questions, provides some answers, and reviews some illustrative cases.

Surface Freight Forwarders

Definition:

Arranges transport, but also (1) plays a role in the assembly, consolidation, break bulk and distribution of the freight; (2) assumes responsibility (and liability) for transportation from the place of receipt to the place of destination; and (3) uses an interstate carrier for any part of the transport, 49 U.S.C. §13102(8). All §13102(8) criteria must be met. *Chemsource v. Hub Group*, 106 F.3d, 1358, 1361 (7th Cir. 1997), *Independent Machinery, Inc. v. Kuehne & Nagle, Inc.*, 867 F. Supp. 752, 757 (N.D. Ill. 1994). Need not *perform* each function, but must "proffer" them. *Phoenix Assurance Co. v. K-Mart Corp.*, 977 F. Supp. 319, 324 (D.N.J. 1997); *Metropolitan Shipping Agents of Illinois, Inc. v. United States,* 342 F. Supp. 1266, 1269 (D.N.J. 1972); *Superior Transportation Systems, Inc.--Petition for Declaratory Order--Classification of Operations Conducted for Boise Cascade Corp.,* 1995 WL 623273 *2 (I.C.C. Oct. 18, 1995). *Cf. National Motor Freight Traffic Association, Inc. v. United States,* 205 F. Supp. 592, 594-97 (D.D.C. 1962), *aff'd,* 372 U.S. 246 (1963) (per curiam). At least one case has held to the contrary. *Pacific Austral Party, Ltd. v. Intermodal Express, Inc.,* 1990 WL 141010 *2 (N.D. Ill. Sept. 26, 1990.)

"[T]he term 'assembles and consolidates' means the assembly or consolidation of less than carload quantities into carload shipments." *Chemsource, supra,* 106 F.3d, at 1361.

Registration Requirements:

1. Must register with DOT.

Liability Regime:

2. Carmack liability; considered "carriers" under ICCTA.

Agency Relationships:

Differing Views:

1. Agent of Shipper. *Zenith Elec. Corp. v. Panalplina, Inc.,* 68 F.3d 197, 198.

2. Depends upon facts of particular freight scenario. *Constructors Tecnicos v. Seafood Serv., Inc.*, 945 P.2d 841, 846 (5th Cir. 1991).

3. Independent Contractor. *Koninklijke Nedlloyd BV. v. Uniroyal, Inc.*, 433 F. Supp. 121, 128 (S.D.N.Y. 1977);

4. Service is indicia. *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56, 63 (7th Cir. 1971) (noting service for others as one indication of independent contractor's status).

Limitation of Liability Issues:

1. Released value doctrine applies.

Transportation Brokers

Definition:

1. Broker: 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).

2. A broker does not have a role in the actual assembly or carriage of the goods. *Transportation Revenue Management, Inc. v. First NH Investment Services Corp.,* 886 F. Supp. 884, 886 (D.D.C. 1995).

3. An independent party serving as a middleman between motor carriers and the shipping public. *Reiter v. Cooper*, 507 U.S. 258 (1993); arranges transport with a motor carrier for shipper for compensation, but does not act as a carrier which actually provides transport for compensation.

4. Determination as to broker or forwarder status based upon what services entity offers rather than declared purpose. *United States v. California*, 297 U.S.C. 175, 181 (1936).

5. Both domestic and international air freight forwarders may act simply as brokers in arranging transportation with a carrier as an agent for a disclosed principal (14.C.F.R. 297.5 (1992)); *See St. Laurent v. Air Freight Transportation Corporation of N.J.*, 86 A.D.2d 511, 445 N.Y. F.2d 745 (1st Dept. 1982).

Liability Regime:

1. Non-Carmack, common law, contractual, *See Servicemaster Co. v. FTR Transport, Inc.* 868 F. Supp. 90, 95 (E.D. Pa. 1994) (contract between broker and shipper not subject to federal regulation). Released value doctrine does not apply. *Chemsource v. Hub Group, Inc.*, 106 F.3d 1358, 1361 (7th Cir. 1997); *Custom Cartage, Inc. v. Motorola, Inc.*, Fed. Cas. (as. P. 84,082) (N.D. Ill. 1999). Also, potential tort liability for negligent selection. Negligent selection causes of action are oft alleged, but rarely have succeeded. Most courts find that the broker is obligated to ensure that the motor carrier is appropriately insured and has a satisfactory rating with the DOT.

2. Carrier/shipper may also seek recovery directly from broker's surety. Of course, this recovery is limited to the amount of the broker's surety bond on file– generally $10,000.00. *See Milan Express Co. v. Western Surety Co.*, 792 F. Supp., 571 (M.D. Tenn. 1992).

Registration Requirements:

1. Must register with DOT.

Agency Relationships:

Generally considered independent contractors; sometimes considered shippers' agents. *Cf. Gelfand v. Action Travel Center, Inc.*, 55 Ohio App. 3d 193 (1988).

Limitation of Liability Issues:

Released value doctrine does not apply to brokers. *Chemsource, Inc. v. Hub Group*, 106 F.3d 1358, 1361.

Air Freight Forwarders

Liability Regime:

Federal aviation law has historically recognized both direct and indirect air carriers. *DHL Corp. v. CAB,* 584 F.2d 914 (9th Cir. 1978). Ordinarily, direct carriers perform custodial transportation while indirect carriers undertake to be legally responsible for safe delivery and provide logistical support including procuring and assembling cargo for shipment, packaging, booking cargo and arranging for surface transportation.

An indirect air carrier has been defined as a freight forwarder who issues an airway bill, *Martin Marietta Corp. v. The Harper Group,* 950 F. Supp. l250 (S.D.N.Y. 1997), and is treated as a carrier under the Warsaw Convention. *Pan Am v. CF. Freight,* 23 Avi. Cases 17, 189 (S.D.N.Y. 1990).

An indirect air carrier is treated as a custodial carrier both under federal common law on domestic moves and under the Warsaw Convention in international carriage and is afforded the same defenses and opportunities for limitation of liability. *Confeccos Texteis DeVouzela v. Space Tech Systems Inc.,* 972 F.2d 1338 (9th Cir. 1992).

Warsaw Convention Applicability to Air Freight Forwarders:

Section I of Article 18 of the Warsaw Convention requires that the loss be "presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air." 49 U.S.C. § 40105, Article 18. However, this presumption may be rebutted by evidence demonstrating that the loss occurred on land or in a warehouse outside the airport. *See Victoria Sales Corp. v. Emery Air Freight, Inc.,* 917 F.2d 705, 706-07 (2d Cir. *1990); Royal Ins. Co. of America v. Air Express Int'l,* 906 F. Supp. 218, 219-20 (S.D.N.Y. 1995).

Carmack Applicability to Air Freight Forwarders:

The Carmack Amendment applies to the extent freight is transported by motor carrier (1) between a place and (a) a place in another state. Carmack Amendment, 49 U.S.C. §10521(a)(1)(a). The Carmack Amendment does not apply to transportation provided on contiguous municipalities, or in a zone that is adjacent to and commercially part of the municipality. *Id.* at § 10526(d). For instance, transport from Newark to New York City is within the same commercial zone and is not governed by the Carmack Amendment. *See Sega v. AM. Express Freight*, 1985 WL 577784 at *5 (quoting 49 C.F.R. § 1048.20(a)(b)). Contrarily then, if air freight forwarders become involved in interstate land transport, outside the airport's commercial zone, their liability *may* be governed by Carmack.

However, if Carmack does not govern, federal common law does, and federal common law incorporates the released value doctrine. *First Pennsylvania Bank v. Eastern Airlines*, 731 F.2d 11 13, 1122 (3d Cir. 1984).

Air freight forwarders are exempt from Carmack applicability where the air freight forwarder's use of motor transportation is necessitated by circumstances, such as weather or mechanical failure which is beyond the control of the air freight forwarder. Overbooking or over-solicitation of air space does not create the type of emergency situation contemplated by this provision. *See Phoenix Assurance Co. v. K-Mart Corp.,* 977 F. Supp. 319, 324 (D. N.J. 1997); *Quality Exchange, Inc. v. Universal Air Freight, Inc.,* 574 F. Supp. 622, 625 (W.D. N.C. 1983) (gathering authorities).

Liability Limitations:

Air freight forwarders or indirect carriers may limit their liability under federal common law, on a released valuation basis. *Deiro v. American Air Lines, Inc.,* 816 F.2d 1360, 1365 (9th Cir. 1987) (under released value doctrine, in exchange for low carriage rate, passenger-shipper deems to have released carrier from liability beyond a stated amount). Such a liability limitation is enforceable only if: (1) it resulted from a fair, open, just, and reasonable agreement between carrier and shipper, entered into by the shipper for the purposes of obtaining the lower of two or more shipping rates-proportioned to the amount of risk, and (2) the shipper was given the option of additional recovery upon paying a greater rate. *See Williams Dental Co. v. Air Express Int'l,* 824 F. Supp. 435, 441 (S.D.N.Y.), *aff'd mem,* 17 F.3d 392 (2d Cir. 1993). In determining whether these requirements for enforceability of the air forwarders liability limitations are met, courts have considered such factors as: (1) whether the carrier was given adequate notice of the limitation of liability to the shipper, (2) the economic stature and commercial sophistication of the parties, and (3) the availability of 'spot' insurance to cover shipper's exposure.

Customs Brokers

Definition:

A customs broker is a person who is licensed under 19 CFR 111.1 to transact customs business on behalf of others. Customs brokers prepare customs documents for clearance through U.S. Customs and the customs departments of foreign shipping destinations. They deal with the entry and admissibility of the merchandise pursuant to these customs regulations, the classifications and valuation thereof, the payment of duties, taxes or other charges assessed or collected by Customs upon merchandise by reason of its importation, or the refund or rebate or drawback thereof. *See* 19 CFR 111.1. *See also, General Electric Co. v. Harper Robinson & Co.*, 18 F. Supp. 31, 34 (S.D.N.Y. 1993).

Liability Regime:

Common law and Contractual

*Limitation of Liability Issues***:**

The Customs Modernization Act of 1993, 19 U.S.C. §1641 (the "Mod Act") provides at (f) that: "The Secretary may not prohibit customs brokers from limiting their liability to other persons in the conduct of customs business. . . ".

However, in any event, if a claim against a customs broker is not related to any error or breach of its contract as a customs broker, but instead emanates from the broker's arranging for the delivery 'of freight once it has passed through customs, a customs broker can limit its liability, particularly when there is an established prior course of dealings between the customs broker and the shipper. *See General Electric Co. v. Harper Robinson & Co.*, 818 F. Supp. 31, 35 (E.D.N.Y. 1993); *Calvin Klein Ltd. v. Trylon Trucking Co.*, 892 F.2d 191, 195 (2d Cir. 1989) (upholding $50.00 limitation on liability where parties were business entities with ongoing commercial relationship involving numerous prior transactions); *Capital (converting Equipment v. LEP Transport, Inc.*, 750 F. Supp. 862 (N.D. 111. 1990), *aff'd.* 965 F.2d 391 (7th Cir. 1992).

Shippers' Agents

Definition:

Arranges for transport on behalf of the shipper.

Registration Requirements:

Need not register with FHWA.

Liability Regime:

NonCarmack; common law; contractual. *Tuggle v. Piggyback Consolidated, Inc.*, 1997 U.S. Dist. LEXIS 22175 (C.D. Cal.)

Agency Relationships:

> Agent of Shipper: An agent with no ownership interest in the goods who is acting on behalf of a disclosed principal is not liable for breach of contract by the principal. *See Ariel Maritime Group, Inc. v. Zust Bachmeier of Switzerland, Inc.*, 762 F.Supp.55, 59 (S.D.N.Y. 199 *1); Seguros Banvenez, S.A. v. SIS Oliver Drescher,* 761 F.2d 855, 860 (2d Cir. 1985); *Interocean Shipping Co. v. National Shipping and Trading Corp.,* 462 Fd.673, 678 (2d Cir. 1972); *Sea-Land Serv., Inc. v. Amstar Corp.*, 690 F. Supp. 246 (S.D.N.Y. 1988).

Logistics Managers

Definition:

Logistics managers provide seamless transportation service. They may operate their own trucks or hire carriers to pick up shipments and take them to the logistic manager's dock for packaging, consolidating and loading to carrier's facilities, or they may conduct these services on the shipper's premises. 'The logistics manager functions as a broker, a freight forwarder and a customs broker. Normally, logistics managers are not responsible for safe delivery unless they have held themselves out as a carrier by either promising safe delivery or issuing their own airway bill (for air cargo). *Pan American World Airways Inc.* v. C*F. Air Freight Inc.,* 23 Av.Cas. (CCH) §17,189 (S.D.N.Y. 1990).

Registration Requirements:

None.

Liability Regime:

Common Law, contractual.

Agency Relationships:

Generally, a shippers' agent.

The evolution of liability regimes, legal principles and categorization issues as applied to intermediaries is evolving on a daily basis. This area is also one of the fastest growing, and fastest changing, aspects of the transportation business itself, particularly as it is spurred by the rampant growth of the internet, e-commerce, and the proliferation of dot-coms. That growth has already spawned new and different categories of intermediaries, such as internet freight consolidators and internet freight exchanges, which are out there doing business now. These entities cannot be easily pigeonholed into existing intermediary categories. Consequently, they will undoubtedly spawn interesting new legal, contractual and registration issues down the road (and probably another outline.)

Case Studies: The Logistics Miasma Swirls

The services and roles of third party logistics providers, such as transportation brokers, logistics managers, surface freight forwarders, and international freight forwarders are a constantly evolving work in progress. The role of the freight intermediary expands and contracts, based upon the nature of the multimodal transport involved, the exigencies of the marketplace, and the tectonics of the intertwined global economy. Oftentimes, that role only truly crystallizes in the crucible of the actual transport of the freight itself. The dizzying array of liability regimes that are involved in domestic and international multimodal shipments, lends itself to theories and allegations which seek to characterize freight intermediaries as *shippers*, as *carriers*, as NVOCC's, warehousemen and even as *manufacturers' suppliers*. As courts seek to walk this tightrope of interlocking and overlapping liability regimes, they reason their way to conclusions that often run afoul of the conclusions from *other* jurisdictions, but nonetheless serve as precedent, and didactic examples of pragmatic lessons.

To Be or Not To Be? Is a Broker, a Motor Carrier.

At the threshold of any analysis in many cases involving freight intermediaries is the initial categorization inquiry. Is the entity a transportation broker? A freight forwarder? A carrier, or even a shipper? This issue was recently addressed in *Roadmaster (USA) Corp. v. Calmodal Freight Systems, Inc.*, 153 Fed. Appx. 827; 2005 U.S. App. LEXIS 23203 (3rd Cir. 2005). In that case, Roadmaster, an importer, sued Calmodal, alleging that Calmodal breached an oral agreement for the interstate transport of goods. Roadmaster contended that Calmodal acted as an interstate carrier, and not a broker, for these freight shipments. The parties agreed that if Calmodal was a broker, it would not be liable under the Carmack Amendment for freight loss and damage. At trial, the court found that Calmodal did not act as an interstate motor carrier, relying upon testimony that Calmodal had merely "arranged for" the interstate transportation.

> Even if Roadmaster had not waived the right to present the issue, its argument lacked merit. Roadmaster seeks to invalidate the contract between itself and Calmodal as illegal, and therefore unenforceable, because Calmodal allegedly violated the Interstate Commerce Act by acting as a broker without a license. However, the Act provides a specific penalty for brokers operating without a license. *See* 49 U.S.C. Section 14901(a) (providing that a person that 'does not comply with Section 13901 is liable to the United States for a civil penalty of not less than $500 for each violation and for each additional day the violation continues). It is inappropriate to 'add judicially to the remedies' by rendering a private contract void when a Congressional statute provides specific penalties for violation. *See Kelly v. Kosuga*, 358 U.S. 516, 519, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959).

Id. at 830. Thus, the distinction between whether the entity is a carrier or a broker can mean the difference between significant freight loss and damage liability. If an alternate breach of contract claim is not pleaded against the transportation broker, that cause of action may also be lost. Finally, a base level of inquiry in dealing with any freight intermediary is to confirm that it is licensed. While that lack of a license was not determinative in this case, it can be a factor in other determinations by the court, or by a jury.

The Himalayas Reach Ohio – Kirby Lives!

Recently, the U.S. Supreme Court, in a rare foray into freight loss and damage and liability limitation scenarios, found, in *Norfolk Southern Ry. Co. v. Kirby,* 543 U.S. 14, that a Himalaya clause in a maritime bill of lading extended liability limitations to downstream inland carriers in the shipment sequence. Despite an anomalous decision from the Second Circuit, Kirby is the standing extant pronouncement of the U.S. Supreme Court on this issue.

This issue was discussed in a typically complicated freight loss and damage scenario for an international shipment in *Limited Brands, Inc. v. F.C. (Flying Cargo) Int'l Ltd.*, 2000 U.S. Dist. LEXIS 17029 (S.D. Ohio 2006). In that case, Limited Brands, Inc. sought recovery for freight lost in transit from Israel to Columbus, Ohio. Mast Enterprises, Inc. ("Mast") was a Limited subsidiary that arranged for the delivery of manufactured goods to Columbus. Mast had purchased certain goods from the manufacturer in Tel Aviv, Israel, which Mast subsequently sold to Victoria Secret, also a Limited subsidiary.

Mast then contracted with F.C. Flying Cargo International ("Flying Cargo") for the shipment of the 596 cartons of garments from Israel to Columbus, Ohio. Flying Cargo hired its affiliate, Danmar Lines, to arrange for the carriage of the merchandise. Danmar accepted the merchandise for carriage and issued a master airway bill and bills of lading for the shipment, which was loaded into a container in Israel.

Mast had a long-term agreement with Flying Cargo for freight forwarding services from Israel to Columbus. Flying Cargo acted as the local agent in Israel for the parent company of Danmar, Danzas AEI International, Inc. Flying Cargo issued the bills of lading as agent of Danmar. Flying Cargo was listed on each of the bills of lading as the "forwarding agent" and "agents for the carrier".

Danmar then retained ZIM Container Lines ("ZIM") for ocean transport of the shipment from Israel to New York. Danmar also retained defendant Cargo Connections Logistics Corp. ("Cargo Connections") to transport the shipment overland from the U.S. port to the freight port's station in Columbus, Ohio. Cargo Connections then retained Palmer Industries to transport the container to Columbus.

The container arrived in New York without incident. One week later, Cargo Connections hauled the container from the port terminal in New York to a freight station in New Jersey, for overnight storage prior to its transportation to Ohio. Palmer Industries was in charge of operating this facility. Sometime after its arrival, the container was stolen from Palmer Industries' facility.

The bills of ladings for the shipments issued by Danmar contained a Himalaya clause, and a subcontracting clause by which the carrier was entitled to subcontract portions of the carriage. The Himalaya clause made clear that all defenses and limitations of the carrier shall be available to all persons of whose services the carriers makes use for the performance of the contract. The clause also contained a covenant by the shipper not to sue entities in the shipment sequence, other than the carrier. The Limited plaintiffs brought an action alleging that all the defendants were liable under the Carriage of Goods by Sea Act ("COGSA").

All defendants filed motions for summary judgment. Flying Cargo also filed a motion to dismiss on the grounds that there was no personal jurisdiction over it in Ohio. Flying Cargo contended that it was incorporated under the laws of Israel, had its principal place of business in Israel, had no officers, employees or other business related activity in Ohio and that its only point of contact with Ohio was this single shipment. The Limited presented an affidavit stating that Mast and Flying Cargo had a "long-term business relationship", in which Mast used Flying Cargo for freight forwarding services. In light of that allegation, the court found that there *was* personal jurisdiction over the Israeli corporation, in Ohio. This is not overly surprising, since the court specifically recognized that in our multi-modal global economy, freight movements may invoke liability in distant fora: "The court also considers the inherently multi-national and multi-modal nature of COGSA cases in the maritime character of the contracts at issue in this case." *Id.,* Slip op. at 6, n. 5.

The other defendants moved to dismiss on the basis of the covenant not to sue provision. The court then discussed the ramifications of *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004):

> A limitation of liability provision, commonly referred to, as in this case, a Himalaya clause, extends to inland carriers. In *Kirby*, the Supreme Court announced that Himalaya

> clauses, properly drafted, extend downstream to all sub-carriers. The Court noted that, in complex over-seas cargo cases, the parties recognize and contemplate the use of various modes of transportation. According to the court, this industry practice means that the parties must have anticipated that the services of a land carrier, not just the original overseas carrier would be necessary in performing the contract.

Id., slip op. at 6-7. Further explaining *Kirby*, the court noted that:

> The more general issue was whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation. The Supreme Court found that the contracts arranged by the intermediary-freight forwarder prevented the cargo owner from suing the land-carrier for more than the freight forwarder negotiated. The Court held that 'when it comes to liability limitations for negligence resulting in damage, an intermediary can negotiate reliable and enforceable agreements with the carriers it engages'. *Kirby*, 543 U.S. at 33. Thus, an intermediary freight forwarder binds a cargo owner to the liability limitations it negotiates with downstream carriers.

Id., slip op. at 7.

Consequently, the court found that *Kirby* "compelled the conclusion" that Palmer Express and Cargo Connections *could* invoke the maritime bill of ladings' Himalaya clause. However, as the court explained, the action *could* continue against Danmar:

> *Kirby* emphasized that the shipper retained the right to proceed against a carrier who, as the party with full knowledge of the bills of lading at issue 'should bear responsibility for any gap between the liability limitations and the bills.' *Kirby* 543 U.S. at 35. Section 1303(8) of COGSA similarly prevents a carrier from completely exonerating itself from liability. Inasmuch as the covenant not to sue contained in the bills of lading does not relieve the carrier, in this case Danmar, from liability, it comports with section 1308(8) of COGSA.

Id. at 7.

The court also noted that neither COGSA nor the bills of lading precluded Danmar from pursuing its subcontractors for indemnity or contribution. Also, even though plaintiffs had not chosen to avail themselves of their rights against the carrier Danmar, that did not render the bills of lading and the covenant not to sue therein contrary to COGSA. The court then dismissed plaintiff's claims against Palmer Industries and Cargo Connections.

The liability of freight forwarder Flying Cargo, however, was a different story. The court directly pointed out the *Kirby* intent to protect *downstream* maritime and inland carriers. It was doubtful that Flying Cargo was a downstream carrier. As the court explained:

> Nonetheless, the relationship between plaintiffs and Flying Cargo is a separate matter from the liability of downstream carriers. Having authorized Flying Cargo in some manner to enter into transportation agreements, plaintiffs are bound under *Kirby* to the agreements this intermediary made with third-party subcontractors. *Kirby*, however, does not vitiate all liability between carriers, or freight forwarders acting as common carriers, and cargo owners.

Id., slip op. at 8. The court then denied the summary judgment motion filed by lying Cargo.

This case elucidates upon several important points. First, in spite of the itinerant holding in the Second Circuit, *Kirby* remains the law of the land. Its finding that Himalaya clauses protect downstream inland carriers is coalescing and crystallizing with each decision of its progeny. Shippers should know that the limitations *of which they are aware*, can protect downstream carriers and intermediaries, *of whom they are unaware*. However, intermediaries, carriers, and their counsel should remember to scrutinize where in the shipping sequence their actions fall. *Kirby* does not apply to upstream carriers or intermediaries, as this holding confirms.

The Edge of the Envelope: Freight Forwarder as Manufacturer Supplier?

As phenomena such as freight assembly warehouses, just in time inventory and RFID continue to grow and evolve, so do the categories into which plaintiffs attempt to pigeonhole freight forwarders. This expansion is exemplified in the recent case of *Delgadillo v. Unitrons Consolidated, Inc.*, 191 Fed. Appx. 547; 2006 U.S. app. LEXIS 18331 (9th Cir. 2006). In that case, plaintiffs Alfredo Delgadillo and his wife filed a *product liability claim* against freight forwarder Unitrons Consolidated Inc. ("Unitrons") and freight forwarder Superspeed Transportation Inc. ("Superspeed") The district court granted summary judgment to the defendants, and the plaintiffs appealed.

Delgadillo sought to hold the forwarders liable under a provision of the Idaho Product Liability Act that holds: "[a] product seller, other than a manufacturer, is also subject to the liability of the manufacturer . . . if [t]he manufacturer is not subject to service of process under the laws of the claimant's domicile; or . . . [t]he claimant would be unable to enforce the judgment against the product manufacturer." The manufacturer in this instance was admitted to be unavailable under the Act. Consequently, the forwarders would be liable under Idaho's Act if they were determined to be "product sellers" under that Act.

The Act defined "product seller" as: "any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use of consumption". The defendants contended that they were freight forwarders. They described themselves as "travel agents for cargo". They contended that their role was simply to "arrange for the shipment" of the subject machine to the United States, prepare the paperwork and collect and pay freight charges. These activities, the forwarders asserted, were insufficient to qualify them as "product sellers" under the Act.

In reviewing the District Court's summary judgment decision, the Appellate Court discoursed that:

> The district court properly focused its attention on the nature of [the forwarder's] involvement in placing the product into the stream of commerce. Viewing the evidence in the light most favorable to the [forwarders], the district court determined that: (1) the lack of a freight forwarding license could lead a reasonable trier of fact to infer Appellees had sold the product; (2) the invoices demonstrating Appellees engaged in other transactions involving industrial equipment could lead a reasonable trier of fact to infer the Appellees have sold other products; (3) the Appellees' insurance policy could lead a reasonable trier of fact to infer Appellees feared liability for distribution of products and; (4) the Appellee's possession of a negotiable bill of lading could lead a reasonable trier of act to infer the appellees had title to the product.

Id., slip op. at 4.

The court agreed, however, with the district court that this evidence was insufficient to find that the forwarders were product sellers under the Act. There was no evidence that the sale of the product was the principal purpose of the transaction. The invoices and insurance policy only permitted a reasonable fact finder to infer that the forwarders may have been involved in the sale or distribution of other goods, not that they had sold or distributed the relevant product at issue. As the court elaborated:

> [T]here is little evidence from which a reasonable trier of fact could conclude that the [forwarders] benefited from the sale of the product; there is no evidence that [the forwarders] advertised the product, marketed the product, financed the purchasing of the product, or created consumer demand for the product; and there is no evidence Appellees had any knowledge or control over the product. Rather, all the evidence tends to show that [the forwarders] acted as typical freight forwarders and their role was merely to arrange the transportation of the product from the Chinese manufacturer-seller to the American buyer.

Id.

This holding draws a line in the sand as to the expansion of freight forwarder categorization. There are similar statutes in the product liability acts of most states, in light of the manufacture of many consumer products overseas. Consequently, such an attempt may be made in other jurisdictions. If a freight forwarder or warehousing company plays a role in actual final assembly of products, it could very well metamorphose into a "manufacturer supplier" under a state's product liability statute. Another item of note is that once again, the fact that the freight forwarder was unlicensed, although not determinative, most certainly did not help the freight forwarder in the court's analysis.

The Customs Broker Feature of Logistics Management; A Form Endorsement of Liability Limitation

The evolving liability of customs brokers was recently discussed in *Morgan Home Fashions, Inc. v. UTI United States, Inc.*, 2004 U.S. Dist. Lexis 13412; 2004 AMC 803 (February 9, 2004, D.N.J.). In that case, Plaintiff Morgan Home Fashions, Inc. ("Morgan"), a New Jersey importer of soft goods to wholesalers and retail chains in the U.S., had contracted with Defendant UTI to serve as Morgan's customs broker. UTI would expedite the movement of imported goods through the customs process for Morgan. UTI was a licensee of the United States Department of Homeland Security, formerly, the United States Custom Service. UTI rendered custom services to Morgan Home on over 100 prior shipments. Those shipments were memorialized by an invoice with standard contractual terms and conditions, including a limitation of UTI's liability to either $50 per shipment, or the fees charged for the services provided, whichever was less. The customer also had the option of paying a special fee to increase the limit of UTI's liability to the shipment's actual value. The terms required that such option be exercised in writing by the customer, prior to shipment. These terms and conditions had been adopted and promulgated by the National Customs Brokers and Freight Forwarders Association of America, of which UTI was a member. Other than the inclusion of these clauses, UTI had never specifically informed Morgan that its liability would be thus limited.

Morgan ended its business with UTI as a result of alleged negligence and delays relating to 42 specific shipments. Morgan then filed a complaint against UTI alleging breach of contract, negligence, breach of fiduciary duties, breach of covenant of good faith and fair dealing, and failure to properly perform services as an agent. After removal, UTI filed a motion for summary judgment, asking the court to determine that as a matter of law, its liability was limited to $50 per shipment.

The court first gave a brief history of liability limitations for customs brokers:

> For some time, Federal regulations specifically prevented custom brokers like [UTI] from limiting their liability . . . However, those regulations were overturned in 1993, thereby permitting custom brokers to use exculpatory clauses for protection from liability . . no longer barred by federal regulations, the legality of a given exculpatory clause now hinges upon applicable state law.

In examining the validity of the exculpatory clause, the court concluded that:

> Generally, the courts must ascertain whether the parties 'so clearly allocated the risks that each party knew, or should have known, the existence of its contingent liability and was thus placed in a position where it could protect itself against such laws by adequate insurance coverage or otherwise.' . . . Based on an application of these

> considerations to the instance case, this court finds that the exculpatory clause must be upheld.
>
> The terms of the contract were spelled out in plain and clear language in each of over 100 transactions between the parties. *Simply because the information was listed on the back of an invoice, does not undermine its clarity*. . . Although the small font and light print of the relevant terms may have made them somewhat difficult to read, they do not approach the near illegibility that has been deemed too inconspicuous to be enforceable. . . . In addition, *where contractual terms are less clear, repeated opportunities for review of the terms can substitute for such conspicuousness. . . . A long line of past dealings like those between the present litigants establishes that contractual terms should be understood by all parties*. . . . The exculpatory clause was included in the contract, and Plaintiff cannot escape its dictates by failing to read it as 'one who does not choose to read a contract before signing it is nevertheless bound by its terms.'

Id. (emphasis added).

The court noted other similar authority from various jurisdictions and then analyzed Plaintiff's claim that it was a smaller company than UTI and thus should receive deferential treatment:

> It is uncontested that Plaintiff failed to object or request changes to the limitation of liability despite an express contractual provision which gave them the opportunity to do so. Although Plaintiff asserts a significant difference in the size of the companies, this is not sufficient to establish that the parties were on unequal footing with respect to the transactions in dispute. *Where the smaller of two businesses is nonetheless experienced in the world of making contracts, no inequality has been found*.

Id. (emphasis added).

The court next considered, and rejected, Morgan's rather creative policy arguments:

> Plaintiff maintains that 'the business of importing goods into the United States would come to a standstill without federally licensed and regulated custom's brokers . . . It is a violation of public policy to permit a licensed

> professional to contract away its professional obligations.' [quoting Morgan's brief]. Such an assertion runs directly counter to the 1993 decision by Congress to repeal the restriction on the use of exculpatory clauses by custom brokers. This legislative decision was a pronouncement of public policy which the court sees no reason to invalidate. Moreover, the fact that the contractual provision has been a standard contractual clause approved by the National Custom Brokers and Forwarder Association of America, Inc. and promulgated to its members for some time without manifesting any significant problems provides further evidence that the public at large has not been injured by its use.

Id.

Finally, the court rejected Morgan's claim that the small monetary size of the liability limitation itself would render it unenforceable:

> Finally, Plaintiff's claim that the maximum liability as provided in the contract 'is a mere pittance' with respect to the value of the shipments does not suffice to render the exculpatory clause unenforceable. The size of the liability cap is relevant only in its relation to the size of the expected compensation to the party who is protected by the cap on liability, in this case, the Defendant. The appropriate inquiry in this context is thus 'whether the cap is so minimal compared with the expected compensation, that the concern for the consequences of a breach is drastically minimized.' . . .
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> * * *
>
> Whether the size of the liability cap is disproportionate to the size of Plaintiff's damages (and to Defendant's exposure to liability), as Plaintiff contends, is of little legal import. The liability cap in the invoice was not mandatory and could have been adjusted pursuant to Section 8(b) [of the Contract]. The parties presumably could have also purchased insurance to cover the risk of potential damages."

Id. The court then granted the motion of UTI to cap liability of $50 per shipment. Obviously this case is helpful to all of those entities that seek to assert liability limitations. These limitations are often contained in various contracts in any shipping sequence, including those used by freight intermediaries.

Conclusion: The Brave New World and the Crystallization of New Functions and Relationships

The growth of third-party logistic managers and, now, fourth-party logistic managers, has burgeoned in recent years. Shippers and consignees are striving for—and indeed—demanding, just-in-time inventory, "one stop shopping", electronic tracking of shipments, and any other innovations that will make their supply chains more efficient. While the traditional surface freight forwarders, transportation brokers, and air freight forwarders still do a regular and consistent business, logistics managers, 3PL's and 4PL's, are becoming ever more prevalent in the transportation industry. These entities are not easily pigeonholed. Often, they transcend statutorily defined transportation entity categories. On many occasions, they are involved in various aspects and links in the transportation continuum. Their activities also often cross international borders, in addition to transcending transportation modes.

Because of this metamorphosing amalgamation of functions, new relationships in the transportation continuum are being formed that simply did not exist before. These relationships are often fluid and transitory. On other occasions, these relationships can be summarized, and can sometimes be captured and memorialized, in contractual documents. The case law involving freight loss and damage claims, freight charge issues and even personal injury liability has been well ensconced for many years, with numerous previously irrefutable principles. However, the fluid and instantaneously reactive expansion of logistic managers, 3PL's, and 4PL's is causing courts to recognize that they must adopt new legal principles, and legal analyses, to, in essence, catch up with the industry.

***Kirby v. Sompo*:**

How the Second Circuit Has Reversed the Supreme Court of the United States

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In November of 2004, a unanimous Supreme Court of the United States in the case of *Norfolk & So. Ry Co. v. Kirby*, 543 US 14 (2004), clearly explained the relationship between maritime law and U.S. domestic transportation law on a multimodal shipment. Kirby was an Australian manufacturer that sold all of the components of a catalytic converting manufacturing plant to General Motors to be installed at their facility in Huntsville, Alabama. There were 10 large components, each of which was placed in a large wooden crate, which in turn would be placed into 10 maritime containers to provide multimodal transportation between the manufacturing facility in Sydney, Australia and the G.M. plant in Huntsville, Alabama. There would be a motor carrier leg from the manufacturing facility to the port in Sydney, ocean transit between Sydney and Savannah, Georgia, and rail transit between Savannah and the G.M. plant in Huntsville, Alabama.

Kirby put up for bids its transit requirements in Australia to find someone to arrange the transportation on its behalf. It hired an international freight forwarder by the name of ICC, which entered into a written contract with Kirby. The international freight forwarder's contract limited ICC's liability to $500 per package, pursuant to the provisions of the Carriage of Goods by Sea Act. Kirby was offered an opportunity to pay a higher rate, i.e. an ad valorem charge to get higher liability, but instead it chose to purchase insurance to cover the difference between the $500 per package and the full value of the components of the plant which it had sold to General Motors for $1.4

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million. The ICC contract further provided that ICC was authorized to make transportation arrangements on Kirby's behalf on any terms it thought prudent.

ICC then contracted with the Hamburg-Sud Lines to provide ocean carriage from Sydney to Savannah, Georgia. In almost identical language, ICC agreed with Hamburg Sud to limit Hamburg Sud Lines' liability to $500 per package, pursuant to the provisions of the Carriage of Goods by Sea Act. Hamburg Sud provided ICC as its shipper with the identical opportunity to declare a higher value, and pay higher transportation charges, which ICC declined because it had no instructions from Kirby to do so, and because it was the low bidder to make the transit arrangements, and that required that the cargo be shipped at the $500 package limitation. The Hamburg Sud bill of lading, however, was an intermodal bill of lading form because it contracted with ICC to deliver the goods to General Motors in Huntsville, Alabama.

Hamburg-Sud in turn contracted with Norfolk Southern to provide the rail transportation between Savannah, Georgia and Huntsville, Alabama, pursuant to a Norfolk Southern exempt circular contract. In that contract Norfolk Southern's liability was equivalent to the lowest limitation of liability of any carrier from origin to destination, with a maximum cap on overall liability of $100,000 per shipment.

Both Hamburg Sud's bill of lading as well as ICC's bill of lading conferred all of the rights and liability limitations to their agents and servants and inland carriers under the standard Himalaya clause.

Everything went well in transit until approximately 100 miles prior to destination, when the Norfolk Southern train was involved in a derailment, and all of the 10 containers and their contents were destroyed. Kirby, of course, received full payment pursuant to its insurance policy, and when Norfolk Southern, the only carrier against whom a claim was filed, offered $5,000, suit was filed against Norfolk Southern in the United States. Kirby's insurer filed a separate suit against ICC in Australia, and a settlement was made pursuant to a confidentiality agreement, the terms of which were never disclosed to anyone.

The suit that was filed in the District Court of Atlanta alleged common law negligence causes of action. Norfolk Southern moved to dismiss the complaint based upon preemption of Carmack and the Carriage of Goods by Sea Act, and the common law causes of action were dismissed, and an amended complaint was filed for breach of contract and breach of the Carmack Amendment obligations. Summary judgment was thereafter granted in the district court, limiting the liability of Norfolk Southern to $5,000, pursuant to the provisions of the two Himalaya clauses, the $500 package limitation under C.O.G.S.A., and many prior decisions holding that the inland carrier would get the benefit of the maritime contracts where they were hired by the maritime carrier to perform an inland leg of a multimodal shipment.

The Eleventh Circuit reversed, holding that ICC was an independent contractor, and that Kirby was not bound by the Hamburg-Sud bill of lading, and therefore Norfolk Southern was not entitled to limit its liability against Kirby, despite the clear language in the two bills of lading, and despite the opportunity of Kirby and its agent to pay a higher rate and get full liability. It was also argued in the Eleventh Circuit by Professor Sturley that the Australian shipper under the Carmack Amendment was not offered a choice of rates and choice of liabilities by Norfolk Southern, and therefore the limitation of liability was ineffective vis-à-vis Norfolk Southern. The Eleventh Circuit liked the agency argument better because it broke the chain between Kirby and Norfolk Southern, thus giving Kirby's insurance company a windfall recovery against Norfolk Southern.

In the Supreme Court decision, the Supreme Court recognized a long line of Supreme Court cases which stood for the proposition that he who hires someone to make transportation arrangements for his cargo is bound by the agreement made by the parties. In fact, in following that principal laid down by the Supreme Court in 1874 and reaffirmed in 1914 in *Great N. Ry. v. O'Connor*, 232 U.S. 508 (1914). The Second Circuit itself had reaffirmed that principal in the case of *Nippon Fire & Marine Ins. Co. v. Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), where the agent who made the arrangements violated his authority because he was specifically prohibited from shipping at a limited liability, and nevertheless the Second Circuit upheld the limited liability of the two airlines that shipped the computers at a minimum value.

Further, The Supreme Court indicated that if the parties agree that pursuant to the provision in the Carriage of Goods by Sea Act, Sec. 7 the parties were at liberty to extend the Carriage of Goods by Sea Act inland, and both bills of lading did so. Thus, The Supreme Court following many prior precedents came to the conclusion that if the parties extend COGSA inland, as Congress had intended, and if the maritime bill of lading provides through its Himalaya clause defenses for inland carriers and agents, then international shippers such as Kirby would be bound by the terms of the agreement made on their behalf, and thus The Supreme Court reversed the Eleventh Circuit's decision and held that Kirby's insurer could only recover the $500 per package that it had agreed to when it hired ICC. To be sure, Professor Sturley argued in his Supreme Court brief that the Carmack Amendment and the failure of Norfolk Southern to give Kirby a choice of rates and choice of liabilities prohibited Norfolk Southern from limiting its liability to Kirby. Because of the multimodal nature of the shipment, The Supreme Court brushed away that argument, and another argument in the *Colgate-Palmolive Co. v. Dart S/S Canada*, 724 F.2d 313 (2d Cir. 1983) case where that Court held that local law applied, thus ignoring all of the provisions the parties had agreed to in the maritime contract.

Then along comes *Sompo Japan Ins. Co. v. Union Pacific R.R. Co.*, 456 F.3d 54 (2d Cir. 2006), where the Union Pacific was hired to transport a shipment of cargo that was damaged in transit on Union Pacific. In *Sompo*, the ocean carrier's bill of lading contract limited Union Pacific's liability to $500 per package via the Himalaya clause and Union Pacific's own exempt circular offered the ocean carrier and opportunity to declare a higher value and pay a higher rate but since Sompo's insured did not declare a value to the ocean carrier, the ocean carrier did not declare a value to Union Pacific. Consistent with Kirby the district court judge granted summary judgment limiting Union Pacific's liability to $500 per package.

In the 2d Circuit, the Union Pacific relying on Kirby argued that pursuant to the ocean carrier's bill of lading contract, the extension of COGSA inland, and the Himalaya clause protecting inland carriers, Union Pacific's liability was limited to $500 per package. In reversing the district court, the Second Circuit, in a 50-page pseudo-scholarly opinion held that The Supreme Court was wrong in its analysis, claiming that the Carmack Amendment trumped the contracts entered into by the parties and that the Union Pacific had to offer the shipper, (not its shipper, the ocean carrier), an opportunity to declare a higher value and pay a higher rate.

The Second Circuit did this based on a number of false premises that appear in its pseudo-scholarly decision. First, it erroneously concluded that the issue of Carmack

Amendment was never argued to The Supreme Court by Professor Sturley, and therefore The Supreme Court overlooked the effect of the Carmack Amendment. Can you imagine Professor Sturley failing to make such a basic argument? In fact, he made such an argument, but The Supreme Court found that the actual contracts between the parties governed the transportation at issue.

Second, the Second Circuit erroneously concluded that on multimodal shipments, the Carmack Amendment's provisions clearly applied, whether or not the contracts made for the transportation recognized that fact. The original Carmack Amendment had its own jurisdictional provision. It governed shipments from one state in the United States to another state in the United States, and shipments from one state in the United States to an adjacent foreign country. It never covered shipments from a foreign country into the United States. As far back as the *Alwine v. Pennsylvania R. Co.,* 15 A. 1d 507 (Pa. Sup. Ct. 1940) decision in 1940, and the cases that followed *Alwine*, it has always held that a through shipment made under a Canadian bill of lading into the United States was governed by Canadian law and a Canadian bill of lading. The Second Circuit overruled all those decisions by holding that the recodification of the Carmack Amendment, which was not supposed to change its content, in fact now made any shipment that had any transportation in the United States, even intra-state, subject to the Carmack Amendment.

Third, it overlooked the specific provision in the Carriage of Goods by Sea Act which allows the parties to insert in the contract a provision that COGSA governs domestic U.S. transportation extending COGSA inland (actually, prior to or after the tackle-to-tackle COGSA service).

Clearly, for someone who participated in writing the briefs and constructing the oral argument in The Supreme Court, the *Sompo* decision is wrong on so many levels based upon basic court structure. Even if the Second circuit believed that The Supreme Court made a wrong decision, it was duty bound to follow that erroneous decision until such time that The Supreme Court itself would reverse its position.

Recently, the Eleventh Circuit in the *Altadis USA, Inc. v. Sea Star Line LLC*, 458 F.3d 1288 (11th Cir. 2006) case followed the decision in *Kirby* after having been reversed based upon its decision in the *Kirby* case itself. The Supreme Court accepted *cert.* based upon the conflicts between the circuits, but unfortunately the case was settled before The

Supreme Court could rule. We will have to wait until another day for the Second Circuit to be overruled.

<u>The *Sompo* Decision:</u>
<u>A Look Back Into The Future of Intermodal Cargo Claims</u>

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When the United States Supreme Court issued its decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), and preceded to radically extend maritime law inland to cover intermodal cargo claims, they fail to consider fundamental transportation law. Namely, they did not take note (at least overtly) that Congress had already created a statutory scheme, in the form of the Carmack Amendment, 49 U.S.C.A. § 11706, along with the Staggers Amendment 49 USC § 10502(e), which for nearly a century had already broadly regulated such cargo claims.[23]

And so on Nov. 9th, 2004-- after just one month of consideration following oral argument-- Justice Sandra Day O'Connor wrote, and the Supreme Court ruled unanimously, that the ocean liability regime passed by Congress known as the Carriage of Goods by Sea Act (COGSA) then found at 49 Stat. 1208, 46 U.S.C. App § 1303, could be applied contractually to inland intermodal railroad cargo claims, without shippers ever being offered a Carmack liability option.

The ruling was profound in its effect. Under COGSA the liability of carriers can be limited to $500 per package, a carrier can be exonerated from liability if it exercised due diligence to avoid the cargo damage, and all law suits for cargo damage must be filed within 1 year of the cargo delivery. In contrast, under the Carmack Amendment, full carrier liability is presumed (in the absence of a tightly scripted method of confirming that a shipper has agreed to a lesser released value), carriers are subject to *de facto* strict liability (subject only to a handful of relatively rare exceptions) and while claims can be

[23] The Justices were not solely at fault. Apparently the issue of the Carmack Amendment's applicability to the claim at issues was never put squarely before them by the parties. Indeed, to the contrary, at the *certiorari* stage, cargo interest brief took the position that the Supreme Court should accept the case because it did not involve Carmack.

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contractually required to be filed with the carrier within 9 months, a shipper has two years from declination of their claim before it must fie a law suit.

The anomaly of the Supreme Court's ruling did not go unnoticed by those of us who often represent cargo interests for a living. On April 27th, 2005 in the "Outside Counsel" column of the New York Journal (Volume 233, no. 80) I and my colleague Barbara Sheridan wrote as follows:

> **Carmack Amendment Ignored**
>
> Exercising this admiralty jurisdiction, the [Kirby] Court extended principles of the maritime law in order to limit the shipper's recovery for cargo damage from the railroad. Perhaps even more surprising is that the Supreme Court ignored the fact that Congress had already provided for a non-admiralty law liability scheme applicable to railroads, particularly the Carmack Amendment.
>
> Thus, with the stroke of a pen, and with no congressional mandate, admiralty lawyers, a plurality of which practice in New York, have suddenly found their area of law vastly expanded and have been called upon to master an entirely new industry over a century after its creation.

The article went on to note the enormous practical significance of the *Kirby* decision for future shippers, given the lack of voluntary incentives for the railroad industry, to offer fair rates to them:

> In holding that the train wreck in *Kirby* fell within the Court's admiralty jurisdiction, the Court thus overlooked an entire statutory scheme that Congress had already enacted to regulate the railroad industry. As noted above, the Court's ruling has the potential of denying shipper's significant rights that should be available to them pursuant to these statutes. This is particularly troublesome in that just four railroads[24] account for 95% of the industry's traffic in this country. William J. Augello, Transportation Logistics and the Law, s*upra*, p. 31. Indeed, these four railroads control over 107,500 miles of railroad track, and, as to be expected, their dominance has been enormously profitable for them; in 2002, they had combined revenue of $35.6 billion. *See* www.oligopolywatch.com/ 2003/

[24] These four railroads are Union Pacific, Burlington Northern Santa Fe, CSX Corporation and Norfolk Southern. William J. Augello, Transportation Logistics and the Law, (TCPC 2001), p. 31, note 50.

> 11/01.html, “Industry brief: US railroads”. The net result of having such few railroads control the vast majority of the industry’s business is that a virtual oligopoly exists in the industry, thus providing shippers with a single alternative to transport goods by rail in that region.[25] In exchange for such privileges, it can be said that Congress has required those railroads offer their shippers options such as Carmack liability.

It would be two years, however, on July 10th, 2006 before the Second Circuit Court of Appeals, tiptoeing gingerly around the evident oversight of their senior colleagues, would rule that the Carmack Amendment does indeed apply to intermodal rail cargo claims. *Sompo Japan Ins. Co. v. Union Pacific Railroad Co.*, 456 F.3d 54 (2nd Cir. 2006).

In contrast to Justice O’Connor, the Second Circuit took almost a year to write the *Sompo* opinion, which runs to almost 20 full pages on Westlaw. Noting that in *Kirby* the issue of the Carmack Amendment’s applicability was not squarely raised, they did not treat it as binding precedent. Rather, they found more persuasive an exceptionally detailed District Court opinion out of the Fifth Circuit, *Berlanga v. Terrier Transp., Inc.*, 269 F. Supp. 2d 821, 829-30 (N.D. Tex. 2003).

The *Sompo* Court ultimately reached the following pertinent transportation law conclusions:

1. Rail claims, whether they be domestic in origin or international intermodal movements, are subject to the Carmack Amendment and the Stagger’s Rail Act of 1980.

2. Those domestic statues require, in order for a railroad to obtain a limitation of liability, that it must specifically offer the shipper the option of having full Carmack liability.

3. These principles apply equally to both import and export shipments.

Sompo has since been carefully followed by District Judges in the Second Circuit: *Sompo v. Union Pacific*, 2007 WL 2230091 (S.D.N.Y. 2007) (J. McMahon); *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 2007 WL 541958 (S.D.N.Y. 2007) (J. Kaplan).

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[25] Union Pacific and Burlington Northern Santa Fe largely dominate the West, and CSX and Norfolk Southern dominate the East and South. *See* www.oligopolywatch.com/2003/11/01.html.

One impediment to the Second Circuit reaching its *Sompo* decision even sooner was the fact that four other Circuit Courts of Appeal previously held that the Carmack Amendment generally did not apply to intermodal shipments *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986); *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394-395, (7th Cir. 1992); *Shao v, Link Cargo (Taiwan) Ltd.* 986 F.2d 700, 701-704, (4th Cir. 1993); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 568 (6th Cir. 2003).

Reviewing those decisions, the Second Circuit concluded, "Most Courts that have answered this question tend to reiterated the Eleventh Circuit's articulation of its holding in *Swift Textiles v. Watkins MotorLines Inc. ..*" In short, the other Circuit Courts had engaged in little primary analysis beyond accepting the *Swift Textiles* ruling, which dated back twenty years. The purported ruling in *Swift Textile* was that the Carmack Amendment only applied to intermodal shipments when a separate domestic bill of lading was issued with respect to those shipments, and that had in fact become the law in four Circuits.

The Second Circuit noticed, however -- as had the Judge in *Berlanga*-- a fundamental inconsistency between the facts in the *Swift Textile* case and with the manner in which the Eleventh Circuit had articulated its holding. The holding states that the Carmack Amendment will apply " as long as the domestic leg [of the shipment] is covered by separate bill or bills of lading. But as the Second Circuit noted:

> The court's statement that a domestic bill of lading is *necessary* for Carmack to apply is perplexing to say the least. Indeed, it was the separate domestic bill of lading (covering a purely intrastate journey) in *Swift* that the motor carrier employed, unsuccessfully, to argue that Carmack *did not* apply. Once the *Swift* court had determined that the parties intended a continuous shipment from the foreign place of origin to the final destination, it deemed the separate domestic bill of lading to be irrelevant. Further, the version of Carmack in force at the time of *Swift* explicitly provided that a motor (or rail) carrier's failure to issue a bill of lading did not remove the carrier from Carmack's reach, *see* 92 Stat. at 1359, 1361, 1453, and that provision still exists as to rail carriers, *see* 49 U.S.C. § 11706(a).

> The disconnect between *Swift's* reasoning and the articulation of its holding has not gone unnoticed. *See, e.g., Berlanga*, 269 F.Supp.2d at 829. In fact, recognizing *63 the inconsistency, one court has hypothesized that *Swift's* use of the phrase "as long as" instead of "even if" was due to a typographical error. *See Canon USA*, 1992 WL 82509, at *7. We are therefore reluctant to rely on any line of precedent derived from *Swift's* articulated holding."
> (Emphasis in original).

The Second Circuit went on to note the large amount of "confusion" caused by *Swift Textile's* articulated holding. For example, in *Capitol Converting*, *supra*, 965 F.2d 391, the Seventh Circuit, having committed themselves to trying to find some logic in the decision, held that Carmack would only apply to a shipment of goods that originated in a foreign country if there was "a separate domestic segment" of the shipment. In point of fact, the Second Circuit noted, that could not have been the basis of the *Swift Textile* holding, because the Eleventh Circuit stated clearly that the shipment in question was a single shipment in "continuation in foreign commerce." *Sompo, supra*, 456 F.3d at 63, n.11. Moreover, if *Capital Converting's* view of the basis for *Swift Textiles* holding was correct, then the Eleventh Circuit should have held that the Carmack Amendment did not apply because "unlike the domestic *interstate* shipment in *Capital Converting*, the domestic shipment in *Swift* was an *intrastate* shipment to which Carmack clearly does not apply." *Sompo*, *supra,* 456 F. 3d 63, n 11. (Emphasis in original).

But the errors did not stop there. As the *Sompo* Court noted, several Courts then went on to adopt the *Capitol Converting* explanation of the *Swift Textile* holding-- entirely erroneous as it may be-- and to find on that basis that the Carmack Amendment did not apply to other intermodal shipments. *See Tokio Marine & Fire Ins. Co. v. Kaisha,* 25 F.Supp.2d 1071, 1081 (C.D.Cal.1997); *N.Y. Marine & Gen. Ins. Co. v. S/S "Ming Prosperity",* 920 F. Supp. 416, 425 (S.D.N.Y.1996); *Toshiba International Corp. v. M/V Sea-Land Exp.,* 841 F. Supp. 123, 128. (S.D.N.Y. 1994).

Finally, by way of proving that overlooking relevant transportation law was not the sole province of the United States Supreme Court, the Eleventh Circuit on August 7th, 2006, decided *Altadis USA, Inc. v. Sea Star Line LLC,* 458 F3.d 1288 (7th Cir. 2006). Notwithstanding the fact that the *Sompo* decision had come down almost a month before, the Eleventh Circuit in *Altadis* failed to distinguish the decision[26] (and thus one can only assume overlooked it) and ruled once again that the Carmack Amendment did not apply to intermodal shipments, absent a separate inland bill of lading. *Id.* at 1291-1293. The shipment in *Altadis* happened to involve motor truck cargo, but the principles set forth in *Sompo* with respect to Carmack's jurisdictional scope should have applied with equal force, assuming that the holding itself was valid.

Interestingly enough, the US Supreme Court granted *certiorari* in *Altadis, but* the case settled before oral argument.

Sompo has generated much discussion. Some trucking law practitioners have published articles lamenting the decision, but not surprisingly, given the decision's detailed research, almost all of the scholarly debate has been favorable. In a paper prepared as part of the New York Forum of Maritime Law Professors' Spring CLE Program at the Association of the Bar of City of New York in May of 2007, entitled "When Ocean Cargo is Damaged in a Train Wreck," the leading maritime law Professor Michael F. Sturley of the University of Texas School of Law described the *Sompo* decision as "a detailed analysis of the question" wherein the Court "carefully examined" the issue of the scope of Carmack's applicability. Sturley went on to say that "that the Second Circuit and the District Court in *Berlanga* were the only courts that had carefully examined the issue." Similarly, the highly respected Benedict's Maritime Bulletin (Volume IV, 3-4, Third/Forth Quarter 2006) published an article entitled "A Challenge to Kirby" which stated that "the reasoning in *Sompo* as to the applicability of Carmack is compelling." And Judge Lewis Kaplan known as one of the most scholarly judges in the Southern District of New York, has described the decision as "an exceptional instructive opinion." *Rexroth Hydraudyne B.V. v. Ocean World Lines Inc., supra,* 2007 WL 541958 (S.D.N.Y. 2007).

At the Tulane Maritime Law Institutes 2007 Conference the question of whether Sompo will ultimately be upheld by the US Supreme Court was put to three leading admiralty law professors; two of the three agreed that it would be so upheld, with the

[26] Again, the transportation bar appears to have let down the bench by failing to bring the *Sompo* decision to the *Altidas* court's attention-- although briefing was indeed completed well before *Sompo* came down.

third stating that he did not know the case well enough to give an opinion. The *Sompo* decision may now be history, but it is also quite likely to be the future.