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

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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.' . . .
>
> * * *
>
> 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.