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The judicial power of the United States is set forth in Article III of the United States Constitution. The judicial branch, like the executive and legislative branches, is a branch of limited powers. Just as Articles I and II of the Constitution enumerate executive and legislative powers, Article III of the Constitution specifies the types of cases that can be heard in the federal courts. Article III provides inter alia: “The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction.”

Why does the Constitution use two terms, “admiralty” and “maritime”? Both historically and today those two terms are used interchangeably. They do not have distinct meanings. No one knows why both of those terms were used. There has been speculation, but as a practical matter the use of the two words “admiralty” and “maritime” has had no impact in ascertaining the scope of jurisdiction or in respect to the subject matter related to those terms. The crucial question then is what is a case of “admiralty and maritime” jurisdiction? The Constitution itself provides no clue, and Congress has not been very helpful. For example, 28 U.S.C. § 1333, simply states: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other
remedies to which they are otherwise entitled." By and large, it has been left to the federal courts to define their own "admiralty and maritime" jurisdiction. The federal courts, led by the United States Supreme Court, have developed tests or criteria to determine whether or not particular types of cases fall within the constitutional and statutory reference to "admiralty and maritime" jurisdiction.

One major test is used in tort cases and a different test is used in contract cases. In tort cases, the courts initially applied a simple locality test. If the tort occurred in "navigable waters," it fell within the maritime jurisdiction of the federal courts. If the tort occurred on land, then it was not within admiralty jurisdiction. Congress, however, did make a slight modification to this test when it enacted the Admiralty Extension Act, which provides that where a vessel in navigable waters causes injury that occurs on land, admiralty jurisdiction extends to such events. The Supreme Court in more recent years has modified the test for admiralty tort jurisdiction by requiring that in addition to maritime location that the tort bears "a substantial relationship to traditional maritime activity." This connection or nexus test is composed of two components, to wit (1) "[a] court, first, must 'assess the general features of the type incident involved,' to determine whether the incident has 'a potentially disruptive impact on maritime commerce,' and (2) "a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"

In contrast to the approach in tort cases, where the place where the tort occurred is a crucial element in determining admiralty jurisdiction, in contract cases the jurisdictional inquiry looks primarily to the nature of the contract. Thus contracts that deal with the use of a ship and the performance of transportation of goods and persons over water are generally maritime contracts. There are some anomalies in the cases that fall within admiralty contract jurisdiction. For example, a contract to build a ship is not a maritime contract, whereas a contract to repair a ship

is. A contract to sell a ship is not a maritime contract but a contract to charter a ship is a maritime contract. These are historical anomalies and there probably are not sound rationalizations for these distinctions today. Nevertheless, there seems to be no movement to abandon these distinctions.

In cases that fall within admiralty jurisdiction what substantive law applies, federal or state law? In other words, does federal law preempt state law? This is a topic that could take several days to discuss and I will make only a few comments. The preemption issue arises more in the regulatory area than in the garden-variety tort or contract areas. There are a considerable number of federal navigation and safety statutes accompanied by even more regulations promulgated by the U.S. Coast Guard. There have been several major cases in recent years where states have tried to impose additional requirements in order to better protect their waters, ports, and other infrastructure. The federal government and the maritime industry have challenged some of these on federal preemption grounds. Sometimes the states win, and sometimes they lose.

In non-regulatory areas of maritime law, especially in the area of the private law of contracts and torts, there are comparatively few federal statutes. Most of the maritime tort law and contract law is jurisprudential, that is, it derives from judicial decisions. In these areas there is a

16. See e.g., Robert Force, Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century, 32 J. MAR. L. & COM. 517 (2001) (discussing the proposition that preemption is less of an issue in the areas of maritime tort and contract claims than claims concerning regulatory maritime issues).
20. Compare Kelly, 302 U.S. at 15-16 (holding that the state act had a permissible field of operation in relations to the owner's tugs), and Huron, 362 U.S. at 448 (holding that the local ordinance could be constitutionally applied to the manufacturer's vessels), with Ray, 435 U.S. at 165-166 (holding that enforcement of some of the state Tanker Law requirements would at least frustrate the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers), and Locke, 529 U.S. at 117 (reversing a decision that state could enforce its laws regulating oil tankers because the federal statutory scheme governing oil tankers preempted the state regulations).
factor that complicates the determination of whether or not the decisions by the federal courts are preemptive of state law. The basic congressional grant of admiralty jurisdiction to the federal courts in implementing Article III of the Constitution, 28 U.S.C. § 1333, qualifies the grant of admiralty and maritime jurisdiction by adding the clause: "saving to suitors in all cases all other remedies to which they are otherwise entitled."22 This qualification is referred to simply as the "saving to suitors clause."23 For all practical purposes, what this means is that virtually any tort or contract case that could be brought in federal court seeking to impose in personam liability under admiralty jurisdiction can be brought in an appropriate state court at the option of the plaintiff. In giving support to this statutorily provided option, the federal courts have placed limits on defendants' right of removal.24 When a suit that could have been brought in federal court under 28 U.S.C. § 1333 is brought in a state court under the saving to suitors clause what law should the state court apply? Is it free to apply its own state law of contracts or state law of negligence or must it apply federal law? This is a very complicated question.25 As a general proposition, as stated by the Supreme Court on a number of occasions, with admiralty jurisdiction comes the application of substantive maritime law.26 What this means is that in most cases state courts are not free to apply their own law unless it is harmonious with federal law. This default rule requires the application of federal maritime law.27 There are exceptions to the rule, most notably in the area of marine insurance where not only state courts but federal courts as well apply state insurance law.28

In the area of carriage of goods by sea, Congress has legislated substantively by enacting first the Harter Act29 and then the Carriage of Goods by Sea Act (hereinafter COGSA).30 Although COGSA expressly applies only to foreign commerce,31 (from a U.S. port to a foreign port or from a foreign port to a U.S. port) it does specifically authorize parties to adopt it as a contractual term in shipping documents issued for domestic

24. Id. at 1383-1384.
26. See, e.g., Grubart, 513 U.S. at 546.
27. Id. at 545 (citing East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986)).
31. Id. § 30701 note sec. 13.
In domestic water transport, it is not uncommon for the contract of carriage to incorporate the terms of COGSA by reference. Inasmuch as Congress has indicated its intention to establish substantive rules regarding maritime commerce, states are not permitted to interfere with these rules. If a case brought in a state court falls within the parameters of COGSA, the state court must apply COGSA. However, the interpretations of federal courts interpreting and applying COGSA, other than decisions by the Supreme Court, are not binding on state courts.

Two other points are relevant. First COGSA expressly does not apply to the entire period of time for which a carrier may be responsible for goods. It applies only to the period “from the time when the goods are loaded on to the time when they are discharged from the ship.” Subject to the provisions of the Harter Act, COGSA, however, expressly authorizes the parties to enter:

[...]nto any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care of the goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

This provision, inter alia, allows a carrier to insert a clause in a bill of lading that extends the application of COGSA to the entire period of time for which the carrier is responsible for the goods. Furthermore, although COGSA is silent on the matter, a carrier is permitted to insert in a bill of lading a clause, called a Himalaya Clause, that extends the defenses, limitation of liability, statute of limitations, and other benefits provided to a carrier under COGSA to others who play a role in helping the carrier fulfill its obligations under its contract of carriage. The Himalaya Clause has been enforced not only with respect to those actors closely connected to the sea leg of the transportation, such as stevedores and terminal operators, but to overland transporters as well.

Mixed Contracts and the Kirby Decision

Contemporary transport contracts are often mixed contracts, as in the case of a through bill of lading, in that they encompass transport both

32. Id. § 30701 note sec. 7.
34. 46 U.S.C. § 30701 note sec. 1(e).
35. Id.
36. Id. § 30701 note sec. 7.
38. See id. at 20.
39. Id. at 32.
by sea and by land. From a maritime perspective, jurisdiction over mixed contracts is not a model of clarity. Prior to *Norfolk Southern Ry. Co. v. Kirby*, the rule was rather simply stated but not so easily applied. A mixed contract did not fall within admiralty jurisdiction except in two instances. First, when the land-based element of the transaction was relatively minor and the dominant substance of the contract was maritime in nature, a court could exercise admiralty jurisdiction. Second, where the maritime segment and land-based segment were severable, a court could exercise jurisdiction over the maritime dispute, but it could not exercise jurisdiction over a dispute involving the land-based segment.

*Norfolk Southern Railway Co. v. Kirby*, decided by the U.S. Supreme Court in 2004, involved a shipment from Australia to Alabama. Two bills of lading were issued. The first, issued by a freight forwarder, ICC, designated Sydney, Australia, as the port of loading; Savannah, Georgia, as the port of discharge; and Huntsville, Alabama, as the ultimate destination for delivery. The freight forwarder then contracted with the actual ocean carrier, Hamburg Sud, which issued its bill of lading to the freight forwarder. The bill of lading issued by the actual carrier also listed Sydney, Savannah, and Huntsville. The freight forwarder's bill of lading adopted the COGSA limitation of liability regime, but for the land leg it provided for a higher limitation amount. The bill of lading issued by Hamburg Sud, the actual carrier, adopted COGSA's $500 per package limit and extended its application to the point of actual delivery. That bill also contained, as did the freight forwarder's bill, a broad Himalaya Clause which extended the benefits of the bill of lading, including the limitation provision, to any person including independent contractors. Hamburg Sud, the actual sea carrier, contracted with Norfolk Southern to perform the land leg of the carriage by rail. As luck would have it, the train wrecked and the cargo was damaged during the land leg.

There are two issues in the case. The first is whether or not a suit brought to recover damages for property—that was damaged on land

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41. See *id.* at 26-27.
42. See *e.g.*, Transatlantic Marine Claims Agency, Inc. *v.* Ace Shipping Corp., 109 F.3d 105, 109 (2d. Cir. 1997).
43. *Kirby*, 543 U.S. at 18.
44. Id. at 19.
45. Id. at 21.
46. Id. at 19.
47. Id. at 20.
48. Id. at 21.
49. Id.
50. Id.
51. Id. at 18.
while an overland carrier pursuant to a marine bill of lading was trans-
porting it—falls within admiralty jurisdiction.\textsuperscript{52} The Court characterizes
both bills of landing as maritime contracts because their primary objec-
tive is to accomplish the transportation of goods by sea from Australia to
the eastern coast of the United States.\textsuperscript{53} The mere fact that transport
over land was to occur subsequently is not determinative of admiralty
jurisdiction. Unlike the approach in tort cases where the location of the
tort is important, with regard to jurisdiction in contract cases, the court
reiterated that it takes a “conceptual” approach.\textsuperscript{54} “[T]he fundamental
interest giving rise to maritime jurisdiction is ‘protection of maritime
commerce,’”\textsuperscript{55} and using a “conceptual approach vindicates that interest
by focusing . . . on whether the principal objective of the contract is mari-
time commerce.”\textsuperscript{56} In this context “the shore” is not an appropriate
place to draw a line.\textsuperscript{57} It was significant to the Court that “[m]aritime
commerce has evolved along with the nature of transportation and is
often inseparable from some land based obligations.”\textsuperscript{58} “The interna-
tional transportation industry ‘clearly has moved into a new era—the age
of multimodalism, door-to-door transport based on the efficient use of all
available modes of transportation by air, water, and land.’”\textsuperscript{59} Goods
stowed in containers are readily moved from one mode of transport to
another. The Court specifically noted the use of through bills of lading,
which can cover the transportation across oceans to inland destinations in
a single transaction.\textsuperscript{60} The older approach to contract jurisdiction would
have precluded the exercise of jurisdiction “to contracts which require
maritime and nonmaritime transportation unless the nonmaritime trans-
portation is merely incidental—and that long-distance land travel is not
incidental.”\textsuperscript{61} Instead the Court fashioned a new rule for determining
whether or not a contract is a maritime contract. “Conceptually, so long
as a bill of lading requires substantial carriage of goods by sea, its purpose
is to effectuate maritime commerce—and thus it is a maritime contract.
Its character as a maritime contract is not defeated simply because it also
provides for some land carriage.”\textsuperscript{62} “Geography, then, is useful in a con-
ceptual inquiry only in a limited sense: if a bill’s sea components are in-

\begin{footnotes}
52. \textit{Id.} at 30.
53. \textit{Id.}
54. \textit{Id.} at 23-25.
55. \textit{Id.} at 25.
56. \textit{Id.}
57. \textit{Id.}
58. \textit{Id.}
59. \textit{Id.}
62. \textit{Id.} at 27.
\end{footnotes}
substantial then the bill is not a maritime contract." To phrase it differently, if the sea transport is substantial then the contract will be a maritime contract.

Thus, *Kirby* has changed the approach to admiralty jurisdiction over mixed contracts in a very important way by substantially modifying the old rule. The emphasis pre-*Kirby* was on whether or not the land-based element was either inconsequential or severable. Post-*Kirby*, the focus is on the maritime component. The jurisdictional issue is resolved by determining whether or not the sea leg constitutes a substantial element of the transaction out of which the dispute arose. Notwithstanding that *Kirby* involved extensive overland transport, and the cargo damage occurred on the overland leg; those facts were not sufficient to defeat admiralty jurisdiction. The Supreme Court found that the transportation from Australia to the U.S. by sea was a substantial component in the overall carriage of that particular cargo, and, therefore, it was appropriate for an admiralty court to take jurisdiction. In determining whether or not to exercise admiralty jurisdiction in mixed contract cases post-*Kirby*, courts should ask whether or not the maritime component of the transport is substantial in light of the overall transportation undertaking.

Having determined that the contract is a maritime contract, the next question is whether or not a state law on contract interpretation should be utilized or whether federal rules for contract interpretation should be applied. Here the Court noted that "our touchstone is a concern for the uniform meaning of maritime contracts." The Court believed that the application of state law to bills of lading such as were involved in this case "would undermine the uniformity of the general maritime law." It emphasized that clauses limiting liability in bills of lading are part of "international intermodal transportation", and that such clauses are used in bills of lading involving international transport throughout the world. The Court observed "when a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." It reverted to the default rule previously mentioned: with admiralty jurisdiction comes the application of substantive admiralty law.

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63. *Id.*
64. See *id.* at 27.
65. See *id.* at 32.
66. *Id.* at 22-23.
67. *Id.* at 28.
68. *Id.*
69. *Id.*
70. *Id.* at 22-23.
rules had to apply, and, if there were no maritime statutory rules, then the jurisprudential rules devised by the Supreme Court and other federal courts would govern the issue.

**COGSA v. Carmack: The Circuit Split**

The *Kirby* holding that federal law applies to maritime contracts that involve ocean transport, does not necessarily answer all of the questions that arise with regard to through bills of lading. In *Kirby*, the court looked only at the utilization of COGSA principally in terms of the limitation of liability provision. There is, however, another issue that has arisen and has resulted in a split in the circuits, that is: whether or not the COGSA or the Carmack Amendment\(^2\) is the appropriate federal rule to be applied to these contracts? Two recent cases, and as will be discussed in the Postscript to this article, there is yet now a third case, demonstrate that there is a split in the circuits on this very important issue. In *Altadis USA, Inc. v. Sea Star Line, LLC*,\(^3\) the Court of Appeals for the Eleventh Circuit held that the Carmack Amendment was not applicable. In *Sompo Japan Ins. Co. of America v. Union Pacific Railroad Co.*,\(^4\) the Second Circuit, in an opinion issued a month earlier, came to the opposite conclusion.

The arrangement in *Altadis* was a fairly common one. The goods were to be shipped from Puerto Rico to the port of Jacksonville, Florida, and from Jacksonville, they were to be taken overland to Tampa, Florida.\(^5\) The shipper contracted with Sea Star, and Sea Star issued a single bill of lading covering the entire shipment from Puerto Rico to Tampa, Florida via Jacksonville.\(^6\) There was a transportation service agreement (TSA) that governed the relations between Altadis and Sea Star.\(^7\) The TSA stated that the bill of lading would govern the relationship between the carrier and the shipper and be subject to COGSA.\(^8\) It also included “inland carriers” as part of the definition of carrier in the agreement and expressly extended the benefits of the TSA to “all parties performing services for or on behalf of the carrier or vessel, its employees, servants, agents or contractors including without limitation . . . inland carriers.”\(^9\) When the ship arrived in Jacksonville, American Trans-Freight (ATF) took possession of the cargo as the inland carrier responsible for deliver-

\(^3\) Altadis USA, Inc., v. Sea Star Line, LLC, 458 F.3d 1288, 1290 (11th Cir. 2006).
\(^4\) Sompo Japan Ins. Co. of Am. v. Union Pacific R.R. Co., 456 F.3d 54, 69 (2d Cir. 2006).
\(^5\) *Altadis*, 458 F.3d at 1289.
\(^6\) *Id.*
\(^7\) *Id.* at 1289 n.1.
\(^8\) *Id.*
\(^9\) *Id.*
ing the shipment to Altadis. After the overland truck carrier took possession of the cargo the driver, at some point during the transport, parked the truck in a closed gas station and left the vehicle overnight. When he came back, the container was gone and, subsequently, was found empty at another location. Sea Star had also entered into an agreement with ATF in the form of the Uniform Intermodal Interchange and Facilities Access Agreement. Under this agreement, Sea Star stated that it would from time to time hire ATF to transport to various locations containers that Sea Star had transported to Jacksonville by ocean carrier under an intermodal through bill of lading. This agreement governed the relations between Sea Star and ATF including an indemnity provision. The shipper sued the Sea Star and ATF. The issue was whether or not the one-year limitation period authorized by COGSA, or the two-year limitation period provided for in the Carmack Amendment was applicable. The district held that the Carmack Amendment was not applicable and the Eleventh Circuit affirmed. 

In affirming, the appellate court stated:

The case law has established that the Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and an overland leg to the final destination in the United States) unless the domestic, overland leg is covered by a separate bill of lading.

The court cites cases from the Sixth Circuit, Fourth Circuit and Seventh Circuit as supporting that position. The court, in part, relied on Kirby to reject the contention that a separate bill of lading is not required. The Altadis court noted that Kirby stood for the proposition that a bill of lading is a maritime contract as long as a substantial carriage of goods by sea is involved. The court stated that the Supreme Court in

80. Id. at 1289.
81. Id., at 1289-1290.
82. Id., at 1290.
83. Id. at 1289 n.2.
84. Id.
85. Id.
86. Id. at 1290.
87. Id.
88. Id. at 1291.
89. Id. at 1292 (citing Amer. Road Serv. Co. v. Consol. Rail, 348 F.3d 565 (6th Cir. 2003)).
90. Id. (citing Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700 (4th Cir. 1993)).
91. Id. (citing Capitol Converting Equip. v. LEP Transp. Inc., 965 F.2d 391 (7th Cir. 1992)).
92. The court in Altadis states that the only circuit to express a contrary opinion is the Ninth Circuit in Neptune Orient Lines, Ltd. v. Burlington N. and Santa Fe Ry. Co., 213 F.3d 1118 (9th Cir. 2000). Cf., Sea-Land Serv., Inc. v. Lozen Int'l., LLC, 285 F.3d 808 (9th Cir. 2002).
93. The Carmack Amendment issue was not before the Supreme Court in Kirby.
94. Altadis, 458 F.3d at 1294.
Kirby stressed the need for uniformity in the general maritime law in order to facilitate efficient contracting for carriage of goods by sea. 95 It also found support for its conclusion in the fact that the Supreme Court in Kirby held that "a single Himalaya Clause can cover both sea and land carriers downstream." 96 The court in Altadis states that to accept the application of the Carmack Amendment in situations such as this, "would introduce uncertainty and lack of uniformity into the process of contracting for the carriage by sea, upsetting contractual expectations expressed in through bills of lading." 97 The court reads Kirby as standing for the proposition "that a rail carrier on the inland leg of a maritime contract is protected by the limitations in a through bill of lading." 98 The Altadis court states that "[t]he apparent purpose of COGSA to 'facilitate efficient contracting in contracts for carriage by sea' would be undermined," 99 and concludes:

In light of the Supreme Court's opinion in Norfolk Southern, and almost uniform case law, and dicta in our own Swift decision, we hold that—in the absence of a separate domestic bill of lading covering the inland leg—the Carmack Amendment, and its two-year minimum statute of limitations, does not apply to this maritime contract covering a shipment pursuant to a single through bill of lading which governs the ocean voyage from Puerto Rico to Jacksonville and also the inland transportation to Tampa. 100

Less than a month before the Eleventh Circuit announced its decision in Altadis, the Court of Appeals for the Second Circuit in Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.—a similar fact situation—concluded that the Carmack Amendment did apply. 101 As pointed out by my former student Raymond Waid—in an article he prepared with some direction from me and published in the Transportation Law Journal 102—the Court of Appeals for the Second Circuit in Sompo 103 adopted a rule that conflicts with those adopted in other circuits. As stated in Altadis, it has generally been agreed that where both sea and land transport are involved in a transaction, and a separate bill of lading has been issued for each of those stages, the Carmack Amendment—if otherwise applicable—governs the separate bill of lading issued for the land leg of

95. Id.
96. Id. (citing Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 14, 29 (2004)).
97. Id.
98. Id.
99. Id.
100. Id.
103. Sompo, 456 F.3d at 75.
the transport.104 However, as Altadis and Mr. Waid point out, courts in several circuits have held that the Carmack Amendment does not apply to a single transportation document that covers both sea and land transport such as a through bill of lading.105

This paper will not trace the history nor examine the case law on the applicability of the Carmack Amendment to through bills of lading. Although I do not necessarily agree with Mr. Waid’s conclusion regarding the application of the Carmack Amendment, his article aptly outlines the history of the Amendment. Instead this paper will offer some comments about the Second Circuit’s analysis regarding the relationship between COGSA and the Carmack Amendment. The court in Sompo finds crucial substantive differences between the law applicable to liability imposed under the Carmack Amendment, and that imposed under COGSA.106 It points out that under COGSA, liability is based on fault, but under the Carmack Amendment there is “something close to strict liability.”107 This position, however, is not completely accurate. Although a literal reading of the Carmack Amendment appears to impose liability without fault, even the Sompo court acknowledges that Carmack is subject to common law defenses.108 As a leading treatise on transportation law states:

At common law and under the Carmack Amendment to the Interstate Commerce Act, once a plaintiff has established a prima facie case against the carrier or surface freight forwarder, the burden of proof shifts to the carrier to show that it was free from negligence and that the loss was caused solely by an act of God, the public enemy, the shipper, the public authority, or that the damage resulted from the nature of the goods, or an inherent vice in the goods.109

The defenses enumerated above are similar to the defenses in COGSA. COGSA, however, has additional defenses, but many of them are clearly inapplicable to damage or loss that occurs on the land leg. For example, the provisions on unseaworthiness are irrelevant to damage that is sustained during rail or truck transport. Likewise perils of the sea, errors in “navigation or management of the ship,” quarantine restrictions, saving or attempting to save life at sea, and probably the fire defense simply are inapplicable to damage or loss that occurs on the land leg. The only COGSA defense that might have some significance is the so-called “q clause” where a carrier is relieved of liability when it can prove that

104. Altadis, 458 F.3d at 1290.
105. Id. at 1292; Waid, supra note 102 at 125-126.
106. Sompo, 456 F.3d at 59.
107. Id.
108. Id. at 59 n.8.
109. 1 Saul Sorkin, Goods in Transit § 5.05 (2005).
neither it nor its servant or agents were negligent, and can also prove what actually caused the damage or loss.110 This defense does not often succeed, except perhaps, in a collision case where the non-carrying vessel was completely at fault.111 Furthermore, there are situations where a carrier may be held strictly liable under COGSA, such as where the shipper proves good order/bad order, and the carrier is unable to bring itself within any defense simply because no one knows how the damage occurred.112 It probably is fair to say, however, that liability under Carmack is stricter than it is under COGSA.

The court in *Sompo* was concerned with the right of a shipper to exchange a lower freight rate for limited liability.113 In other words, in opting for a lower rate under COGSA a shipper opts for carrier liability based on negligence and a limit on the amount of a carrier's liability. It does not give the shipper the option of full coverage under the strict liability regime of Carmack. As everyone knows—except, perhaps, the *Sompo* court—shippers never declare the full value of their goods because the freight rates would be prohibitive. As interpreted by the *Sompo* court, Carmack requires an overland carrier to offer the shipper certain options such as strict liability, and the opportunity to recover full value in exchange for a higher freight rate.114 Where carriage is subject to a through bill, this is unrealistic, not only because shippers never opt for the higher rate, but also because the shipper does not contract with the overland carrier. The shipper contracts with an ocean carrier, a non-vessel-operating common carrier (NVOCC), or a freight forwarder; and COGSA is mandatorily applicable to that contract. It is the ocean carrier who actually contracts with the overland carrier. There is no direct contractual relationship between the shipper and the ultimate land-based carrier. There does not have to be any shipping document issued by the overland carrier to the actual shipper. The overland carrier issues the shipping document for overland carriage to the person who entered into the contract of carriage with the overland carrier. Although the Supreme Court has indicated that there is some type of special or limited "agency" relationship between the ocean carrier and the shipper with respect to the overland carriage, there is nothing in that conclusion that requires the ocean carrier to make sure that the provisions required by Carmack are included in the agreement.115

The court also distinguishes *Kirby* on the ground that *Kirby* involved

111. Id. at 1111.
112. See, e.g., Quaker Oats Co. v. M/V Torvanger, 734 F.2d 238, 243 (5th Cir. 1984).
114. Id. at 58.
a choice between federal law and state law, whereas, in *Sompo* the choice is between two different federal statutes.\textsuperscript{116} The Carmack Amendment issue was not before the Court in *Kirby*, and the holding in that case does not resolve the COGSA v. Carmack issue. For a court to hold that Carmack trumps COGSA, the court would have to ignore some of the crucial language provided by the Supreme Court in *Kirby*, to wit:

Applying state law to cases like this one would undermine the uniformity of the general maritime law. The same liability limitation in a single bill of lading for international intermodal transportation often applies both to sea and to land. . . . Such liability clauses are regularly executed around the world. . . . See also 46 U.S.C. App. § 1307 (permitting parties to extend the COGSA default liability limit to damage done ‘prior to the loading on and subsequent to the discharge from the ship’). Likewise, a single Himalaya Clause can cover both sea and land carriers downstream. . . . Confusion and inefficiency will inevitably result if more than one body of law governs a contract’s meaning. As we said in *Kossick*, when ‘a [maritime] contract . . . may well have been made anywhere in the world,’ it ‘should be judged by one law wherever it was made.’\textsuperscript{117}

Later the Court, again citing § 1307,\textsuperscript{118} states that although COGSA applies tackle to tackle: “COGSA also gives the option of extending its [limitation] rule by contract.”\textsuperscript{119} COGSA should trump the Carmack Amendment because, as suggested by the Court in *Kirby*, COGSA is part of an international regime. Many countries in the world have adopted the Hague Rules on which COGSA is based or have amended their Hague Rules with the Visby Amendments.\textsuperscript{120}

The *Sompo* court, however, finds that there is no conflict between the COGSA and Carmack statutes because the conflict exists between the contract that adopted the COGSA limitation of liability provision and the Carmack provision.\textsuperscript{121} Thus according to the court, the conflict is between a bill of lading (a contract) and a statute, and the statute prevails.\textsuperscript{122} It also points out that there are occasions where parties have extended the reach of COGSA in such a way as to conflict with the Harter Act; and, in such situations, courts have indicated that the Harter Act prevails.\textsuperscript{123} The problem with this analysis is that COGSA expressly states that, except to the extent that COGSA supersedes the Harter Act,

\begin{itemize}
\item \textsuperscript{116} *Sompo*, 456 F.3d at 57.
\item \textsuperscript{117} *Kirby*, 543 U.S. at 28.
\item \textsuperscript{118} 46 U.S.C. § 30701 note sec. 7 (2006).
\item \textsuperscript{119} *Kirby*, 543 U.S. at 29.
\item \textsuperscript{120} ROBERT FORCE ET AL., ADMIRALTIES AND MARITIME LAW 210 (2006).
\item \textsuperscript{121} *Sompo*, 456 F.3d at 69.
\item \textsuperscript{122} Id. at 70.
\item \textsuperscript{123} Id. at 72.
\end{itemize}
the latter shall continue to be in effect. Therefore, nothing in COGSA is intended to override the Harter Act with respect to the pre-loading and post-discharge of the cargo from the vessel. One cannot fairly make the Harter Act analogy because COGSA expressly saves the Harter Act and certain other statutes; but it does not refer to—let alone save—the Carmack Amendment, which was in effect at the time COGSA was enacted. Of course, no one could foresee that transportation technology and practices would develop to the point where they are today, presenting a conflict between the two statutes.

The Sompo court makes much of the fact that although COGSA expressly applies only to foreign commerce not to domestic transport, COGSA does authorize the parties to a domestic transport to incorporate the provisions of COGSA and make COGSA the law governing that contract. COGSA expressly states that where parties do incorporate COGSA, this gives COGSA the force of law as though the statute was expressly applicable to the transaction. In contrast, the provision allowing the parties by agreement to extend COGSA to the pre-loading and post-discharge stages, COGSA does not provide that such agreements have the force of law. The view of the Sompo court notwithstanding, this omission, however, is not fatal. Such a provision was essential to permit the extension of COGSA to domestic carriage. COGSA, itself, preserves the Harter Act except to the extent it is displaced by COGSA. COGSA displaces Harter with respect to foreign trade, but Harter remains the law for domestic transport. If COGSA merely invited parties to a domestic carriage contract to incorporate COGSA in that contract without more, the contract would still be subject to the provisions of the Harter Act. Therefore, it was necessary to add the force-of-law provision to assure that Harter is also displaced where the parties incorporated COGSA in a domestic carriage contract. As the Court of Appeals for the Fourth Circuit has explained: "[s]ince the Harter Act was to be expressly preserved for the domestic trade, statutory authority for the incorporation of COGSA had to be provided."

What Congress has done is to set up two different regimes, and the question is whether or not one regime should displace the other. COGSA is intended to operate essentially while the goods are on the ship, tackle to tackle. Where goods are shipped pursuant to an ocean bill of lading, and thereafter shipped over land pursuant to a separate bill of

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126. Id. § 30701 note.
lading, the logical conclusion is that COGSA applies to sea transport—Carmack applies to land transport. The issuance of the second bill of lading signifies the end of ocean transportation. Therefore, there is no conflict between COGSA and Carmack because the application of COGSA has come to an end before Carmack takes over. One should not overlook the fact that COGSA specifically gives the parties the right to make its terms applicable once the goods have been discharged from the ship.\(^{128}\) This could not apply merely to the time that the goods are on the wharf or in a terminal because every ocean transport scenario contemplates that the goods will then be taken to some inland location via overland transport. COGSA essentially invites the parties to make the terms of COGSA applicable not only to ocean transport but to inland transport as well. Did Congress invite the parties to engage in a vain act? If other legislation, such as Carmack, is applicable and trumps COGSA, why would Congress want to authorize the parties to incorporate COGSA, or any other terms as a regime to govern the post-discharge stages of the transaction? It wouldn’t make any sense. Suppose, for example, goods were damaged while they were being transported from the port to a location in the same city, and the parties had extended the application of COGSA until the goods have been actually delivered to the consignee. Would state law, which would otherwise be applicable, trump the provisions of COGSA? *Kirby* says absolutely not!\(^ {129}\) This is what Congress wanted to achieve by allowing the parties to contract for the extension of COGSA to the pre-loading and post-discharge periods. That is exactly what parties do in a multi-modal transaction pursuant to a single through bill of lading. They make COGSA applicable to the entire period of transport. To hold that Carmack takes precedence negates the provision in COGSA that allows the parties to extend it to the post-discharge stage. The Second Circuit may be incorrect when it concludes that the conflict is between a mere contractual provision and a statute. One may contend that the conflict is between Carmack and the subsequently enacted provision of COGSA that says that the parties may enter into a contract to define their respective rights and duties in the pre-loading and post-discharge stages.

**CONCLUSION**

The Supreme Court, however, will probably resolve this conflict. The Court granted certiorari in the *Altadis* case,\(^ {130}\) but the case settled.\(^ {131}\)

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and the petition for the writ was eventually dismissed.\textsuperscript{132} Is there a practical solution until the Supreme Court or Congress resolves the problem? Ocean bills of lading of foreign carriers often have special clauses directed to cargo shipped to the U.S. The clause paramount or choice of law provision provides that carriage of goods to the U.S. shall be subject to the U.S. Carriage of Goods by Sea statute.\textsuperscript{133} In fact, the freight forwarder’s bill of lading in the \textit{Kirby} case had a special provision relating to damage or loss of goods during the land leg in that it adopted a limitation amount higher than the COGSA limitation.\textsuperscript{134} Until the Carmack Amendment problem is resolved definitively, ocean carriers who utilize through bills of lading may consider adding a clause to the effect that: “Where the Carmack Amendment is compulsorily applicable to overland transport, such transport shall be subject to the terms of the Carmack Amendment with regard to liability and limitation of liability.” There could be added to the option language, whereby the shipper receives limited liability in exchange for a less expensive freight rate, language to the effect that the “the liability regime imposed under the Carmack Amendment shall apply where loss or damage occurs during overland transport where that statute is compulsorily applicable.” The clause would also specify the amount of limited liability. The qualification “compulsorily applicable” is inserted because the Carmack Amendment is not compulsorily applicable in most circuits.\textsuperscript{135} In circuits that follow the \textit{Altadis} approach, the parties would continue to be free to extend COGSA to the overland segment of the transaction.

\textbf{PostScript}

Post \textit{Sompo}, there have been further developments in the Second Circuit. One district court applied the Carmack amendment as per \textit{Sompo} to a trucking company;\textsuperscript{136} but another declined to extend the Amendment to both the land and ocean carriers;\textsuperscript{137} and another declined to extend liability to an ocean carrier.\textsuperscript{138} One district court refused to

\begin{itemize}
\item \textsuperscript{131} See Court Order, Sompo Japan Ins. of Am. v. Union Pac. R.R. Co., No. 02 Civ. 9523(DAB), 2007 WL 4859462, at *1 (S.D.N.Y. Sept. 26, 2007).
\item \textsuperscript{132} \textit{Altadis}, 549 U.S. 1189.
\item \textsuperscript{133} 46 U.S.C. § 30701 (2006).
\item \textsuperscript{134} \textit{Kirby}, 543 U.S. at 14.
\item \textsuperscript{135} See generally Royal & Sun Alliance Ins. PLC v. Ocean World Lines Inc., 572 F. Supp. 2d 379, 392 (S.D.N.Y. 2008) (discussing whether the Carmack Amendment applied in a situation where goods were not damaged during the land portion of a transit and whether it should apply).
\item \textsuperscript{137} Mitsui Sumitomo Ins. Co. v. Evergreen Marine Corp., 578 F. Supp. 2d 575, 582 (S.D.N.Y. 2008).
\item \textsuperscript{138} Sompo Japan Ins. Co. of Am. v. Yang Ming Marine Transp. Co., 578 F. Supp. 2d 584,
apply Sompo on the ground that it is inconsistent with Kirby. Finally, the Second Circuit clarified its decision in Sompo in Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc. In this case, suit was brought against a transportation intermediary, an ocean carrier, and its subsidiary in the United States who arranged for rail transport and improperly released the goods. The district court held that the Carmack Amendment applied to “certain rail carriers,” and inasmuch as none of the defendants was a rail carrier, the Carmack Amendment did not control their liability. On appeal the Court of Appeals affirmed. The Carmack Amendment applies only to certain rail and truck carriers. It does not apply to ocean carriers, NVOCCs, freight forwarders, or even to parties who arrange for rail or truck transportation as was the case here. The Carmack Amendment applies to parties that transport goods by rail or truck. This clarification is important. It completely avoids any conflict with COGSA. In essence, the Court of Appeal for the Second Circuit now says that Carmack trumps the Himalaya clause in the ocean bill of lading to the extent that it purports to provide COGSA benefits without complying with the prerequisites of Carmack. In this context the decision is more persuasive because it is easier to accept a rationale that a Himalaya clause is merely a creature of contract. COGSA does not mention Himalaya Clauses and such clauses do not receive any authority from COGSA. A Himalaya Clause is only a creature of contract. If the Court is correct in applying Carmack to through bills of lading, it is easier to accept the differentiation between parties who operate railroads and trucking companies—and whose facilities and personnel are actually involved in providing transportation services—and those who do not. Thus, it is easier to accept that the mandatory provisions of a statute trump a contrary provision that owes its authority only to the agreement of the parties. However, those of us who, in retrospect, overreacted somewhat to Sompo certainly had plenty of company in the lower federal courts in the Second Circuit.

Now a third court has weighed and taken approach that differs from

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140. Rexroth, 547 F.3d at 355-60.
141. Id. at 354.
142. Id. at 355.
143. Id. at 364.
144. Id. at 355.
145. Id at 360.
146. Id.
both Altadis and Sompo. The Ninth Circuit in Regal Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.\textsuperscript{148} has held that an ocean carrier and its agent that arranges for overland transport by rail has provided rail services and, as such is subject the Carmack amendment. In this case the cargo was shipped aboard K-line’s vessel from China to the United States pursuant to a through bill of lading by contract that called for a railroad to transport the goods to their destination in the Midwest. The cargo was damaged on the overland leg. The K-Line through bill of lading had a Tokyo forum selection clause. The clause would have been valid and enforceable under COGSA, but Carmack requires special measures for contracting out of that statute’s venue provisions. The district court enforced the forum selection clause and dismissed the action. The district court first held that COGSA not Carmack governed ocean voyage. It then held that the inland leg was exempt from the Carmack venue provisions under 49 U.S.C. § 10709 which permits parties to a rail service contracts to contractually agree to litigate in a forum other than the ones specified in Carmack. Thus, the court concludes that the agreement to resolve dispute in Tokyo is permissible. The Court of Appeals reversed. It concluded that 49 U.S.C. § 10709 is not applicable. Section 10502 is the controlling provision. The court looked to 49 U.S.C. § 10102(5) which defines the term a “rail carrier” as a “carrier person providing common carrier railroad transportation for compensation.” The statute, in 49 U.S.C. § 10102(6)(A) also defines a “railroad” as including “a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad.” Finally as the court points out, under 49 U.S.C. § 10501(a)(1)(B), the jurisdiction of the Surface Transportation Board “includes ‘transportation that is by railroad and water, when the transportation is under common control, management or arrangement for continuous carriage or shipment.’”\textsuperscript{149}

The court concluded that under the foregoing definitions, the ocean carrier and its agent by contracting to provide overland transport by rail were in fact subject to the jurisdiction of the Surface Transportation Board. As a consequence, they were subject to Carmack. The court stated: “The K-line defendants therefore provided ‘continuous carriage or shipment’ that was ‘by railroad and water’ via ‘intermodal equipment used by or in connection with a railroad.’”\textsuperscript{150} Although 49U.SC. § 10709 was not applicable, because the district court did not determine whether or not the railroad could opt out of Carmack under 10502 by giving the shipper the full option for Carmack liability, the court of appeals re-

\begin{itemize}
\item \textsuperscript{148} Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., — F.3d —, 2009 WL 428063 (9th Cir. 2009).
\item \textsuperscript{149} Id. at *4.
\item \textsuperscript{150} Id. at *5.
\end{itemize}
manded the case for such determination. Despite the attempts by the appellate court to take pains to avoid a clear rejection of the Second Circuits decision in Rexroth, it seems that the two decisions are in conflict. Hopefully, the Supreme Court will have an opportunity to resolve these conflicts.
INTRODUCTION

This article provides an update on the state of the law in our overloaded, underfunded and outdated transportation system. Indeed, as the reader will discover, several of the laws themselves are obsolete. Consequently, litigants, state legislatures and the courts are frequently the instruments of change in efforts to get in line with the times. Like the congestion at any DC, New York and Boston airports, delays are commonplace, thereby underscoring the need for change.

I. DEPENDENTS AND ACCIDENTS

Maritime law and aviation law overlap when airplanes crash beyond twelve nautical miles from the United States shore. In such instances, the Death on the High Seas Act applies. In this particular case, In re Air Crash Near Nantucket Island, Sami Makary was a passenger on the

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Egypt Air Flight 990, that on Halloween 1999 crashed near Nantucket Island while enroute from Cairo to New York. Mr. Makary was a single, 28 year old business man, survived by his parents, one brother, four sisters and a cousin, who all resided in Egypt. The Court found that he had made substantial financial contributions to his family and awarded pecuniary and non-pecuniary damages in light of the amended DOSHA, which became effective retroactive to deaths occurring after July 16, 1996, allowing non-pecuniary damages on top of pecuniary damages. The amended statute defined non-pecuniary damages as "loss of care, comfort and companionship." The Court pointed out while this definition would include "loss of society" meaning "love, affection, care, attention, companion, comfort and protection," it would not include compensation for "grief and mental anguish." The Court relied upon the close relationship between Sami and his parents and focused on the loss of a child suffered by a parent. The Court even cited Biblical references: for example, the first "love" of the Bible – that is, the first appearance of the Hebrew verb "to love" – is the love of Abraham for his son Isaac. The Court awarded the family non-pecuniary damages for loss of care, comfort and companionship in the total amount of $2,060,000. This included $125,000 to each of the siblings and a non-blood cousin, plus $680,000 to the mother and $630,000 to the father. Pecuniary damages, on the other hand, only totaled $547,389. The evidence was that Sami was sending approximately $2,000 per month to his parents and modest sums to the others for education expenses. This award was by Judge Frederick Block, a Senior Judge, sitting without a jury. It is currently on appeal and being watched by other plaintiffs where aviation disasters come into maritime jurisdiction.

In 1985, the Supreme Court set out to define the term "accident" as referenced in the Warsaw Convention’s provision on liability for international carriers regarding injury to their passengers. The Convention holds international carriers liable for bodily injury sustained by passengers “if the accident so sustained took place on board the aircraft or in

3. Id. at 362.
4. Id. at 362-363.
5. Id. at 363-364.
6. Id. at 364.
7. Id.
8. Id. at 368-369.
9. Id. at 368.
10. Id. at 370.
11. Id. at 369-70.
12. Id. at 370.
13. Id. at 363-64.
14. Id. at 362.
the course of any of the operations of embarking or disembarking.”

The Supreme Court enunciated the standard for defining “accident” as any injury “caused by an unexpected or unusual event or happening that is external to the passenger.”

The courts, therefore, have delineated between events which are unexpected or unusual and events which are merely internal to the passenger himself. For example, in Rodriguez v. Ansett Austl., “the passenger suffered DVT during a 12-hour flight, resulting in a pulmonary embolism, meaning that a blood clot formed during the flight and broke into smaller clots that were then lodged in her lungs.” She alleged that her DVT was caused by an “accident” within the meaning of the Convention due to the airline’s negligence, and that it engaged in willful misconduct by intentionally violating safety procedures, failing properly to design the aircraft, and failing to advise passengers of the risks of developing DVT during long flights.” The appellate court held that her injury was caused by her own internal reaction to the normal operation of the aircraft and was not an “accident” for purpose of Article 17 of the Convention because it was not caused by an unexpected or unusual event.” Therefore, her claim was not cognizable under the Convention.

Similarly, in Twardowski, et al. v. American Airlines, et al., several passengers filed suits against airlines for failure to warn of the risks of developing Deep Vein Thrombosis (DVT) after they suffered injuries as a result of developing DVT during long flights. The court held that an airline’s failure to warn passengers about the risk of Deep Vein Thrombosis, despite requests to do so by various public agencies, does not qualify as an “event” or “accident” under Article 17 of the Warsaw Convention. The court explained that the airlines’ failure to warn did not become an “event” or “accident” simply because public agencies have recommended or requested warnings. The court further explained that

17. Id. at 405.
19. “Deep vein thrombosis (DVT) is a condition that results when a blood clot (thrombus) forms in a large vein, causing either partial or complete blockage of circulation,” which can lead to a pulmonary embolism, a potentially life-threatening complication. AMER. MED. ASSOC., REPORT 4 OF THE COUNCIL ON SCIENTIFIC AFFAIRS (A-04) (June 2004), http://www.ama-assn.org/ama/no-index/about-ama/15278.shtml.
20. Rodriguez, 383 F.3d at 915.
21. Id. at 915-16.
22. Id. at 917-18.
24. Id. at 958-59.
25. Id. at 960.
26. Id.
generalized requests by public agencies are different from particularized requests by individual passengers for assistance, such that no liability attaches to the former. The court also held that airlines had no duty to warn passengers of risks of developing DVT; therefore, failure to warn of the potential risks could not give rise to liability under the Warsaw Convention. In achieving this end, the court cited Article 17 and interpreted it as inferring that the "recovery for a personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking [an aircraft], if not allowed under the Convention, is not available at all." This is most likely the final nail in the coffin for claims of DVT.

Long before the infamous McDonald’s coffee incident, American Airlines and its passengers got burned. For example, in *Diaz Lugo, et al. v. American Airlines*, Norma Figueroa and her husband sued American Airlines for burns she suffered when a cup of coffee spilled on her during a flight from Puerto Rico, a U.S. territory, to the Dominican Republic. Plaintiffs relied heavily on Puerto Rican domestic law. Since in the pretrial order the parties agreed on the Warsaw Convention as a potential source of liability, the court proceeded to analyze the case under the convention and disregarded Puerto Rican law, because of the Convention’s exclusivity.

Fifteen minutes after take off, Figueroa asked the stewardess for a cup of coffee. While the stewardess placed the cup on the tray in front of Figueroa, Figueroa was putting the tourist entry cards between her left leg and her seat’s left arm. Obviously, she did not notice when the stewardess placed the cup of coffee on the tray. While Figueroa was still storing her papers, the stewardess asked if she wanted cream and sugar with the coffee. Figueroa looked at the stewardess and said yes. Then the cup spilled on Figueroa’s lap and she suffered burns in her pelvic and gluteal areas. The Court examined this claim under Article 17 of the Warsaw Convention:

27. *Id.*
28. *Id.* at 961.
29. *Id.* at 959 (citing El Al Israel Airlines, Ltd. V. Tseng, 525 U.S. 155, 161 (1999)).
31. *Id.* at 374.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 374.
38. *Id.*
39. *Id.* at 374-75.
The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.\textsuperscript{40} 

The court concluded that American was liable, because an "accident", as that term has been interpreted under the convention occurred, and that "accident" caused Figueroa's injuries.\textsuperscript{41} The coffee spill was an unusual or unexpected event external to Figueroa.\textsuperscript{42} When a person boards a plane, she is not expecting to have a cup of coffee spilled over her lap.\textsuperscript{43} "The usual operation of an airplane does not require passengers to be spilled with hot coffee".\textsuperscript{44} 

As mentioned above, most courts continue to reject plaintiffs' claims for injuries sustained from the medical condition of DVT, which in some cases has proven to be exacerbated by air travel, or similar injuries resulting from alleged failures to warn on the basis they are conditions internal to the passenger and not unusual or unexpected events.\textsuperscript{45} However, the Ninth Circuit, relying heavily on the Supreme Court case of Olympic Airways v. Husain,\textsuperscript{46} found the checking of plaintiff's carry-on bag once he boarded the aircraft, which was medically necessary for plaintiff's asthmatic condition, was an unusual or unexpected event giving rise to liability when plaintiff had an asthmatic attack.\textsuperscript{47} Although the court recognized plaintiff's own pre-existing condition was a cause for her injury, the airline had first promised it would allow plaintiff to carry the bag onto the plane, then later broke that promise by taking the bag from her.\textsuperscript{48} Thus, the Convention required only that the unexpected occurrence be "a link in the chain of causes" to impose liability.\textsuperscript{49} In light of the huge delays suffered by passengers sitting on tarmacs this past summer, this argument will certainly be tested in pending claims. Along

\textsuperscript{40} Id. at 375 (quoting Warsaw Convention, supra note 16, at art. 17).
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} See Blansett v. Cont'l Airlines, Inc., 379 F.3d 177, 182 (5th Cir. 2004) (rejecting plaintiff's claim for damages for in-flight injuries stemming from DVT); see also Meizen v. Midwest Express Airlines, 701 N.W.2d 626, 631 (Wis. Ct. App. 2005) (arguing that suits based upon a failure to prevent events internal to the passenger would cause non-uniformity).
\textsuperscript{46} Olympic Airways v. Husain, 541 U.S. 1007 (2004) (holding that asthmatic injury stemming from airline inaction despite repeated passenger requests qualified as an external event).
\textsuperscript{47} Prescod v. AMR, Inc. 383 F.3d 861, 868 (9th Cir. 2004).
\textsuperscript{48} Id. at 868.
\textsuperscript{49} Id.; see also Air Fr., 470 U.S. at 406 (determining that a passenger need only prove that one link in a chain of causes leading to injury was an unusual and unexpected event external to the passenger).
these lines, one wonders when delays caused by mechanical issues could be prevented through better maintenance programs for aircraft. These delays may be considered a link.

New York considered these delays a major problem and was the first state to pass a Passenger Bill of Rights (PBR). The legislation amended New York’s General Business Law and added a new article – 14 A – entitled “Airline Passenger Rights.” Under this legislation, the airline will have an obligation to provide care to passengers “whenever they have boarded an aircraft and are delayed more than three (3) hours on the aircraft prior to takeoff.” Under this law carriers are required to provide “(1) electrical power for fresh air and lights, (2) waste removal service in order to service the holding tanks for on-board restrooms, and (3) adequate food, drinking water and other refreshments.”

However, this law was struck down by the Second Circuit Court of Appeals. The court’s position is that the law is preempted by two federal laws, the Airline Deregulation Act (ADA) and the Federal Aviation Act (FAA). Congress enacted the ADA in 1978, loosening its economic regulation of the airline industry after determining that “maximum reliance on competitive market forces would best further ‘efficiency, innovation, and low prices’ as well as variety [and] quality... of air transportation.” Congress’ intention was to ensure that the States would not regulate on their own. In fact, an express provision was included preempting the application of state deceptive business practice laws to airline fare advertisements because such regulation related to air carrier prices. More generally, the express preemption provision prohibited states from legislation related to a price, route, or services of an air carrier.

The Second Circuit concluded that New York’s law relates to the service of an air carrier, finding that service is inherent to requiring airlines to provide food, water, electricity and restrooms to passengers during lengthy ground delays. Following Congress’s intent, the Supreme

51. Id.
52. Id.
53. Id.
54. Air Transport Ass’n. of America, Inc. v. Andrew Cuomo, 520 F.3d 218, 224-25 (2d Cir. 2008). At least nine other states have proposed legislation regarding lengthy ground delays.
55. Id. at 223-25.
57. Id.
58. Id. at 379.
59. Id. at 378-79.
60. Air Transport Ass’n., 520 F.3d at 223. Interestingly, in following a multi-modal trend, the court relied on a trucking case dealing with tobacco. In Rowe v. N.H. Motor Transp. Assn., 128
Court has repeatedly emphasized the ADA’s preemption provisions.\textsuperscript{61}

The California Legislature was soon to follow with its own Passenger’s Bill of Rights.\textsuperscript{62} Assemblyman Mark Leno proposed AB No. 1943 in an attempt to amend Chapter 9 of the Public Utilities Code.\textsuperscript{63} The bill would have required air carriers to provide (1) electrical service that is sufficient to provide fresh air and light, (2) waste removal service for sanitation facilities, and (3) adequate food, drinking water, and other refreshments to passengers whenever passengers have boarded an aircraft and are detained for more than three hours.\textsuperscript{64} The bill was passed by the House but was not approved by the Senate. It is unlikely that the bill will become law in light of the plight of the New York law and considering the budgetary issues confronting California.

As mentioned above, these laws are also preempted by the FAA.\textsuperscript{65} The FAA was enacted to create a “uniform and exclusive system of federal regulation” in the field of air safety.\textsuperscript{66} “The intent to centralize air safety authority and the comprehensiveness of these regulations, have led several other circuits to conclude that Congress intended to occupy this entire field and thereby preempt state regulation of air safety.”\textsuperscript{67} Applying this position, the Second Circuit stated that

If New York’s view regarding the scope of its regulatory authority carried the day, another state could be free to enact a law prohibiting the service of soda on flights departing from its airport, while another could require allergen-free food options on its outbound flights, unraveling the centralized federal framework for air travel.\textsuperscript{68}

Undaunted, the European Union (EU) has also taken action with EC Regulation 261/2004.\textsuperscript{69} This regulation covers passenger rights in extended delay cases and provides remedies for cancellations and denied boarding scenarios.\textsuperscript{70} In the case of delays, if the delay is longer than two hours, the airline must offer passengers “care,” and if the delay is longer than five hours, reimbursement or rerouting.\textsuperscript{71} Care is defined as providing meals, beverages, two telephone calls, access to faxes and e-mails and

\begin{thebibliography}{99}
\bibitem{1} S.Ct. 989, 998 (2008), a Main law aimed at preventing underage tobacco use through tobacco delivery regulation was struck down on pre-emption grounds.
\bibitem{61} See Rowe, 128 S.Ct at 998.
\bibitem{63} Id.
\bibitem{64} Id.
\bibitem{65} Id.
\bibitem{66} Air Transport Ass’n., 520 F.3d at 224.
\bibitem{67} Id.
\bibitem{68} Id. at 225.
\bibitem{69} Id. at 224-25.
\bibitem{70} Id. at 2.
\bibitem{71} Id. at 4-5.
\end{thebibliography}
hotel accommodations where necessary. Under the boarding scenario, if the flight is overbooked the airline must seek volunteers to give up their seats. If the number of available seats is insufficient, the passengers who have been denied boarding are entitled to compensation, rerouting or reimbursement of the ticket at the passenger’s choice.

With regard to whether an event is unusual or unexpected, courts often leave that question to a jury’s determination, as it is heavily based on a juror’s factual findings as to what meets the standard. For example, in Magan v. Lufthansa German Airlines, the court found summary judgment for defendant airline improper when the lower court held as a matter of law that “light” or “moderate” turbulence could never be an accident for purposes of liability under the Convention. The court insisted a jury could find under certain circumstances turbulence could be unusual or unexpected and thus constitute an accident sufficient to impose liability.

Finally, courts have interpreted the Convention as permitting recovery for psychological injury “only to the extent that they flow from bodily injuries.” In one case, the court denied a pregnant woman recovery for her alleged mental injury, which she claimed resulted from concern about injury to her unborn child after she fell down on a plane. The court reasoned although plaintiff suffered physical injuries from the fall itself, she could not raise an issue of material fact her alleged mental injury, caused by concern for her unborn child, resulted from actual physical injury to herself or her child.

However, in Lloyd v. American Airlines, Inc., the court reasoned claims for physical injury in a different way. The jury returned a verdict in favor of plaintiff for $6,500,000. Ana Lloyd was sitting at the back of the airplane when flight 1420 crashed and burned on a stormy runway on the night of June 1, 1999. When the accident occurred, Ana was injured, both physically and mentally, in the cabin of flight 1420. Physi-

72. Id. at 5.
73. Id. at 4.
74. Id. at 4-5.
75. Magan v. Lufthansa German Airlines, 339 F.3d 158 (2d Cir. 2003).
76. Id. at 166.
77. Id.
80. Id.
82. Id. at 924-25.
83. Id. at 917.
84. Id.
85. Id.
cally, she suffered a puncture wound, an injury to her knees, and lung damage from smoke inhalation. Most of her physical injuries have subsided, though she does have a scar on her leg as a result of the puncture wound, and she continues to experience stiffness in her knee.

Nonetheless, her damages are mainly psychological. She reasonably believed that she would die in the accident – the cabin filled with fire and smoke, and she was trapped in the back of the plane. "Her remarkable escape from the burning plane was through a relatively small hole in the wreckage, because all emergency exits were apparently jammed shut after the crash, and a wall of fire and smoke prevented her escape to the front of the plane." The plaintiff now suffers from serious, chronic PTSD and major depression." At trial, the defendant argued that plaintiff should not be allowed to recover for PTSD, because the PTSD did not flow from her physical injury. Currently, the Supreme Court requires physical injury in order for an international passenger to recover. According to undisputed testimony at trial, plaintiff suffered physical injury to her knee, to the back of her leg, smoke inhalation, and cuts and scrapes as a result of crawling through the small opening in the wreckage of the airplane to escape.

Federal courts have come to different conclusions regarding the nexus required between physical and psychic injuries suffered by passengers involved in airline accidents. In In re Aircrash Disaster Near Roselawn, Indiana, the district court noted that "the Warsaw Convention itself contains no prohibition against the recovery of any particular type of damages," and held that once liability has been established, passengers may recover for all the damage they sustained in the accident, both physical and emotional." In this case, even if Ana had not proved a connection between her physical injuries and her mental injuries, there was evidence that PTSD constitutes a physical manifestation of injury.

Therefore, the court in Lloyd reasoned that this was not a case where plaintiff pinched her finger in her tray table. In this case, there were
real physical and mental damages. Yet, while "any physical injury should permit a plaintiff to cross the liability threshold and access all available remedies in Warsaw cases, in this case the plaintiff's injuries were a proximate cause of her mental injuries." The evidence presented at trial established that PTSD is a biological/physical as well as psychological injury. Consequently, the court entered judgment on the jury's verdict.

Thus, it appears the courts have taken a moderate stance on the definition of an accident under the Warsaw Convention. Where a passenger has a pre-existing condition that could be exacerbated by flight travel, as long as nothing "unexpected" or "unusual" occurs during the flight, liability will not attach. However, in the event a passenger does have a pre-existing condition aggravated by an occurrence on the plane that is uncommon, liability very well could arise. The rationale for this rule is clear in that when a passenger has a pre-existing condition, she has an obligation to take steps to avoid exacerbating the condition that may result from normal or reasonably expected air travel events. However, in cases of unusual or unexpected air travel occurrences, those that a passenger likely cannot foresee, the burden is more properly placed on the defendant air carrier to take steps to mitigate the harm. This moderate position is reinforced by the fact psychological injury, while still recoverable, is not unconditionally allowed when accompanied by physical injury so as to avoid vexatious litigation for claims of emotional harm due only to unexpectedly stressful or frightening airplane experiences.

II. DEFINING INTERNATIONAL TRANSPORTATION UNDER THE WARSAW CONVENTION

Article 1(2) of the Convention defines international transportation as "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties . . . . "

Manion v. American Airlines, Inc. relates how the courts apply Article 1(2) of the Convention. Plaintiff arranged his honeymoon trip from Boston, Massachusetts to Shannon, Ireland with Aer Lingus an air-

99. Id.
100. Id.
101. Id.
102. Id.
103. Warsaw Convention, supra note 16, at art. 1(2).
105. Id. at 1, rev'd on other grounds, 395 F.3d 428 (D.C. Cir. 2004).
line company. On June 4, 1995, plaintiff and his wife arrived at Chicago’s O’Hare airport to board their plane to Boston. Plaintiff alleged that he and his wife noticed unusual excessive noise from the engine before takeoff. Apparently, plaintiff requested ear plugs from the stewardess, but was told that there were none available on domestic flights. He also alleged that he tried to change seats, but there were no empty seats available. However, the story from his deposition is different—he stated that he did not ask the flight attendant to change seats. Two days later, plaintiff commenced to notice a sharp ringing in his ear. Plaintiff did not visit a doctor during his honeymoon. Once plaintiff returned from the honeymoon, his doctor diagnosed him with Tinnitus, “a chronic condition which results in a continuous ringing in the ears and is symptomatic of other ear problems such as the overproduction of wax, ear infections, and acoustic tumors.” The most common cause of Tinnitus is excessive exposure to loud noise on the job (musicians, carpenters) or recreation noise (shooting, loud music). Plaintiff’s doctor referred him to the University of Maryland School of Medicine’s Tinnitus Clinic, where he remains a patient.

To determine whether Article 1(2) of the Warsaw Convention governs, the court analyzed if the flight from Chicago to Boston qualifies as international transportation. “The domestic portion of international travel qualifies as international flight if both the passenger and air carrier are reasonably aware of the international nature of the transportation.” A passenger is bound “by the Warsaw Convention where he was aware of the international character of the flight, even though he was injured on the domestic portion of the flight ....”

Plaintiff opposed application of the Warsaw Convention and cited the language of the Convention, which states “according to the contract

106. Id. at 2.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id.
112. Id. at 3.
113. Id.
114. Id.
115. Id.
116. Id.
117. Id.
119. Lemly, 807 F.2d at 27 (construing Stratis, 682 F.2d at 412)
made by the parties."120 Plaintiff argued that the language is based in the parties' subjective, rather than objective intent.121 In support of this claim, plaintiff stated that he made the travel arrangements from Boston to Chicago on different days.122 He did not even check his bag straight to Ireland.123 However, the court disagreed with his position.124 "In order to determine the terms of a contract, the Court must decide the intent of the parties based on the objective evidence, rather than the 'after-the-fact professed subjective intent.'"125

The Court considered that the itinerary, which included all of plaintiff's outgoing and return flights was issued in one ticket booklet.126 "The booklet contained the tickets for the Chicago to Boston flight, and for the Boston to Ireland flight, as well as return coupons for the Shannon to New York flight, and from New York to Washington, D.C."127 The Court highlighted that even though plaintiff made the travel arrangements on different occasions, he purchased the tickets in one payment.128 "The international nature of the flight is also substantiated by the fact that there was an insignificant time difference between the initial and subsequent flight . . . and the fact that the original carrier was aware of the passenger's subsequent flight plans."129 Thereby, the Court concludes that the flight from Chicago to Boston qualifies as an international transportation and is governed by the Warsaw Convention.130 Therefore, American Airlines was granted partial summary judgment on this ground.131

The court then applied the Warsaw Convention to analyze if the injury was caused by an accident.132 "Thus, the Court must now determine whether an accident caused plaintiff's alleged injury, thereby rendering defendant strictly liable for damages in the amount of $75,000."133 To that effect, plaintiff and defendant rely on Air France to support their

120. Manion, 17 F.Supp.2d at 4 (quoting Warsaw Convention, supra note 104, at art. 1(2)).
121. Id.
122. Id.
123. Id.
124. Id.
126. Id.
127. Id.
128. Id.
129. Id. (citing In re Air Crash Disaster at Warsaw, on March 14, 1980, 748 F.2d 94, 96 (2d Cir. 1984)).
130. Id.
131. Id.
132. Id.
133. Id.
arguments. “This case presents a similar factual scenario as in Air France.” Here, plaintiff alleges that the negligent operation and maintenance of the airline’s engines caused his ear injury. “However, this case is distinguishable from Air France because the plaintiff here has not conceded that the airline engines operated normally and plaintiff has not completed discovery as he has filed a motion to compel.”

“In his Motion to Compel, plaintiff alleges that defendant has refused to produce relevant passenger and maintenance logs which could substantiate plaintiff’s claims. Before this Court can determine whether as a matter of law an accident caused plaintiff’s injuries, discovery must be complete. Because discovery issues are currently pending before the Court, the Court will deny defendant’s motion for summary judgment without prejudice, on this issue solely, with leave to refile after all discovery disputes have been resolved.”

III. A HEFTY PROBLEM: TINY PLANES AND THE GROWING WAISTLINE

A. EMPLOYMENT DISCRIMINATION

The Americans with Disabilities Act (ADA) is the primary tool used by employees to combat employment discrimination. The ADA states “no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to the terms, conditions, and privileges of employment.” To be a “qualified individual,” the individual must have a disability and “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” The ADA defines “disability” as “(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.”

Dealing with the overweight and obese in the airline industry has
been a growing problem, especially since Americans' waistlines have been growing as well.\textsuperscript{144} Not surprisingly, litigation regarding this issue has begun to arise, although so far, with the exception of one case, it has not been aimed at the airlines. Fortunately for them, the airlines have generally avoided litigation with regard to this issue. Indeed, the one reported case against the airlines failed.\textsuperscript{145} In \textit{Tudyman}, the plaintiff was a flight attendant who was over the maximum weight limits United had set for its crews.\textsuperscript{146} United fired Tudyman for being overweight and he sued under the Rehabilitation Act of 1973 for discriminatory firing based on his weight.\textsuperscript{147} The court found as a matter of law plaintiff was not a handicapped individual, was not substantially limited in any major life activity, and defendants did not perceive plaintiff to have a physical impairment which limited his activities in violation of the Rehabilitation Act of 1973.\textsuperscript{148} It is noteworthy this case was decided before the ADA was enacted, although the ADA was modeled after the Rehabilitation Act.\textsuperscript{149} Interestingly, although plaintiff was an overweight individual, it was due not to excess fat tissue but because he was a bodybuilder.\textsuperscript{150} Thus, the court appeared to come to its conclusion in part because plaintiff undoubtedly voluntarily assumed weight beyond the limits defendants had set.\textsuperscript{151} Therefore, had plaintiff been overweight due to excess fat tissue, which may or may not be assumed voluntarily, the court may have come to a different conclusion. Although \textit{Tudyman} is the only case that has dealt with allegations of employment discrimination by the airlines for being overweight, other cases concerning obesity discrimination have held obesity alone is not a disability.\textsuperscript{152}


\textsuperscript{146} \textit{Id.} at 746.

\textsuperscript{147} \textit{Id.} at 741.

\textsuperscript{148} \textit{Id.} at 746.

\textsuperscript{149} The ADA was enacted 17 years later, in 1990.

\textsuperscript{150} \textit{Tudyman}, 608 F. Supp at 746.

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{See}, e.g., Hazeldine v. Beverage Media, 954 F. Supp. 697, 705-06 (S.D.N.Y. 1997) (holding that despite evidence that plaintiff's obesity affected her ability to engage in everyday activities, it was not a disability as a matter of law since her performance of these activities was not substantially limited); \textit{see also} Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp 1082, 1092 (S.D. Iowa 1997) (granting employer summary judgment when employer denied plaintiff's promotion because plaintiff's weight was inconsistent with the "corporate image," reasoning that obesity alone is generally not a disability within the meaning of the ADA); Coleman v. Ga. Power Co., 81 F. Supp. 2d 1365, 1371 (N.D. Ga. 2000) (granting defendant summary judgment on
By way of contrast, in 1996 the EEOC filed suit on behalf of a woman who was denied employment as a bus driver because she was morbidly obese.\textsuperscript{153} The employer alleged one reason for denying the application was because plaintiff would not be able to handle emergency situations and would thereby put passengers in danger.\textsuperscript{154} The court found the employer’s argument incorrect and unpersuasive and held the applicant was perceived as having a disability when she could have performed the tasks the job required without substantial limitation.\textsuperscript{155} Moreover, the court rejected defendant’s reliance on the pre-employment medical evaluation for denying the applicant since the evaluation standards were “wholly inconsistent” with the Department of Transportation’s regulations.\textsuperscript{156}

The overwhelming majority of court decisions on employment discrimination for the obese and overweight find against the plaintiffs. The rationales for these holdings appear to be largely based on the idea obesity is not a physiological disorder, rather it is more of a voluntarily assumed condition. Further, obesity alone does not appear to \textit{substantially} limit a person’s ability to perform most job tasks, thereby making them handicapped, even though he or she may be somewhat limited. However, although \textit{Texas Bus Lines} rejected defendants’ assertion an obese bus driver would not be able to perform her job tasks and as such would pose a danger to passengers in the event of an emergency, the courts may be more willing to accept this argument regarding potential airplane emergencies, especially post-911.\textsuperscript{157} Accordingly, although the employee in such plane emergencies might be considered handicapped, courts may be willing to find for the airlines where the disability is shown to be job-related and consistent with the business activity and such performance cannot be accomplished by reasonable accommodations.\textsuperscript{158}

\textsuperscript{154} \textit{Id.} at 979.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 980.
\textsuperscript{157} See, e.g., E.E.O.C. v. Trans States Airlines, Inc., 356 F. Supp. 2d 984, 988 (E.D. Mo. 2005) (recognizing that the airline industry has drastically changed because of 9/11), \textit{aff’d}, 462 F.3d 987 (8th Cir. 2006).
\textsuperscript{158} \textit{See} 42 U.S.C. § 12112 (2000).
B. Passenger Discrimination and Other Passenger Issues

In addition to the ADA is the Air Carriers Access Act ("ACAA"), which prohibits discrimination not in the employment context, like the ADA, but discrimination against passengers in air travel.\(^{159}\) Despite their differing applications, the ACAA prohibits discrimination in the provision of air transportation by air carriers using the same grounds applied by the ADA.\(^{160}\) Thus, in the context of the ADA, many courts have stated because the standards under both acts are generally the same, the construction of one statute is instructive in the construction of the other.\(^{161}\)

Turning then to the passengers themselves, the problem that arises most often are seating difficulties with regard to oversized passengers. Although some airlines have chosen to provide the obese passenger with a free seat, many airlines, asserting financial difficulties as their reason, have chosen to require obese passengers taking up more than one seat to purchase an additional ticket.\(^{162}\) Many have questioned this practice, defining it as discriminatory and plainly "mean-spirited."\(^{163}\) However, following the September 11th terrorist attacks, the nine major airlines\(^{164}\) posted a collective $7.2 billion dollar loss, Southwest being the only airline to post a profit.\(^{165}\) In fact in 2001, Southwest attributed its entire profit to just six seats per flight.\(^{166}\) Thus, in the event a plane is full, providing an obese passenger with two seats would result in another passenger being bumped and the airline having to compensate that individual for the fare.\(^{167}\) Consequently, providing a free seat to an obese passenger, or worse, making the seats larger thereby reducing the overall number of seats would have a significant negative financial effect on the airlines, especially for those that fail to post a profit.\(^{168}\)

Aside from the financial impact, there is the effect on the other passengers on the plane. For example, on a two-hour Delta Airlines flight from New Orleans to Cincinnati, passenger Philip Shafer was forced to sit next to an obese man who could not fit into his seat with the armrest


\(^{160}\) Bolton, supra note 140, at 813.

\(^{161}\) Id. at 828; See also, Andrews v. Ohio, 104 F.3d 803, 807 (6th Cir. 1997).

\(^{162}\) Bolton, supra note 140, at 833. As of 2004, Southwest Airlines, Continental Airlines, Northwest Airlines, and American Airlines require purchasing an additional ticket, whereas Delta Airlines and United Airlines have no such policy.

\(^{163}\) Id. at 804.


\(^{165}\) Bolton, supra note 140, at 805-806.

\(^{166}\) Id. at 808.

\(^{167}\) Id.

\(^{168}\) Id.
The man consequently spilled into Mr. Shaffer's seat leaving him only a portion of the seat he purchased. Shafer eventually sued Delta Airlines under a breach of contract claim for failing to provide him with a full seat and reasonable comfort. In another case, a 63 year-old woman was forced to share a seat with an obese passenger on a flight from London to Los Angeles. The woman settled for $20,000 with Virgin Atlantic for injuries resulting from the lack of accommodations, the injuries including a blood clot, torn leg muscles and sciatica. Although suing an airline for failure to accommodate may be an extreme remedy, it is certainly not fair to a passenger for an airline to require that passenger to sit in only a portion of an already small seat for which they likely paid a lot of money.

Decisions dealing with employment discrimination under the ADA are instructive as to how to interpret travel discrimination under the ACAA. Under the ADA, modification of a position to accommodate the needs of the disabled employee, creating a job vacancy for a disabled employee, or promoting the disabled employee to a job better suited to his handicap are not reasonable accommodations that are required to be performed by the employer. Even assuming, arguendo, an obese individual is disabled and thus a qualified individual under the ACAA, modifying the seats on an airplane to make them larger, bumping another passenger to a different flight, or offering an upgraded seat such as first-class for no additional cost, are all likely unreasonable remedies when compared to the above ADA accommodations, and hence not required. Moreover, the Code of Federal Regulations specifically states "[c]arriers are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased" for persons with disabilities, likely because that would be an unreasonable accommodation. However, even if one or all of these accommodations were adjudicated as reasonable, given the financial difficulties of the airlines and the fact so few seats account for an airlines' profit margin, making these accommodations could constitute an undue hardship, which is an additional basis under the ADA to avoid having to

169. Id. at 809.
170. Id.
171. Id.
172. Id.
173. Id. at 810.
174. See id. at 828.
175. See id. at 828-30.
176. See id.
177. C.F.R. § 382.38 (2008) (outlining who is considered disabled and the accommodations that must be made for them).
Nevertheless, under the ADA, the courts have continued to express the view obesity alone is not a disability, thus, the same is likely in the context of the ACA.A.\textsuperscript{179} The solution to this problem poses difficult hurdles but a fair compromise can be achieved. In fact, Southwest Airlines’ policy appears to be the most accommodating for both sides.\textsuperscript{180} The policy does require obese passengers to purchase an additional seat if they do in fact take up more than the seat they have purchased.\textsuperscript{181} This is determined by allowing the passenger to pre-board the aircraft and sit in a seat, he or she having to buy an additional ticket at child’s fare price if they cannot fit into the seat with the armrest(s) down.\textsuperscript{182} Although this practice may sound embarrassing to the passenger, every person has the ability to purchase the ticket beforehand, paying the same price as the seat initially purchased.\textsuperscript{183} Moreover, in the event the plane is not full, Southwest refunds the purchase price of the ticket and always gives passengers the option of switching to a less crowded flight, at no additional fee, to ensure the refund will be provided.\textsuperscript{184} Finally, the practice is applied indiscriminately to anyone who may require an additional seat, including, for example, infants occupying more than one seat due to a restraining device or a person desiring to carry an oversized bag onto the plane.\textsuperscript{185} Thus, with careful as well as thoughtful consideration of the issue, both the airlines’ and oversized passengers’ needs may be reasonably accommodated.

As a result of high fuel prices and the cutback in the number of flights by carriers, passengers being “bumped” from flights due to overbooking on the part of the airlines is becoming more common. “Bumping” occurs when more passengers appear to board a flight than the number of seats available, because the airline sold more tickets than the aircraft’s seating capacity.\textsuperscript{186} To address this problem Congress passed a federal regulation which provides for compensation for those passengers inconvenienced due to being “bumped.”\textsuperscript{187} Under 14 C.F.R. § 250.5, a “bumped” passenger is entitled to compensation of $400 per passenger or a lower amount computed “at a rate of 200% of the sum of the value of the passenger’s remaining flight coupons up to the passen-

\textsuperscript{178} Bolton, supra note 140, at 830-31.
\textsuperscript{180} Bolton, supra note 140, at 831-34.
\textsuperscript{181} Id. at 831.
\textsuperscript{182} Id. at 831-32.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 833.
\textsuperscript{185} Id. at 831.
\textsuperscript{187} See 14 C.F.R § 250.1-250.11 (2008).
ger's next stopover, or if none, to the passenger's final destination.\textsuperscript{188} This rule only applies if the passenger is actually "bumped" due to overbooking.\textsuperscript{189}

In \textit{Stone v. Continental Airlines}, plaintiff, a partner at a law firm, booked two tickets so that he and his daughter could take a holiday ski trip.\textsuperscript{190} They were "bumped" from the flight and unable to be accommodated with an alternative flight so the airline refunded the costs of the two tickets.\textsuperscript{191} Plaintiff filed suit seeking damages for his out of pocket expenses and deprivation of the use of the contents of his luggage, as well as damages under New York's consumer protection statutes and punitive damages.\textsuperscript{192}

The court held that federal law preempts a claim for punitive damages by a prospective passenger who was "bumped" from a scheduled flight and that the airline's actions were permitted by statute and regulation.\textsuperscript{193} The court also held that a showing of violation of a public right was necessary to support punitive damages.\textsuperscript{194} However, the court awarded damages for the plaintiff's monetary loss as well as deprivation of the use of the contents of his luggage.\textsuperscript{195} The court explained that while the award of punitive damages is preempted by federal statute, a "bumped passenger is entitled to contract damages upon showing (1) a ticket purchase, (2) involuntary denial of boarding within the meaning of federal regulations, (3) non-acceptance of an airline's offer of compensation, and (4) damages."\textsuperscript{196}

With the enactment of the Federal Aviation Act, Congress gave airline carriers broad discretion to refuse to transport a passenger on the ground that transporting the passenger is, or would be, "inimical to safety."\textsuperscript{197} In \textit{Cerquiera v. American Airlines, Inc.},\textsuperscript{198} the court held that an airline could not be held liable for refusing to transport a passenger whom it believes might be inimical to the safety of its passengers unless the decision was arbitrary and capricious.\textsuperscript{199} This case involved three passengers who were refused transport after their behavior caused the captain of the air carrier to believe that they were a possible threat to the

\begin{itemize}
\item \textsuperscript{188} 14 C.F.R. § 250.5.
\item \textsuperscript{189} 14 C.F.R. § 250.6.
\item \textsuperscript{190} \textit{Stone}, 804 N.Y.S.2d at 654.
\item \textsuperscript{191} \textit{Id.} at 654.
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Id.} at 655-56.
\item \textsuperscript{194} \textit{Id.} at 656.
\item \textsuperscript{195} \textit{Id.} at 658-660.
\item \textsuperscript{196} \textit{Id.} at 656.
\item \textsuperscript{197} 49 U.S.C. § 44902(b) (Supp. I 2003).
\item \textsuperscript{198} \textit{Cerquiera v. American Airlines, Inc.}, 520 F.3d 1 (1st Cir. 2008).
\item \textsuperscript{199} \textit{Id.} at 14.
\end{itemize}
safety of other passengers.\textsuperscript{200} Factors considered by the captain were: (1) the three men were seated next to each other, (2) near the emergency exit, and (3) they were behaving boisterously and making suspicious comments.\textsuperscript{201} The captain also pointed out that the plaintiff: (1) was hostile toward one of the flight attendants prior to boarding, (2) had made an odd comment during boarding, and (3) spent an unusually long period of time in the restroom.\textsuperscript{202} Both flight attendants and passengers were uncomfortable with the behavior of plaintiff and the two men seated next to him.\textsuperscript{203} This all led the captain to ask the three passengers to disembark the plane for further questioning by appropriate authorities.\textsuperscript{204} Subsequently, the men were not allowed to board the flight and it departed without them.\textsuperscript{205}

Plaintiff filed suit against the air carrier alleging that he was intentionally discriminated against by the airline due to his perceived race (he had olive skin and dark hair).\textsuperscript{206} The court found no evidence of discrimination on the part of the captain of the aircraft and found that removal of the three men was reasonable under the circumstances.\textsuperscript{207} The court explained that the decision to refuse transport under the FAA is restricted to the information actually known by the decision-maker at the time the decision was made, not what the decision-maker reasonably should have known.\textsuperscript{208} Therefore, the captain had no duty to inquire into information received from other sources or to conduct a thorough investigation and was entitled to accept at face value the representations made to him by other air carrier employees, including the flight attendants.\textsuperscript{209} The First Circuit Court of Appeals vacated that judgment of the federal district court, which awarded plaintiff $130,000 in compensatory damages and $270,000 in punitive damages.\textsuperscript{210}

\textit{In re Air Crash at Lexington, Kentucky} involved the runaway crash of Comair Flight 5191.\textsuperscript{211} The court addressed the issue of whether Congressional intent or the self critical analysis privilege precluded disclosure of Defendant, Comair’s, Aviation Safety Action Program Reports

\textsuperscript{200} Id. at 4-11.
\textsuperscript{201} Id. at 5-7.
\textsuperscript{202} Id. at 4-6.
\textsuperscript{203} Id. at 6-7.
\textsuperscript{204} Id. at 7.
\textsuperscript{205} Id. at 8-9.
\textsuperscript{206} Id. at 5 n.2, 10-11.
\textsuperscript{207} Id. at 17.
\textsuperscript{208} Id. at 14-15.
\textsuperscript{209} Id. at 15.
\textsuperscript{210} Id. at 4, 11, 20.
(ASAP) for the purpose of litigation. These reports were a part of a voluntary program initiated by the Federal Aviation Administration (FAA), whereby airline employees were encouraged to report safety-related incidents to an Event Review Committee. If a report was the only source of information regarding an incident the FAA was to take no action. The FAA was limited to administrative action consisting of a letter of correction or warning notice if the report was not the only source. The report could not be used by the company for disciplinary action, although corrective action may have been required. In short, ASAP reports were a vehicle whereby employees, participating air carriers, and repair station certificate holders could identify and report safety issues to management and to the FAA for resolution, without the reports being used for legal or disciplinary actions.

Defendant, Comair, requested a protective order against disclosure of any ASAP reports, claiming that disclosure would contradict the intent of Congress and the FAA, as evidenced by 49 U.S.C. § 40123, and also that the reports were privileged under the self-critical analysis privilege. The court reasoned that the plain language used by Congress and the FAA revealed that the protection given to ASAP reports was limited, and that the language simply precluded government from disclosing the information pursuant to Freedom of Information Act (FOIA) requests. The court explained that “disclosure in litigation was obviously contemplated, as the FAA agreed to produce the reports pursuant to a court order.” In regard to the self critical analysis privilege, the court explained that there was no such privilege in Kentucky law. The court held that disclosure of the ASAP reports would not contradict the intent of Congress and the FAA and that the reports were not privileged. The court denied defendant’s motion for a protective order to prevent discovery of pilot and employee safety reports. This ruling may have an impact in other modes of transportation.

212. Id. at *5, *8.
213. Id. at *1.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id. at *1-*2.
219. Id. at *7.
220. Id.
221. Id. at 8, (citing Univ. of Ky. v. Courier-Journal & Louisville Times Co., 830 S.W.2d 373 (Ky. 1992)).
223. Id. at *10.
IV. LOST IN TRANSPORTATION: LOSS OR DAMAGE TO CARGO

A. THE CARRIER REQUIREMENT

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly referred to as the Warsaw Convention (Convention), "established a uniform set of rules for the determination of airline liability in the transportation of passengers, baggage, and cargo."

The Convention, in establishing this universal standard, "has undergone multiple alterations since its inception in 1929 to adapt to changes in the international airline industry."

With regard to cargo, a carrier's liability for damages sustained to any checked baggage or goods is limited to 250 francs per kilogram unless the consignor has made an alternative declaration of value at delivery. However, for a defendant to be able to limit its liability, it must qualify as a "carrier" under the Convention. Alternatively, it will be considered merely a freight forwarder and as such will not be able to limit its liability. Factors to be considered in determining whether a party acted only as a forwarder or as a forwarder-carrier include: the way the party's obligation is expressed in documents pertaining to the agreement, although a party's self-description is not always controlling; history of dealings between the parties; issuance of a bill of lading, although the fact a party issues a document entitled "bill of lading" is not in itself determinative; and how the party made its profit. Essentially, contracting for the delivery of goods to their final destination instead of merely arranging for their transportation subjects a defendant to strict limited liability under the Convention.

In this vein, little has changed since Zima devised the standard for carrier determination. For example, in Royal Insurance Co. v. Fountain Technologies, Inc., the court found Kamino International Transport was a common carrier because not only did it refer to itself as such but it also actually shipped the goods through their complete journey, from origin to final destination, charging one flat fee for their services and the
This rule works well since it uses the Convention rules when an entity is more than just tacitly involved in shipping the goods thereby avoiding applying the limitations to everyone who is in some way connected with the cargo shipment.

B. Damage During the Air Carriage

In addition to the carrier requirement, the Convention liability limitations apply only if the occurrence in question "took place during the carriage by air." However, although liability does not extend to damage that does not occur in the air, there appears to be a rebuttable presumption subject to contrary proof, if damage occurs during performance of the contract for carriage by air (i.e. during loading, delivery or transshipment), any damage is presumed to have occurred in the air. This presumption appears to be applied in one case in which the court imposed liability on the carrier because it could not produce any evidence the damage occurred after it performed the air carriage contract. The court focused on the carrier's possession and control of the damaged goods in determining the damage occurred during performance of the contract. Since there was no evidence to support a contrary finding defendant carrier had possession of goods when the damage occurred, and as such was still performing on the contract, the Convention rules applied. Thus, even though the damage could certainly have occurred on the ground, the Convention limitations nevertheless applied because the damage was presumed to have occurred in the air and there was no evidence to rebut the presumption.

C. Cargo Air Waybill Requirements

"An air waybill is a written document describing the shipping arrangement between the air carrier and the shipper." Specifically, Article 8 of the Convention lists certain essential information that must be

232. Id. at 730 (applying Zima Corp., 493 F. Supp. 268).
235. Id.
236. Id.
237. Id.
238. Id.
240. "The air consignment note shall contain the following particulars: (a) the place and date of its execution; (b) the place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character; (d) the name and address of the consignor; (e) the name and ad-
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included in an air waybill or Article 9 will strip the limited liability protection from the air carrier.\(^{241}\) Although some circuits have taken a liberal approach with regard to the specific requirements of Article 8, the overwhelming trend appears to favor a strict application of the provision.\(^{242}\)

Articles 8 and 9 are especially important with regard to flight stops because the waybill information provides the shipper with notice of the places their cargo will stop and the jurisdictions in which a suit could potentially be brought.\(^{243}\) Therefore, air carriers should take the steps necessary to ensure all the relevant and required information is on the waybill to ensure they receive the limited liability protection afforded under the Convention.

**D. WHO CAN SUE**

In regard to standing, the Convention really only addresses who may sue and who may be sued in the case of successive carriages, the consignor being able to sue only the first carrier and the consignee the last.\(^{244}\)

"However, outside the context of successive carriage, the Convention does not discuss which parties have standing for cases of damage to..." Warsaw Convention, supra note 104, at art. 8.

\(^{241}\) See Tai Ping Ins. Co., 94 F.3d at 31; see also Warsaw Convention, supra note 104, at art. 8-9.

\(^{242}\) See Intercargo Ins. Co. v. China Airlines, 208 F.3d 64, 67-68 (2d Cir. 2000) (holding the failure of the air waybill to include the final destination information meant the air carrier's liability would not be limited); see also Republic Nat'l Bank v. Delta Airlines, 263 F.3d 42, 45 (2d Cir. 2001) (holding failure to properly mark the air waybill with the "place of execution" meant liability would not limited); Federal Ins. Co. v. Yusen Air & Sea Serv., 232 F.3d 312, 314 (2d Cir. 2000) (refusing to limit liability because an agreed stopping place was not reflected on the waybill); Tai Ping Ins. Co., 94 F.3d at 33 (holding failure to include the correct flight number prevented incorporation by reference of airline published timetables and liability would not be limited); Fireman's Fund Ins. Co. v. Panalpina, Inc., No. 00 C 2595, 2001 WL 969032 at *7 (N.D. Ill. Aug. 24, 2001); Running Bear Farms, Inc. v. Expeditors Int'l of Wash., Inc., No. C-2-00-859, 2001 WL 102515 at *8-9 (S.D. Ohio Feb. 1, 2001); Nissan Fire and Marine Ins. Co. v. BAX Global Inc., No. C 02-2516 JSW, 2006 WL 1305217, at *4 (N.D.Cal. May. 11, 2006).

\(^{243}\) See Running Bear Farms Inc., 2001 WL 102515 at *8; see also Republic Nat'l Bank, 263 F.3d at 45.

\(^{244}\) Warsaw Convention, supra note 14, at art. 30.
cargo.”245 In fact, there has been some contention as to whether third parties may also sue under the Convention.246 In *Alitalia Airlines*, the insurance company for the plaintiff shipper sued the defendant carrier for damage to plaintiff’s cargo.247 The defendant objected to the insurance company’s standing to sue since it was neither a consignor nor a consignee.248 The court rejected defendant’s argument and cited Article 15 of the Convention as authority for the proposition “that any legal relationships third parties possess vis-à-vis consignees and consignors under local law are not altered by those portions of the Warsaw Convention that define consignees/or’s rights.”249 Thus, subrogation interests and other legal assignments do not appear to be affected by the Convention standing requirements.

E. Damages

The Convention’s limitation on liability applies a monetary amount to each kilogram of cargo.250 However, there has been some contention as to whether this applies only to the portion of the cargo actually damaged or to the entirety of the cargo.251 In *Motorola*, only a small portion of a shipment of cellular phones was physically damaged in transport but the plaintiff wanted to calculate the damages based on the entire weight of the shipment, arguing the damaged portion of the shipment affected the value and usability of the entire shipment.252 The court agreed, holding “when a portion of a shipment is damaged in transit, the liability limitation under the Convention is based on the weight only of the damaged portion; but when the damaged portion affects the value and usability of other parts of the shipment, the liability limitation is based on the weight of all affected items in the shipment.”253

However, the trend appears to favor contracting in the air waybill the amount of damages available and, more importantly, how to calculate them.254 In *Central*, the plaintiff attempted to use the affected weight standard to argue although only a portion of the cargo was damaged, the damage affected the entire shipment, thus, damages should be assessed

246. Id. at 460.
247. Id. at 456.
248. Id. at 456.
249. Id. at 460; see also Warsaw Convention, supra note 16, at art. 15.
250. Warsaw Convention, supra note 16, at art. 22.
251. See Motorola, Inc. v. Fireman’s Fund Ins. Co., 308 F.3d 995, 999 (9th Cir. 2002).
252. Id.
253. Id. at 1001 (terming it the “affected weight standard”).
from the entire weight of the shipment.\(^{255}\) The court disagreed and instead enforced the terms of the air waybill, which upon a plain meaning interpretation applied liability only to those goods actually damaged.\(^{256}\) Thus, it is wise for parties shipping goods via air to include not only a fixed or readily ascertainable damage amount on the waybill in the event of damage or loss but also to include a clear means by which to determine against which goods damages will be applied.

**CONCLUSION**

While the holding in *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999* is generous when compared to the restrictive limits of Warsaw, creative advocacy is going to persist and, at times, prevail until treaties like Warsaw are adjusted to become in line with current economics.\(^{257}\) This is also true in the context of international cargo shipments. Warsaw needs a formula to keep it current. With regard to the definition of an accident under Warsaw, the courts appear to be adopting a fair and balanced approach. Further, the approach used by Southwest with obese passengers appears to be most fair. The delays predominately caused by an overloaded and outdated air transportation system in the U.S. is harming air carriers on their balance sheets as they are burning expensive fuel during delays. It has caused at least 10 states to attempt regulations that add further cost to weakened group of carriers. The Second Circuit properly struck down NY’s law.\(^{258}\) The FAA should act in order to stem the tide of attempted additional costly state regulations.

\(^{255}\) Id. at *3.  
\(^{256}\) Id. at *6.  
\(^{257}\) *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*, 462 F. Supp. 2d 360.  
\(^{258}\) *Air Transport Ass’n. of America, Inc.*, 520 F.3d at 223, 224.
High Speed Rail: Planning and Financing the Next Fifty Years of American Mobility

Joshua D. Prok*

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I. INTRODUCTION

In the second decade of high speed rail regulation in the U.S., concerted efforts of the federal government and many States have produced a rich patchwork of plans for a new transcontinental railroad. These plans provide solutions to myriad transportation problems ailing many major metropolitan areas; however, they lack the financial support to make them a reality.

Over the next half century, investments in high speed rail will change the way major U.S. cities are connected. High speed rail will insulate the U.S. from its dangerous reliance on fossil fuels and make intercity travel more efficient. High speed rail services will create permanent jobs and catalyze adjacent long-term economic development.

To put this vision of the future in context, this article first describes the federal and State developments in regulating high speed rail. Then, several financial and political solutions are proffered for the transition from planning to implementation. Current market forces favoring high speed rail development are then considered. The discussion concludes with a vision for future development of high speed rail in the Rocky Mountains and the West within the prevailing multimodal transportation environment.

II. THE FEDERAL REGULATORY FRAMEWORK AND DEVELOPMENTS

The Swift Rail Development Act of 1994 (Swift Act) might well be considered the heart of federal regulation of high speed rail.1 In the Swift Act, Congress declared high speed rail to be an environmentally advantageous alternative to other intercity transportation, and acknowledged that federal funding would be necessary to develop the technology necessary to make high speed rail a reality in the U.S.2 The purpose of the Act

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was "to encourage farsighted State, local, and private efforts in the analysis and planning for high-speed rail systems in appropriate intercity corridors." The Swift Act put the onus on "State and local governments" to develop the technology with federal planning support when necessary, and states that "new high-speed rail service should not receive Federal subsidies for operating and maintenance expenses." The Secretary of Transportation delegated authority under the Swift Act as it related to high speed rail to the Federal Railroad Administrator.

Congress, therefore, directed the States to develop and operate high speed rail services with preliminary guidance from the Federal Railroad Administration (FRA). Accordingly, codified portions of the Swift Act provide "high-speed rail assistance" for continued corridor development through "eligible activities," including: environmental study, economic analysis, financial planning, and acquisitions. The assistance provides "matching funds" not to exceed fifty percent of the costs of qualifying eligible activities. In terms of financing for fiscal years 2006-2013, the federal government makes $100,000,000 available to State and local governments for corridor development and technological improvements. The FRA publishes an annual "Notice of funding availability; solicitation for applications" for State and local governments to apply for high speed rail assistance.

A) MAGNETIC LEVITATION TECHNOLOGY

Indicating that State and local authorities can choose the technology that will best serve their needs in the planning process, Congress has defined "high-speed rail" broadly as:

all forms of nonhighway ground transportation that run on rails or electromagnetic guideways providing transportation service which is—
(A) reasonably expected to reach sustained speeds of more than 125 miles per hour; and
(B) made available to members of the general public as passengers, but does not include rapid transit operations within an urban area that are

3. § 102.
4. § 102.
8. § 26101(a)(1).
10. § 26101.
This definition thus incorporates magnetic levitation technology, or "maglev," further defined as, "transportation systems employing magnetic levitation that would be capable of safe use by the public at a speed in excess of 240 miles per hour." The emergence of second-generation maglev systems, which are installed on existing railroad crossties, may make maglev a more favorable choice not only for passenger rail corridors, but as an innovation for freight service. Furthering the goal of developing better intercity rail services in the U.S., this definition allows for technological flexibility, but strictly limits federal financial assistance to projects that facilitate intercity transportation.

Toward enhancing flexibility, Congress also created the Magnetic Levitation Transportation Technology Deployment Program ("Maglev Program") to demonstrate maglev technology in a partnership financing. Regarding the partnership financing, although the federal share is not to be more than two thirds, funds received by States under the Congestion Mitigation and Air Quality Improvement Program (CMAQ) did not count against the federal share. Much like the Swift Act delegation, duties regarding maglev development, under the Maglev Program and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETY-LU), were delegated to the Federal Railroad Administrator. The currently relevant phase of the Maglev Program is "Phase V— Completion of Detailed Engineering and Construction January 1, 2002 and beyond," as projects have been selected in the Baltimore-Washington and Pittsburgh, Pennsylvania areas. Both projects are in the final stages of environmental analysis, while preliminary environmental and engineering studies for projects in California and Nevada are underway.

17. § 332(d).
19. § 322(b), (h).
21. 49 CFR 1.49(kk), (mm).
B) ENVIRONMENTAL LAW

Such environmental analysis is mandated by the National Environmental Policy Act (NEPA), and comprises much of the FRA’s significant current activity in high speed rail development. NEPA promotes informed decisions by the federal government through an analysis of alternatives. Regulations promulgated by the Council on Environmental Quality further provided that federal agencies performing analysis under NEPA can engage in tiering, by incorporating findings from broad studies into more specific environmental analyses. “Tiering is appropriate when the sequence of statements or analyses is . . . [f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.”

The California High-Speed Train Program Environmental Review/Environmental Impact Statement illustrates the first step in a two-tiered environmental review process under NEPA. A 2005 Record of Decision indicated that the FRA would first lead a collaborative determination with the California High Speed Rail Authority over whether to develop high speed rail in California. After choosing the high speed rail option, over alternatives to do nothing or enhance highways and airports, the second phase involves more site-specific analysis. Subsequently, the FRA announced its intent to conduct such second tier analyses in California. Similar tiered environmental reviews are underway in other parts of the country.

C) REAL PROPERTY ACCOMMODATIONS

To accelerate planning and development, Congress also empowered the Secretary of Transportation to authorize States to make accommodations within federal-aid highway rights-of-ways, in the form of available

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27. Id. at 148-49 (quoting 40 C.F.R. § 1508.28 (2008)).
28. Id.
30. Id. at 3.
31. Id. at 4, 11-14.
air space or land, for high speed rail and maglev systems.\textsuperscript{34} Such available land or air space is to be provided "with or without charge to a publicly or privately owned authority or company or any other person for such purposes if such accommodation will not adversely affect automotive safety."\textsuperscript{35} Resultant provisions appear in state laws to accommodate high speed rail and maglev systems by providing necessary land or airspace.\textsuperscript{36}

D) Safety Technology

The Secretary of Transportation is also responsible for establishing safety regulations regarding high speed rail service.\textsuperscript{37} FRA safety regulations for passenger and freight overlap in certain areas, such as: track design,\textsuperscript{38} use of horns at crossings,\textsuperscript{39} and engineer qualification and certification.\textsuperscript{40} However, specific regulations for passenger service revolve around equipment standards\textsuperscript{41} and emergency response.\textsuperscript{42} Similarly, mandates concerning certain power braking systems apply only to freight.\textsuperscript{43}

Recent research and development efforts by the FRA involve demonstrating Intelligent Railroad Systems: "computers, and digital communications to collect, process, and disseminate information to improve the safety, security, and operational effectiveness of railroads."\textsuperscript{44} The FRA is working with applicable industries to integrate "new sensor, computer, and digital communications technologies into train control, braking systems, grade crossings, and defect detection, and into planning and scheduling systems[."	extsuperscript{45} Greg Summy, General Solicitor for Norfolk Southern, expressed his enthusiasm for such systems, stating:

the hot thing at our company is a dynamic braking system that can allow the brakes in one train [to] know where other trains on the line are and brake automatically, which will hopefully prevent collisions. Also, . . . new crossing systems that are being tested . . . make it very difficult for vehicles to cross

\begin{itemize}
\item 34. 23 U.S.C. § 142(f) (1998).
\item 35. Id.
\item 36. E.g. CAL. STS. & HIGH. CODE § 104.12(b) (2001).
\item 38. See generally 49 C.F.R. § 213.1 (2008).
\item 40. See generally 49 C.F.R. § 240.1 (1999).
\item 41. See generally 49 C.F.R. § 238.1 (2002).
\item 42. See generally 49 C.F.R. § 239.1 (2004).
\item 43. See generally 49 C.F.R. § 232.1 (2004).
\item 45. Intelligent Railroad Systems, supra note 44.
\end{itemize}
train tracks when they shouldn't.\textsuperscript{46}

The implementation of such devices will produce the benefits of "making railroad operations-freight, intercity passenger, and commuter-safer and more secure, reducing delays, reducing costs, raising effective capacity, improving customer satisfaction, improving energy utilization, [and] reducing emissions."\textsuperscript{47} To spur implementation, of these systems Michigan is exemplary, where the legislature provides that deployment of traffic control devices may be ordered "at no cost to the freight railroads" to secure high speed rail corridor crossings.\textsuperscript{48} Michigan also calls for state and federal fund expenditures to secure land to build crossings along high speed rail corridors.\textsuperscript{49}

Congress' October 16, 2008 passage of the Rail Safety Improvement Act of 2008\textsuperscript{50} renews a national commitment to safety by mandating that the FRA "shall consider the assignment and maintenance of safety as the highest priority... in railroad transportation."\textsuperscript{51} Toward this end, Congress required the FRA to "develop a long-term strategy" consisting of annual plans and schedules to attain the following goals:

1) Reducing the number and rates of accidents, incidents, injuries, and fatalities involving railroads including train collisions, derailments, and human factors.
2) Improving the consistency and effectiveness of enforcement and compliance programs.
3) Improving the identification of high-risk highway-rail grade crossings and strengthening enforcement and other methods to increase grade crossing safety.
4) Improving research efforts to enhance and promote railroad safety and performance.
5) Preventing railroad trespasser accidents, incidents, injuries, and fatalities.
6) Improving the safety of railroad bridges, tunnels, and related infrastructure to prevent accidents, incidents, injuries, and fatalities caused by catastrophic failures and other bridge and tunnel failures.\textsuperscript{52}

Congress also appropriated upwards of $225,000,000 for each fiscal year from 2009 to 2013 to implement its vision.\textsuperscript{53} It also provided $50,000,000 for the same fiscal years for "Railroad Safety Technology Grants" to railroads and railroad suppliers, as well as State and local gov-

\textsuperscript{46} E-mail from Greg E. Summy, General Solicitor, Norfolk Southern Corporation, to author (Feb. 3, 2008, 13:43 MST) (on file with author).
\textsuperscript{47} Intelligent Railroad Systems, supra note 44.
\textsuperscript{48} MICH. COMP. LAWS § 462.303 (1994).
\textsuperscript{49} MICH. COMP. LAWS § 462.317 (1994).
\textsuperscript{51} Id. § 101 (amending 40 U.S.C.A. § 103(c)).
\textsuperscript{52} Id. § 102 (codified at 49 U.S.C.A. § 20101 note).
\textsuperscript{53} Id. § 3 (amending 49 U.S.C.A. § 20117(a)).
ernments, to deploy train control technologies.\textsuperscript{54} Drawing upon these federal efforts will ensure that future high speed rail development in the U.S. will be a model for safety throughout the world.

\textbf{E) Transit Policy}

The Federal Transit Administration (FTA) also administers a Rail Infrastructure Technology program seeking to improve planning and construction of transit equipment and systems.\textsuperscript{55} Through its joint efforts with University Transit Centers, the program seeks to make safety a larger concern for transit planners by providing more realistic cost forecasts for transit development.\textsuperscript{56} Concerning the risk inherent in track shared by freight and transit operations, such as light rail, the FTA has concluded that little or no increased risk to passengers is entailed.\textsuperscript{57}

\textbf{F) Emergency Legislation}

President Barack Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA) into law on February 17, 2009, making appropriations:

(1) To preserve and create jobs and promote economic recovery.
(2) To assist those most impacted by the recession.
(3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.
(4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
(5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.\textsuperscript{58}

Such appropriations carry "emergency designations" under "pay-as-you-go principles."\textsuperscript{59} Accordingly, the ARRA provides some $8 billion in "Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service" through the end of the 2011-12 fiscal year, as well as $1.3 billion in "Grants to the National Railroad Passenger Corporation" and $6.9 billion in "Transit Capital Assistance" through the end of the

\textsuperscript{54} Id. § 105 (codified at 49 U.S.C.A. § 20158).
\textsuperscript{56} \textit{Rail Technology and Systems Information}, supra note 55.
\textsuperscript{58} American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. § 3 (Enrolled as Agreed to or Passed by Both House and Senate), available at http://thomas.loc.gov/home/approp/app09.html#h1 (following the "H1" link at the upper right of the screen).
\textsuperscript{59} Id. at § 5.
2009-10 fiscal year. These emergency appropriations dwarf Congress' prior funding of high speed rail and other public transit investments to date, including the prior legislation discussed. The ARRA also charts a course for long-term investments that diversify and democratize our critical national transportation infrastructure.

III. LEGAL FRAMEWORKS AND ACTIVITIES IN THE STATES

The FRA has designated eleven major high speed rail corridors across the U.S.:

(1) Pacific Northwest (from Eugene, Oregon to Vancouver, British Columbia); (2) California (from Sacramento to San Diego); (3) Chicago Hub Network (including several cities in Illinois, Indiana, Minnesota, Wisconsin, Missouri, Michigan, and Ohio); (4) South Central (including cities in Texas, Oklahoma, and Arkansas); (5) Gulf Coast (including Houston, parts of Louisiana, Mississippi, Alabama, and Georgia); (6) Florida; (7) Southeast (including North Carolina and South Carolina); (8) Keystone (including Pennsylvania, District of Columbia, and Maryland; (9) Empire State, Northern New England, and Northeast (including New York, Massachusetts, Connecticut, and Montreal, Quebec).

This section analyzes relevant portions of recent State legislation dealing with high speed rail or maglev regulation and development.

A) PACIFIC NORTHWEST

Oregon defines a "high speed rail system" in terms of passenger service "exceeding 79 miles per hour and connecting two or more urban areas." Oregon law deals primarily with settling disputes over ownership of high speed rail crossings. Washington has found "intercity passenger rail services [and] intercity high-speed ground transportation" to be "transportation facilities and services. . .of statewide significance." It furthermore characterizes high-speed rail development as "economic development activities." Thus, the Pacific Northwest has recognized high speed rail as a future economic driver.

60. Id. at Title XII.
64. WASH. REV. CODE § 47.06.140 (2007).
65. WASH. REV. CODE § 43.163.010 (1999).
B) California

The California High-Speed Rail Act governs high speed rail development throughout the state. It created the California High Speed Rail Authority (CHSRA) to design a California High Speed Rail Service with the goal of providing high speed rail as an environmentally friendly alternative to expanding airports and highways in the state by 2020. The California Legislature cited successes in both Europe and Japan to rationalize high speed rail development to compete with short air travel. The legislation emphasized integration of high speed rail service with existing transit systems, such as bus and conventional rail. Accordingly, the CHSRA was charged with planning the system, but ultimate approval of financing options remained with the Legislature and Governor, as did decisions regarding implementation of the plans, including, issuing debt and acquiring rights-of-way.

Subsequently, grants have been provided to fund planning activities along with toll revenues. California also provided for the CHSRA to create guidelines for issuance of securities for eligible highway-railroad crossing safety projects. Debt has been issued to finance high speed rail under the Highway Safety, Traffic Reduction, Air Quality and Port Security Fund of 2006. Finally, the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century was approved in a November 4, 2008 election. Passed as Proposition 1A, the legislation provides State guarantees for some $9.95 billion of the “first phase” costs of the plan while:

establish[ing] rigorous fiscal and legislative controls on the expenditure of state bond funds to ensure that they are directed to construction activities in the most cost effective and efficient way, and ensure that the project will be successfully completed.77

Governor Swarzenegger authorized delaying this ballot initiative un-

68. § 185010.
69. § 185030.
70. §§ 185034-185036.
75. CAL. GOV'T CODE §§ 2704 et. seq.
77. California High-Speed Rail Authority, Questions & Answers, What is Proposition 1A?, http://www.cahighspeedrail.ca.gov/faqs/proposition-1a.htm.
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until 2008, citing the CHSRA’s failure to provide “a business and finance plan that substantiates the viability of the project.” This delay came in the face of the federal government’s determination that the CHSRA had developed an economically viable plan, as discussed above. Despite controversy, California, therefore, has committed itself to leadership in high speed rail development.

C) Chicago Hub Network

Congress provided for the states to enter into compacts to aid the development of high speed rail:

(a) Consent to compacts.—Congress grants consent to States with an interest in a specific form, route, or corridor of intercity passenger rail service (including high speed rail service) to enter into interstate compacts to promote the provision of the service, including—

(1) retaining an existing service or commencing a new service;

(2) assembling rights-of-way; and

(3) performing capital improvements, including—

(A) the construction and rehabilitation of maintenance facilities;

(B) the purchase of locomotives; and

(C) operational improvements, including communications, signals, and other systems.

(b) Financing.—An interstate compact established by States under subsection (a) may provide that, in order to carry out the compact, the States may—

(1) accept contributions from a unit of State or local government or a person;

(2) use any Federal or State funds made available for intercity passenger rail service (except funds made available for Amtrak);

(3) on such terms and conditions as the States consider advisable—

(A) borrow money on a short-term basis and issue notes for the borrowing; and

(B) issue bonds; and

(4) obtain financing by other means permitted under Federal or State law.

Several compacts have since been formed, with differing responsibilities delegated to the resulting regulatory bodies.

By the terms of the Midwest Interstate Passenger Rail Compact (Midwest Compact), the following states are eligible to join: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Da-


kota, Ohio, South Dakota, and Wisconsin. The Midwest Compact empowers a Commission to spend funds from the federal government and the member states to accomplish its objectives, including planning and advocacy for high speed rail development. The Midwest Compact became effective in 2000, when it was ratified by Indiana, Minnesota, and Missouri. To date, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, and Ohio have entered into the Midwest Compact. The Commission currently focuses on garnering support from members of Congress to fund high speed rail in a manner similar to other transportation investments: an "80/20 federal-state split."

The Tri-State High Speed Rail Line Compact (Tri-State Compact) is another compact more bent on execution than planning. Michigan ratified the Tri-State Compact, although Illinois has repealed its membership. Ohio additionally has a Rail Development Commission charged to "develop, promote and support safe, adequate, and efficient rail service throughout the state," including a plan for high speed rail. The State provided that the body shall administer "rail service continuation subsid[ies]" and "acquisition or modernization loan[s]," as well as a Rail Development Fund and Federal Rail Fund for purposes of rail development and rehabilitation. The Rail Development Commission also has

83. MIDWEST INTERSTATE PASSENGER RAIL COMPACT, supra note 82.
84. 45 ILL. COMP. STAT. § 78/5 (2007).
85. IND. CODE § 8-3-22-1 (2008).
86. IOWA CODE § 327K.1 (2007).
88. MINN. STAT. ANN. § 218.75 (2008).
89. MO. ANN. STAT. § 680.200.
90. NEB. REV. STAT. § 74-1601 (2007).
93. THE MIDWEST INTERSTATE PASSENGER RAIL COMPACT, supra note 82.
95. 45 ILL. COMP. STAT. §§ 75/0.01 et. seq. (1996).
96. OHIO REV. CODE ANN. § 4981.03 (West 2008).
97. OHIO REV. CODE ANN. § 4981.04 (West 2008).
98. OHIO REV. CODE ANN. § 4981.05 (West 2008).
99. OHIO REV. CODE ANN. § 4981.09 (West 2008).
100. OHIO REV. CODE ANN. § 4981.091 (West 2008).
authority to issue bonds for rail projects.\textsuperscript{101} While concerted planning efforts in the Chicago Hub Network Corridor have been significant, more financial preparation along the lines of Ohio's experience are necessary to implement high speed rail.

\textbf{D) South Central}

Oklahoma has ratified the Interstate Midwest Regional Passenger Compact.\textsuperscript{102} Texas enacted the Texas High-Speed Rail Act in 1989, and awarded a franchise to the "Texas TGV Consortium" in 1991.\textsuperscript{103} Texas abolished its High-Speed Rail Authority, however, in 1995.\textsuperscript{104} Renewed public support for high speed rail in Texas therefore may be crucial for future development in the South Central Corridor.

\textbf{E) Gulf Coast}

Louisiana established the Interstate 10-12 Corridor Commission to work collaboratively with the state's Department of Transportation and Development and parish governments to bring about "transportation improvement," including "high-speed rail service... into Texas."\textsuperscript{105} Georgia law is speculative, designating passenger rail corridors and waiting for "federal or private funds" to convert those areas to high speed rail development.\textsuperscript{106} Much like the situation in the South Central Corridor, the leadership of Texas, possibly through a new interstate compact, would likely spur development of high speed rail in the Gulf Coast Corridor.

\textbf{F) Florida}

Florida declared that it would "establish a high-speed rail system that links the Tampa Bay area, Orlando, and Miami" by 1995.\textsuperscript{107} Much like the California equivalent, The Florida High Speed Rail Authority Act\textsuperscript{108} was created largely as a palliative of environmental concerns and traffic congestion, and as a "catalyst for economic growth and development."\textsuperscript{109} Unlike the CHSRA, the Florida High-Speed Rail Authority (FHSRA) has wider powers, including ownership of the state's high

\begin{thebibliography}{99}
\bibitem{101} \textit{Ohio Rev. Code Ann.} § 4981.13 (West 2008).
\bibitem{102} \textit{Okla. Stat. Ann. tit. 66, § 328 (West 2008).}
\end{thebibliography}
speed rail system as a corporation. However, the FSHRA is still limited by legislative control over the amount of its debt accumulation. The FSHRA is similarly constrained to legislative designation of initial construction priorities and thereafter local and private financial participation is to guide development.

"Associated development," by the FSHRA or in joint ventures, is also contemplated as a "source of revenue for the establishment, construction, operation or maintenance of the high-speed rail system." Associated development includes: "property, including air rights, necessary for joint development, such as parking facilities, retail establishments, restaurants, hotels, offices, or other commercial, civic, residential, or support facilities, and may also include property necessary to protect or preserve the rail station area by reducing urban blight or traffic congestion. . ." Purchases or leases of property by the FSHRA, not including associated development, are exempted from certain state taxes when they become part of the system; as are the sales and income from securities issued by the FSHRA or on its behalf. Florida's broader view that recognizes the economic vitality that high speed development will attract into surrounding areas should be a selling point for other States considering their own projects.

G) Southeast

North Carolina and Virginia formed the Virginia-North Carolina Interstate High-Speed Rail Compact. This agreement is also focused on planning and advocacy through a Commission. South Carolina designated its Division of Mass Transit to receive "federal and other funds for...high-speed rail planning and development." Whether in pairs or larger coalitions, compacts move States closer to implementing high speed rail as they share a common goal, and the resources necessary to attain it.

H) Keystone

By the terms of the Interstate High Speed Intercity Rail Passenger Network Compact (Network Compact), the following states are eligible

111. § 341.822(2).
to join: Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, and West Virginia.\textsuperscript{119} The Network Compact sought a joint effort to examine the feasibility of a high speed rail line connecting major cities in the member states.\textsuperscript{120} The regulatory body it created was the Interstate Rail Passenger Advisory Council.\textsuperscript{121} Illinois,\textsuperscript{122} Indiana,\textsuperscript{123} Michigan,\textsuperscript{124} New York,\textsuperscript{125} Ohio,\textsuperscript{126} and Pennsylvania\textsuperscript{127} joined the Network Compact. Pennsylvania also enacted the High Speed Intercity Rail Passenger Commission Act\textsuperscript{128} that created a High Speed Intercity Rail Passenger Commission\textsuperscript{129} responsible for planning high speed rail in the state,\textsuperscript{130} in cooperation with the Federal government and the Interstate Rail Passenger Advisory Council.\textsuperscript{131} More work on funding the shared plans of the States in the Keystone Corridor is now necessary.

I) Empire State

Beyond joining the Network Compact, New York has authorized the issuance of close to $1.5 billion in bonds for transportation improvements, including intercity rail improvements.\textsuperscript{132} Indiana has created a High Speed Rail Development Fund\textsuperscript{133} and an Industrial Rail Service Fund\textsuperscript{134} that provide financial support for its membership in high speed rail compacts. Illinois similarly authorized its Department of Transportation to determine its financial obligations in its high speed rail and maglev development organizations by agreements.\textsuperscript{135} Similar financial planning can assist other areas seeking to expedite high speed rail development.

J) Northern New England

New Hampshire also provided $85,000 of certain railroad taxes to aid feasibility study of a high speed rail line connecting Boston and Montreal,

\begin{itemize}
  \item \textsuperscript{119} \textit{E.g.}, \textit{N.Y. Transp. Law} § 19 (2008).
  \item \textsuperscript{120} \textit{E.g.}, § 19 at art. I.
  \item \textsuperscript{121} \textit{E.g.}, \textit{Ind. Code} § 8-3-19-1 (2008) (described at art. III).
  \item \textsuperscript{122} \textit{45 Ill. Comp. Stat.} 70/1 (2007).
  \item \textsuperscript{123} \textit{Ind. Code} § 8-3-19-1.
  \item \textsuperscript{124} \textit{Mich. Comp. Laws} § 462.71 (2008).
  \item \textsuperscript{125} \textit{N.Y. Transp. Law} § 19.
  \item \textsuperscript{126} \textit{Ohio Rev. Code. Ann.} § 4981.35 (2008).
  \item \textsuperscript{129} § 683.
  \item \textsuperscript{130} § 684.
  \item \textsuperscript{131} § 685.
  \item \textsuperscript{132} \textit{N.Y. Transp. Law} § 480 (2008).
  \item \textsuperscript{133} \textit{E.g.}, \textit{Ind. Code} § 8-23-25-4 (2008).
  \item \textsuperscript{134} \textit{Ind. Code} § 8-3-1.7-2 (2008).
  \item \textsuperscript{135} \textit{20 Ill. Comp. Stat.} § 2705/2705-450 (2009).
\end{itemize}
Support for high speed rail in Connecticut is more abstract, where it has empowered a Commissioner to "engage in experimental projects relating to any available or future mode of transportation, including but not limited to, high speed rail service."  

K) NORTHEAST

The Northeast Corridor is characterized by federal regulation, through Amtrak, because Congress found the corridor particularly important to the nation. Specifically, Amtrak has authority to develop high speed rail in the corridor to serve Boston, Massachusetts, the District of Columbia, and intermediate intercity markets. Just over $2 billion in appropriations for the corridor have already been authorized by Congress. Consequently, Congress foreclosed the Northeast Corridor from eligibility for "high-speed rail assistance." Final system plans for the United States Railway Association aspire to coordinate efforts by the National Railroad Passenger Corporation and similar entities to identify corridors where "upgrading rail lines for high-speed passenger operation would return substantial public benefits."

IV. THE TRANSITION FROM PLANNING TO IMPLEMENTATION

The staggering costs involved in transforming existing rail infrastructure to accommodate high speed service, or building dedicated lines from the ground up, is a major stumbling block for implementation of the planning activities described above. Even with the recent increases in federal attention to and funding of high speed rail development, the capital necessary to construct new national high speed rail projects, or renovate existing rail infrastructure to accommodate high speed service, easily exceeds the billions already allocated. China, for example, has committed "a quarter-trillion dollars" to continue developing its high speed rail services. In addition to public funding, therefore, other fi-
nancing sources are critical to bridge the gap from planning to implementation.

A) The California Business Plans

An example is California, where the California High-Speed Rail Authority devised a Business Plan ("2000 CHSRA Plan") in June 2000 that estimated funding requirements of $24.97 billion under a "phased financing" plan.\textsuperscript{147} In contrast to a "full financing" alternative, the phased plan would have funded the project over time, recognizing the incremental nature of the development process required by the strictures of federal environmental law and funding requirements.\textsuperscript{148} Revised financial estimates, however, put the figure near $45 billion for the system linking major cities from Sacramento to San Diego.\textsuperscript{149}

The 2000 CHSRA Plan would have relied on "1/4-cent statewide sales tax revenue," "sales tax bond net proceeds," "commercial paper net proceeds," "other funding sources," and interest to fund its high-speed rail system.\textsuperscript{150} Federal funding under the Transportation Infrastructure Finance and Innovation Act (TIFIA) is another potential resource.\textsuperscript{151} The CHSRA Plan also remarked, "[f]reight revenues could be a source of funding for constructing and operating the high-speed train system, if sufficient freight operations were to occur."\textsuperscript{152}

Subsequent to the passage of Proposition 1A in 2008, the largest chunk of financing will come from bonds backed by the State of California.\textsuperscript{153} Such "private activity bonds" may be tax-exempt under federal law.\textsuperscript{154} "High-speed intercity rail facility bonds are exempt facility bonds if 95% of the net proceeds of the bond issue are used to provide a high-speed intercity rail facility, and all of the property financed by the issue is owned by a governmental unit."\textsuperscript{155} Owners of any remaining property financed by the bonds must make an "irrevocable election not to claim depreciation or any tax credit with respect to the bond-financed prop-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{147} California High Speed Rail Authority, 6.0 Funding and Building the System 5-6, June 2000, available at http://www.cahighspeedrail.ca.gov/images/chsr/20080117120711_Plan_6.pdf.
  \item \textsuperscript{149} California High-Speed Rail Authority, Questions & Answers, Financing/Costs, http://www.cahighspeedrail.ca.gov/faqs/financing.htm.
  \item \textsuperscript{150} Funding and Building the System, supra note 147 at 3.
  \item \textsuperscript{152} Funding and Building the System, supra note 147 at 3.
  \item \textsuperscript{154} Mertens Law of Federal Income Taxation § 8.54 (Revised by Gina M. Torielli 2008).
  \item \textsuperscript{155} Id. (citing I.R.C. § 142(a)(11) (2008)).
\end{itemize}
\end{footnotesize}
All proceeds from tax-exempt bonds must be spent within three years of issuance, or applied toward redemption of outstanding bonds. As is the case in California, a high speed rail agency’s ability to issue debt may be constrained by legislative, executive, or popular control.

Based on “conservative estimates,” the 2000 CHSRA Plan promised to “return twice as much financial benefit to” California in its first twenty years, generating “$900 million in annual revenues” and “an annual operating surplus of more than $300 million.” Expectations from the CHSRA’s most recent 2008 Business Plan further project an overall economic impact of “$150 billion in measurable present value benefits—approximately three times the present value of the train’s capital and operational costs over the next 40 years.” Accordingly, some $11 billion in “direct benefits to Californians” are expected in 2030, such as: “320,000 permanent jobs,” “12 billion pounds” of avoided carbon dioxide emissions, and some 55 million passenger trips generating revenues of some $2.4 billion.

B) Attracting Private Investment

This confidence in revenues also suggests that project financing may be attractive for private investors. As such, the CHSRA 2008 Business Plan envisions “public private partnerships” and “local support” to round out financing sources in addition to the State and federal funds already discussed. Specifically concerning private investment,

“[n]on-recourse project financing” is a type of financing in capital-intensive industries in which a project’s financial backing is based upon the ability of the project’s potential cash flow to pay off project debt, rather than relying upon the credit-worthiness of the project sponsors. Under this type of project financing, the debt, equity, and credit enhancement are combined for the construction and operation of a facility. The assets of the facility, including the long-term revenue producing contracts, become the collateral or the lenders.

156. Id. (citing I.R.C. § 142(i)(2)).
157. Id. (citing I.R.C. § 142(i)(3)).
158. See PART III, supra at B.
160. BUSINESS PLAN 2008 SUMMARY, supra note153 at 1.
161. Id.
162. See id.; SUMMARY OF THE HIGH-SPEED RAIL SYSTEM BUSINESS PLAN, supra note 159 at 2.
163. BUSINESS PLAN 2008 SUMMARY, supra note 153 at 2.
Federal guarantees may also be necessary to enhance private interest in undertaking the risk of operating losses entailed in project financing.\textsuperscript{165} Increased private investment, and complementary private operation, may also allay critics who cite Amtrak's lack of profitability to discourage future public investment in high speed rail.\textsuperscript{166}

Freight service on the high speed lines could also provide "credit enhancement" for high speed rail projects, as committed buyers of the service will augment future revenue returns.\textsuperscript{167} The 2000 CHSRA Plan suggested that freight service could provide valuable financing for implementation costs associated with high speed rail development, especially if freight operations were linked to passenger service cars.\textsuperscript{168} Due to the track congestion that conventional freight services entail, dedicated lines for high speed rail service are usually advocated to keep speeds up.\textsuperscript{169} With the advent and further refinement of Intelligent Railroad Systems, however, freight and passenger services may be able to share track more safely and efficiently.\textsuperscript{170} Thus, synchronizing freight operations to passenger service schedules, and linking freight and passenger cars, would eliminate conventional congestion and safety concerns, and enhance financing.

C) Changing the Multimodal Balance

Although high speed rail is typically marketed as an alternative to airline travel, consideration of high speed rail freight service would necessitate a contemporary shift away from certain regional motor carrier operations providing similar services now.\textsuperscript{171} The FRA's Intermodal Transportation and Inventory Cost (ITIC-IM) Model is a valuable tool for confronting the economic feasibility of changing from motor carriers to rail freight service in the face of dynamic market conditions.\textsuperscript{172} Sample data in the documentation accompanying the ITIC-IM suggests that intermodal freight poses a cost-effective alternative to truck transporta-
tion in terms of "annual logistics costs," and that savings are accentuated as the speed of rail service increases. While some uncertainty over freight access to new high speed rail lines exists, public policy can still adapt to allow this option to front part of the hefty bill.

Such changes in the multimodal balance could portend future legal battles as high speed rail development changes the dynamics of business allocation in passenger and freight transportation, as motor carriers and airlines will seek to retain their market positions. Southwest Airlines fought development of high speed rail in Texas, when high speed rail development threatened its dominance of the "short-to-medium distance market" in the State. Although the court dispute ultimately resolved itself through an analysis of whether the Texas High-Speed Rail Authority had waived its governmental immunity, the practical resolution came when Texas' chosen high speed rail franchisee defaulted. Current portents of the intermodal shift to come in the U.S. include the downsizing and service reductions at Air France, in the face of competition from intercity high speed rail for passengers in France. By investing in high speed rail service, and changing the multimodal balance, however, California estimated savings of $12 billion in operating costs by 2050 for airlines and $13.6 billion in "highway-related benefits," including avoided accident costs and reduced congestion. Extrapolating to other markets, the American Planning Association has noted that "U.S. airports are nearing saturation," and "[m]ore than half of all flights in and out of U.S. airports are less than 500 miles," meaning that high speed rail can provide a more efficient alternative to compete with most current air travel in this nation, and also expand capacity to accommodate future demand.

D) ENHANCING POPULAR SUPPORT

Whether by taxation, administering direct grants and guarantees, controlling debt issuance, or resolving intermodal disputes, governmental mechanisms will largely control funding the advancement of high speed

174. See generally Powell, supra note 103 at 1091.
175. Id. at 1094-95.
176. Id. at 1135-37.
178. SUMMARY OF THE HIGH-SPEED RAIL SYSTEM BUSINESS PLAN, supra note 159 at 3.
179. Shelly Poticha, Transportation in the Multi-City Regions in SMART GROWTH IN A CHANGING WORLD 51-52 (Jonathan Barnett, ed, 2007) (illustrating the current airport saturation in Figure 4-5).
rail in the U.S. Therefore, popular support, reflected in the policy forwarded by elected governmental officials, is a key to successful implementation of the existing high speed rail service plans. Wavering public support led to the preliminary failure of a Transrapid maglev project in Germany.\textsuperscript{180} Conversely, the enhanced power of government in China may have made their decision to develop high speed rail easier as it built the first commercial high speed maglev route which began revenue service in January 2004.\textsuperscript{181} Recently, the Committee on Senate Banking, Housing and Urban Affairs heard testimony regarding the establishment of a National Infrastructure Bank,\textsuperscript{182} proposed by Senator Hagel, and modeled after the European Investment Bank, that would use a $60 billion initial appropriation to catalyze private investment in infrastructure improvements, including a "railway that is as good as Europe's."\textsuperscript{183} Authorizing the National Infrastructure Bank to issue "long bonds" that mature in up to fifty years, and to provide subsidies of "credit insurance, interest rate discounts, or even grants," would constitute a huge step forward in putting State high speed rail plans into action.\textsuperscript{184}

Without risking paternalism, or even socialism, in continuing high speed rail development policy, another way to gauge public support is to enhance public participation in the planning process. The federal government is already implementing pilot programs that encourage public participation in the transit planning process.\textsuperscript{185} Also, the FTA's work in encouraging Transit Oriented Development is important for the public to practically use new high speed rail.\textsuperscript{186} Integrating high speed rail into intermodal transportation hubs, like the San Francisco International Airport, will make high speed rail accessible and competitive in the intercity transportation market.\textsuperscript{187} California meets this need by accommodating high speed rail development into airport facilities.\textsuperscript{188} Florida also recog-
nized the benefits of high speed rail in the urban development overflow of "associated development."189 Such associated development has already occurred around railroads in Texas.190 If the public is more involved in planning, and continuing urban development and renewal provides a lifestyle conducive to using transit systems, including intercity high speed rail, advocacy for enhanced public funding may become more robust.

Mobilizing public support, however, presents a significant hurdle for bridging the gap from planning to implementing high speed rail in the U.S., given the spirit of individualism that permeates this nation. In this vein, the centuries-old commentary of Alexis de Tocqueville largely still rings true: "[the] American way [is] relying on [oneself] alone to control [one's] judgment."191 Thus, if the public fails to support bond initiatives to raise capital for high speed rail, or appears unreceptive to transit oriented development, market forces will provide the extra impetus to surmount the current challenges in enhancing transportation infrastructure in the U.S.

V. THE PUSH FROM ENERGY MARKET FORCES

Former President George W. Bush recently stated, "America's got to change its habits; we've got to get off oil[ . . . ] Until we change our habits, there's going to be more dependency on oil."192 The existing high speed rail development structure entails a choice among technological alternatives that rely on different power sources for locomotion, namely: diesel, electricity,193 and electromagnetism.194 In an environmentally-sensitive age, society is perhaps more motivated to develop high speed rail technologies that will rely less on fossil fuels, especially foreign oil.195 Since adherence to conventional scarce energy resources for transportation also dictates war and peace, the market becomes another potent factor on this choice as never before.

Spiking oil prices in 2008 showed the dangers inherent in the prevail-
High Speed Rail

ing undiversified transportation fuel situation.\footnote{196} High and volatile gasoline prices decreased consumer demand for automobiles.\footnote{197} High liquid fuel prices, and the weak dollar, even translated to higher food prices.\footnote{198} High fuel prices have also forced airlines to cut costs, service routes, and jobs, while increasing fares.\footnote{199} As for motor carriers, independent truckers vociferously protested in Washington for relief, one Pennsylvania trucker saying, "[i]f we don’t do something, then the next time you see us, we’ll be in the welfare line[,] There are so many people here hurting."\footnote{200} "Environmentalists, hunters, landowners, and lawmakers" also have rallied to stop domestic oil and gas production.\footnote{201} These outcries show that the rising costs of conventional transportation fuels put parts of the transportation business at risk. At the same time, they highlight an opportunity to diversify and change.

The current energy economy thus provides an atmosphere that should prompt high speed rail planners to choose electrified systems. France adopted a Grand Strategy to power its intercity rail with nuclear and hydroelectric generation.\footnote{202} It subsequently reduced its carbon emissions from liquid fuels by some 34\% in 2000; meanwhile, the U.S. increased its emissions by 2.4\% during the same timeframe.\footnote{203} Indicating a break from this shameful record, President Obama made environmental stewardship part of his campaign platform in 2008.\footnote{204}

Although the electrification of high speed rail corridors may present an unwarranted expense under some analyses,\footnote{205} integrating distributed wind technology into the high speed rail corridors holds the potential to

\footnote{196} Energy Information Administration, \textit{This Week in Petroleum}, http://tonto.eia.doe.gov/oog/info/twip/twip.asp (showing the recent volatility in retail gasoline prices in a chart on the upper left).
\footnote{197} Bunkley, \textit{supra} note 195.
\footnote{202} Drake, \textit{supra} note 171.
\footnote{203} \textit{Id}.
\footnote{204} Maeve Reston and Paul Richter, \textit{McCain Stresses Cooperation in L.A. Speech on Foreign Policy}, \textit{L.A. Times}, Mar. 27, 2008 (viewed online on March 27, 2008 at http://www.latimes.com) (quoting John McCain's statement that we need to be "good stewards of our planet"); Salena Zito and Mike Wereschagin, \textit{Clinton Reaches to Her Choir}, \textit{Pittsburgh Tribune Review}, March 15, 2008 (citing opinion of Pennsylvania Governor Ed Rendell that Hillary Clinton would be better in "developing renewable energy resources" than both Barack Obama and John McCain).
\footnote{205} \textit{Transportation Economics & Management, Inc.}, \textit{supra} note 193 at 2-18.
recover these expenditures by making the infrastructures de facto power plants. The wind created by trains is aptly illustrated by the “Kinetic Light Air Curtain” at the Denver International Airport,

a grouping of 5,280 propellers laid out on a grid system that changes from tight to loose configurations as the train passes. The propellers are made of reflective stainless steel and are 12” in diameter... The propellers are activated by physical phenomena already existing in the tunnel, including... wind generated by the movement of the train.206

Micro turbine technology exists to turn this art into a real power plant model, but further commercial development of the technology for this application is necessary.207 Uses of wind electricity generated from trains in operation can power Intelligent Railroad Systems and other new safety technology; security enhancements, including surveillance systems; and onboard amenities like electrical and internet connections for passengers. Since the high speed rail planning process is still underway, the necessary adaptation to accommodate this efficiency innovation is possible. Exploring this energy opportunity will put consumers in control of a new electrical supply through their decision to use high speed rail, democratizing the energy marketplace.208 Making high speed rail corridors into electric power plants will also enhance the financial viability of these expensive projects.

National security concerns from the reliance on imported liquid transportation fuels will also be alleviated by choosing electrification, due primarily to the abundance of U.S. coal resources.209 The U.S. has the moniker “Saudi Arabia of coal” due to the abundance of domestic reserves, of which half are federally owned.210 Although electricity developed with coal entails “environmental concerns,”211 they could be limited in a system that efficiently captures and uses the wind energy produced by the trains in operation.

Notwithstanding the environmental and national security advantages of developing high speed rail over other alternatives, the high price of gasoline has already convinced consumers across the U.S. to rely on mass


208. See VIJAY V. VAITHEESWARAN, POWER TO THE PEOPLE 23 (2003).


210. Id. at 9-2.

211. Id. at 9-1.
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transit. New York, Boston, San Francisco, Miami, Charlotte, and Denver are among the major cities where mass transit ridership has increased five percent or more in the first quarter of 2008. Additionally, transit managers forecasted public transportation to grow by five percent nationally in 2008, the most robust growth in over a decade. Extrapolating these trends to a complementary intercity high speed rail market indicates a strong potential ridership base.

Meanwhile, freight railroads are investing more heavily in track improvements and expansion than at any point in the last century: $10 billion since 2000, with another $12 billion investment planned. Adding capacity and straightening track has allowed the railroads to expand from shipping traditional railroad commodities to more finished goods, enhancing competition with long-haul motor carriers that use up to three times more fuel. Thus, the railroads seem well prepared to accept a greater role in providing transportation services throughout the U.S., and are "urging Congress to pass a railroad investment tax credit" for improvements in intercity rail corridors.

VI. CONCLUSION: REGIONAL HIGH SPEED RAIL IN 2050

As the second decade of high speed rail regulation continues in the U.S., current market forces and inadequate infrastructure capacity may turn the public's favor back to trains, with the help of the government. Since the 1930's, the federal government has steadily moved the U.S. away from its trains, starting with the efforts of Franklin Roosevelt to thin "fat-cat railroad barons." The liquid fuel industry, as well as manufacturers of individual automobiles, later had great influence on the steady realization of Dwight Eisenhower's interstate highway vision disfavoring passenger rail. Today, congestion in all modes is commonly documented, especially on the highways. To wit, Kenneth Hoffman, a member of the Transportation Lawyers Association, recently commented that the highway congestion problem is so bad in certain areas that trips on the interstate highway take longer now than before the interstate sys-

213. Id.
214. Id.
215. Machalaba, supra note 190.
216. Id.
217. Id.
218. Richmond, supra note 7 at 6-7.
220. See REGIONAL PLAN ASSOCIATION, supra note 187 at 9.
tem was built.\textsuperscript{221}

Advancing from the current situation, America 2050: A Prospectus (Prospectus) provides a vision of the U.S. halfway through the 21st century as a patchwork of "globally competitive megaregions" connected by "a world class multimodal transportation system," forming a "national framework for prosperity, growth, and competitiveness."\textsuperscript{222} The Prospectus identifies confronting land use strategies that "force reliance on personal automobiles" and creating "new capacity... in roads, rails, airports, seaports and other systems" as major challenges for the years ahead.\textsuperscript{223} To pay for these improvements, the Prospectus envisions:

new financing methods that leverage private capital to build strengthened, expanded transportation networks of high-speed rail, improved metropolitan commuter rail, smart highways, seaports and airports connected at multimodal transportation hubs. Congestion pricing and user fees will reinvest transportation-generated revenue into maintaining and expanding the systems.\textsuperscript{224}

This sentiment that the government must work with the private sector to fund infrastructure improvements, including high speed rail, promises to "create economic integration among various regions."\textsuperscript{225} Recognizing this benefit, many States have been working to attract private investment through bond initiatives, by encouraging development around new high speed rail services, and by joining compacts to leverage their administrative and financial resources.

Thinking on a regional level will furthermore provide long-term stability via strength in numbers and economic leverage. Operating new railways will provide jobs to fuel our economy through the recessions of the next fifty years. Moving to rail will democratize transportation by enhancing choices for the public. Enhancing choice will insulate our national economy from the adverse economic consequences of systemic reliance on the volatile fossil fuel markets. Efficiency benefits from rail can also be reaped in both passenger and freight services.

A) The Rocky Mountains and the West: A 2050 Vision

Recently, "representatives of the Colorado Department of Transportation, communities along [Interstate 70] from Golden to Glenwood Springs, the trucking and ski industries, and transit and highway advo-

\textsuperscript{221} Kenneth Hoffman, Transportation Business Law Lecture at the University of Denver Sturm College of Law (Apr. 21, 2008) (commenting on congestion plaguing the stretch on Interstate 35 between Dallas and San Antonio).
\textsuperscript{222} \textsc{Regional Plan Association}, supra note 187 at 3.
\textsuperscript{223} Id. at 8.
\textsuperscript{224} \textsc{Regional Plan Association}, supra note 187 at 17.
\textsuperscript{225} Zaidi, supra note 61 at 339.
"High Speed Rail" approved an “historic agreement” to widen the highway and provide for a new mass transit system by 2025.\textsuperscript{226} Traffic on the Interstate 70 corridor between Denver and several world class ski areas, mostly in the westward Summit and Eagle Counties, has increased steadily over the last two decades.\textsuperscript{227} To pay the “$5 billion to $10 billion” price tag on these corridor improvements, including high speed rail, congestion pricing mechanisms suggested by local lawmakers have encountered intense political opposition.\textsuperscript{228} Therefore, the public demands better assurance that such short-term sacrifices will fund infrastructure improvements with long-term benefits. Given the capital intensiveness of high speed rail development, supporting it is necessarily an investment in the future.

Following the template of similar high speed rail projects in the U.S., the Interstate 70 corridor needs high speed rail assistance in the form of necessary funds and FRA expertise to guide its high speed rail planning. The Rocky Mountain Rail Authority began studying the feasibility of high speed rail development in Colorado in 2008.\textsuperscript{229} To date, however, the entire Rocky Mountain region, including Denver and the Interstate 70 corridor, lacks recognition as a designated high speed rail corridor.\textsuperscript{230} Until the political will supporting high speed rail in this area gains the federal government’s attention, Colorado would do well to prepare taxation plans including tax incentives for associated development and improvements of existing track, while attracting other private financing for the Interstate 70 project by creating an agency to administer direct grants and guarantees, and control issuing tax exempt long bonds. In the event that a National Infrastructure Bank becomes a reality, exerting pressure in Congress should also be a chief concern among the State’s representatives therein.

Assuming federal spending continues, as exemplified by the recent doling out of some $8 billion for high speed rail in the ARRA, building coalitions across state lines to will be essential to enhance the lobbying power within Congress for the Interstate 70 project, and others in the Rocky Mountain West. Additionally, if the communities supporting high speed rail along Interstate 70 expand their vision westward, they may find eager partners in Utah for an interstate compact. Regional planners have already shared a vision for connecting the “Front Range” from Laramie

\textsuperscript{228} \textit{Id.}
\textsuperscript{230} Bureau of Transportation Statistics, \textit{supra} note 61.
County, Wyoming down to Albuquerque, New Mexico. Accordingly, Denver's Union Station would be converted into a world class transit port, instead of a museum; as this author can attest, several gates in the current terminal, like the gate for the Portland Rose line, are merely façades. Furthermore, high speed rail development along Amtrak's California Zephyr line, through the Rocky Mountains to Northern California, provides the vision for a more trans-continental Interstate 70 expansion starting from Denver.

Given the current market forces favoring high speed rail development, the problem on Interstate 70 reiterates that financing is the fundamental challenge of building the next transcontinental railroad in the U.S. As the private railroads are already eagerly investing in corridor improvements, they should be viewed as valuable partners in developing high speed rail. Other industries should consider partnerships as well, particularly those that depend on tourism and travel. Coordinated efforts among neighboring communities and States, to effectively use their combined resources to enhance and improve rail services, can be accomplished through new interstate compacts aimed at implementing existing plans.

B) A NEW MULTIMODAL BALANCE

Meanwhile, the federal government should continue to follow the lead of China, and make its financial commitment to high speed rail projects in the States meaningful and long-term. If high speed rail is to compete with automobiles and airplanes, it should be funded at a commensurate level. Such a commitment would help realize the larger vision of making the multimodal transportation system in the U.S. the envy of the world for safety and efficiency. The ARRA is a strong starting point for this long-term commitment. As this commitment continues to develop, transportation industries must brace themselves for new business niches, and transportation lawyers must prepare their clients for a dynamic future in the multimodal business of moving people and freight.

232. Id.
I. INTRODUCTION

This review provides an analysis of the current conditions of bridges in the United States, examples of bridge failures and maintenance deficiencies, and a synopsis of personal injury remedies and defenses available to injured parties as a result of bridge failures. Specifically, the I-35W Minneapolis, Minnesota Bridge collapse that occurred on August 1, 2007, will be examined. As of December 2007, the Federal Highway Administration (FHWA) determined that of the approximately 599,766 private and public vehicular and railroad bridges built and maintained in the United States, nearly 72,524 bridges are structurally deficient, representing 12.1% of the total number of bridges in the United States.¹ The scope of this review is further narrowed to design errors; corrosion and struc-

¹ See Fed. Highway Admin., U.S. Dep't Transp., Deficient Bridges by State and
tural fatigue; and construction, repair and maintenance failures; similar to those identified in the I-35W Bridge collapse. The personal injury remedies available to victims of the I-35 W Bridge collapse include litigation, settlement negotiations, and compensation fund options. The injured parties from the I-35W Minneapolis Bridge collapse have potential claims of action against the State of Minnesota for negligence and the contractor and subcontractor performing bridge renovation at the time of collapse.

In lieu of legal action, the injured parties may opt to accept compensation from proposed funds currently approved by the Minnesota State Legislature and under review by the Governor.2

II. BRIDGE CONDITIONS

In the United States, safety issues continue to emerge as a result of bridge construction, maintenance, and repair. As recent as March 2008, the Pennsylvania Department of Transportation (PennDOT) closed a section of the I-95 highway leading to the Philadelphia Bridge due to discovery of a 6-foot crack in a 40-year-old pillar as depicted in Figure 1 below. The bridge was not scheduled for inspection for another year based on the two year federal bridge inspection cycle.3 In 2007, many witnessed the aftermath of the I-35W Bridge collapse in Minneapolis, Minnesota; 13 people died and another 145 suffered injuries.4 As identified in Table 1, as of December 2007, the US Department of Transportation (US DOT), Federal Highway Administration (FWHA) assessed 72,524 bridges and deemed them structurally deficient.5 Of the 599,766 bridges across the United States, that number represents 12.1% of the total.6 Tables 2 and 3 illustrate FHWA bridge statistics by year built, age and condition (1948-2007).7

Both the I-95 Philadelphia and I-35W Minneapolis Bridges were classified as “structurally deficient” in the National Bridge Inventory (NBI) Database prior to their respective failures.8 An NBI “sufficiency

6. See id.
rating” of less than 50 percent “qualifies a bridge for federal replacement funding.” The I-95 Philadelphia Bridge was last inspected on October 2, 2007, five months before its need for repair was discovered. At that time, it received a “sufficiency rating” of 51 percent. The I-35W Minneapolis Bridge was last inspected on June 22, 2007, two months in advance of its collapse, with a “sufficiency rating” of 50 percent. As a result of these actual failures, there is great cause for concern regarding the 72,524 bridges currently categorized as structurally deficient. Kevin Womack, Professor of Civil Engineering at Utah State University, surmised “chances are we will have something occur in the future, [in] the next year or two, that will probably take lives again.”

Figure 1: 6 foot crack in the pillar of the I-95 Philadelphia Bridge.

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9. Nussbaum, supra note 8, at A01.
10. Id.
11. FHWA Structure Inventory and Appraisal, supra note 8.
13. Id.
TABLE 1: FHWA DEFECTIVE BRIDGE STATISTICS

<table>
<thead>
<tr>
<th></th>
<th>Number of Bridges</th>
<th>Number of Structurally Deficient Bridges</th>
<th>Number of Functionally Obsolete Bridges</th>
<th>Number of Deficient Bridges</th>
</tr>
</thead>
<tbody>
<tr>
<td>NHS Bridges</td>
<td>116,145</td>
<td>6,160</td>
<td>17,149</td>
<td>23,309</td>
</tr>
<tr>
<td>Non-NHS Bridges</td>
<td>483,621</td>
<td>66,364</td>
<td>62,643</td>
<td>129,007</td>
</tr>
<tr>
<td>Totals</td>
<td>599,766</td>
<td>72,524</td>
<td>79,792</td>
<td>152,316</td>
</tr>
</tbody>
</table>

Table includes 50 U.S. States, District of Columbia and Puerto Rico as of December 2007. NHS - National Highway System

TABLE 2: FHWA BRIDGE STATISTICS BY YEAR BUILT, AGE AND CONDITION (1948-2007)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Condition</td>
<td>Age in Years→</td>
<td>0-9</td>
<td>10-19</td>
<td>20-29</td>
<td>30-39</td>
<td>40-49</td>
</tr>
<tr>
<td>Structurally Deficient Bridges</td>
<td>0</td>
<td>1,852</td>
<td>3,327</td>
<td>8,039</td>
<td>13,338</td>
<td>11,448</td>
</tr>
<tr>
<td>Functionally Obsolete Bridges</td>
<td>0</td>
<td>7,455</td>
<td>6,587</td>
<td>10,331</td>
<td>19,406</td>
<td>12,821</td>
</tr>
<tr>
<td>Deficient Bridges</td>
<td>0</td>
<td>9,307</td>
<td>9,914</td>
<td>18,370</td>
<td>32,744</td>
<td>24,269</td>
</tr>
<tr>
<td>Total Bridges</td>
<td>62,881</td>
<td>82,748</td>
<td>77,489</td>
<td>91,162</td>
<td>107,433</td>
<td>62,797</td>
</tr>
</tbody>
</table>

Table includes 50 U.S. States, District of Columbia and Puerto Rico as of December 2007.

TABLE 3: FHWA BRIDGE STATISTICS BY YEAR BUILT, AGE AND CONDITION (PRIOR 1904-1947)

<table>
<thead>
<tr>
<th>Year Built</th>
<th>1938-1947</th>
<th>1928-1937</th>
<th>1918-1927</th>
<th>1907-1917</th>
<th>Prior 1904</th>
<th>No Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Condition</td>
<td>Age in Years→</td>
<td>60-69</td>
<td>70-79</td>
<td>80-89</td>
<td>90-100</td>
<td>&gt;100</td>
</tr>
<tr>
<td>Structurally Deficient Bridges</td>
<td>8,272</td>
<td>12,616</td>
<td>5,908</td>
<td>3,771</td>
<td>3,514</td>
<td>93</td>
</tr>
<tr>
<td>Functionally Obsolete Bridges</td>
<td>5,875</td>
<td>9,168</td>
<td>4,157</td>
<td>1,758</td>
<td>1,947</td>
<td>130</td>
</tr>
<tr>
<td>Deficient Bridges</td>
<td>14,147</td>
<td>21,784</td>
<td>10,065</td>
<td>5,529</td>
<td>5,461</td>
<td>223</td>
</tr>
<tr>
<td>Total Bridges</td>
<td>32,794</td>
<td>46,948</td>
<td>17,491</td>
<td>7,797</td>
<td>9,033</td>
<td>604</td>
</tr>
</tbody>
</table>

Table includes 50 U.S. States, District of Columbia and Puerto Rico as of December 2007.

Of additional concern is the fact that privately owned bridges in the United States are not subject to inspection requirements incorporating the National Bridge Inspection Standards (NBIS). The FHWA confirmed that "the FHWA does not know if privately owned highway bridges are inspected using the NBIS or other standard," and to what extent privately owned highway bridges are maintained. The NBIS

14. DEFICIENT BRIDGES BY STATE AND HIGHWAY SYSTEM, supra note 1.
16. See id.
18. Id.
identify three cycles of inspection for bridges: inspections at (1) regular intervals within twenty-four months; (2) less than twenty-four months with level and frequency based on age, traffic considerations, and known deficiencies; and (3) greater than twenty-four month intervals and less than forty-eight month intervals with FWHA written approval.

Various agencies in the United States have been diligently addressing these concerns with government officials from the respective States where these structurally deficient and functionally obsolete bridges have been identified in the NBI Database. Ms. Mary E. Peters, Secretary of Transportation, has been working with Congress to expedite the making of new laws and the funding to address the deficiencies identified in the required inspections. On October 30, 2007, legislation was introduced in the House of Representatives identified as the Bridge Reconstruction and Inspection Act of 2007, H.R. 3999 IH, at the 100th Congress, 1st Session. This Act was to amend Title 23 USC for improving the safety record of the federal-aid highway bridges, to strengthen the inspection standards and processes, and to provide funds for reconstructing structurally deficient bridges. In addition, the Safety Board issued an NTSB Safety Recommendation, H-08-1, on January 15, 2008, which specifically requires bridge owners to determine load capacity using calculations including structural elements of non-load-path-redundant steel truss bridges within the NBI Database, for bridges designed and constructed similar to the I-35W Bridge in Minneapolis.

The FHWA NBI Database further classifies deficient bridge conditions as structurally deficient, functionally obsolete and deficient. Structurally deficient bridges are bridges with reduced load carrying capacity due to deterioration in significant load-carrying bridge elements. Functionally obsolete bridges are of the result of the bridges' geometrics not meeting current design standards. Deficient bridges are bridges that require significant maintenance and repair to remain in service. Even though a bridge is identified as being deficient, the bridge is not likely to collapse or be identified as unsafe. Inspectors perform inspections to determine whether unsafe conditions exist causing the structure

19. Id. at 74438.
20. See Mary E. Peters, Sec'y of Transp., Statement before the Committee on Environment and Public Works United States Senate (September 20, 2007).
22. Rosenker, supra note 4, at 5.
23. DEFICIENT BRIDGES BY STATE AND HIGHWAY SYSTEM, supra note 1.
25. Id. at ES-4.
26. Id. at 3-14.
to be closed to the public. After the inspector completes the Structure Inventory and Appraisal (SI&A) Sheet, the sufficiency rating is computed using a formula collected on the data entered on the SI&A Sheet. The computed numeric value is referenced against the scale whereby 100 percent represents a sufficient bridge and a zero percent represents a deficient bridge.

III. BRIDGE FAILURES

Bridge failures can be attributed to a variety of factors, including but not limited to improper design, unsafe construction and repair practices, lack of proper maintenance, corrosion and metal fatigue, collisions and natural forces such as wind, rains, floods and earthquakes.

A. DESIGN ERRORS

On August 1, 2007, the Interstate 35 West (I-35W) Bridge collapsed over the Mississippi River in Minneapolis, Minnesota. The I-35W Bridge collapsed due to structural failure during rush hour: 13 people died and an additional 145 sustained injuries. The I-35W Bridge was maintained and owned by the state highway agency. The National Transportation and Safety Board (NTSB) determined the probable cause was found in the design of the undersized gusset plates. The FHWA published a report that identified that the “gusset plates at U10 and L11 consistently failed the D/C ratio checks conducted and the U10 gussets also violated the unsupported edge limitations.” The demand to capacity ratio (D/C) is a calculation used in the measurement of design efficiency. The FHWA determined that “the capacity inadequacies were considerable for all conditions investigated with the plate providing approximately one-half of the resistance required by the design loadings.” The NTSB Safety Recommendation identified that the design process was seriously flawed whereby 112 of the gusset plates located on the main trusses of the

27. Id.
30. NTSB Safety Recommendation, supra note 4.
31. Structure Inventory and Appraisal, supra note 8.
33. Id.
bridge, after its failure, were only half as thick as required.\textsuperscript{34} In addition to the inadequacy of the design, renovations to the bridge since its build in 1967, added significant weight to the overall structure.\textsuperscript{35} Moreover, during the times renovations were performed and at the time of its collapse, the I-35W Bridge was subjected to additional weight based on heavy machinery and paving materials "being parked and stockpiled on the center span."\textsuperscript{36} The NTSB estimated 300 tons of equipment and material was on the bridge at the time of collapse.\textsuperscript{37} Further, the Structure Inventory and Appraisal (SI&A) Sheet for the I-35W Bridge, Structure 9340, last updated on June 22, 2007, reflected that the bridge held a "sufficiency rating" of 50\% rendering its status as "structurally deficient."\textsuperscript{38} In addition to these Interim Report findings, a recent Associated Press article brought attention to photographs of bent gussets on the I-35 Bridge taken during contractor inspections, four years in advance of the collapse.\textsuperscript{39}

![Figure 2: I-35W Bridge collapse in Minneapolis, Minnesota on August 2, 2007.\textsuperscript{40}](image)

\begin{itemize}
  \item \textsuperscript{34} Rosenker, \textit{supra} note 4.
  \item \textsuperscript{35} \textit{Id}.
  \item \textsuperscript{36} \textit{Id}.
  \item \textsuperscript{38} Structure Inventory and Appraisal, \textit{supra} note 8.
  \item \textsuperscript{40} Jim Gehrz, \textit{Minneapolis Bridge Collapse} (photograph), \textit{WASH. POST}, August 2, 2007,
\end{itemize}
B. Corrosion and Structural Fatigue

On June 28, 1983, the Interstate 95 (I-95) Bridge collapsed over Mianus River in Greenwich, Connecticut. During the collapse, two tractor semi-trailers and two automobiles drove off the edge of the bridge. Three people died and another 3 people sustained serious injuries. The NTSB concluded that the probable cause of the collapse of the Mianus River Bridge was due to a series of mechanical failures in securing the suspension system over the bridge span. Structural failures of these mechanical components, responsible for the suspension of the bridge, such as an upper pin and hanger assembly, were due to corrosion followed by fatigue. In addition, the NTSB identified deficiencies in the Connecticut Department of Transportation bridge safety inspection and bridge maintenance program, and the NTSB report highlighted the importance of an adequate surface drainage system for bridge roadways.41

On December 15, 1967, the US 35 Highway Bridge collapsed over the Ohio River near Point Pleasant, West Virginia. After the US 35 Highway Bridge collapsed, thirty-one vehicles fell into the Ohio River or landed on the shore resulting in 46 fatalities and 9 injuries. The NTSB determined that contributing causes of the bridge collapse were stress corrosion and corrosion fatigue. Inspectors had difficulty accessing many of the forty year old metal bridge components for visual inspections due to accessibility.42

C. Construction/Repair/Maintenance

On May 15, 2004, while under construction, a 40-ton steel support girder failed on the Colorado State Route 470 (C-470) Bridge over Interstate 70 East (I-70E) Highway. Figure 3 shows the aftermath of the failed girder impacting the severed van. The metal braces that secured the girder failed and the girder fell onto a van crushing a family of three.43 Temporary metal braces, secured by eight 10 inch bolts, held the 6 foot tall girder to the existing bridge already in place. The Colorado Department of Transportation (CDOT) initially identified the probable cause as a shift in the girder causing the braces to give way and allowing the girder


to fall. The NTSB also determined the probable cause to be the failure of the temporary bracing system as a result of insufficient planning by the prime contractor, subcontractor and CDOT. The NTSB identified a contributing factor as the CDOT’s failure “to effectively oversee safety-critical contract work for the project.”

Figure 3: C-470 Bridge steel girder under construction collapsed on eastbound vehicle on I-70 near Golden, Colorado.

The C-470 Bridge steel girder support failure is typical of bridge construction failure. Most bridge failures occur during the construction stage. Moreover, the most common bridge construction failure is “the result of insufficient temporary support or bracing . . . or inadequate consideration of construction loads.”

44. Id.
46. Id. at 22.
47. Feld & Carper, supra note 29, at 150.
IV. Remedies and Defenses

The remedies and defenses for bridge accidents which result in personal injury and property damage vary based on several factors. These factors include the types of parties involved, such as individuals, employees, corporations, and government entities, private or public authorities, private contractors (prime, general and subcontractors), construction contractors (prime, general and subcontractors), design engineers, vendors and material suppliers. Corporations include motorcoach, motor carrier, taxi, bus, railroad, maritime and insurance companies, in addition to some private toll authorities. Private authorities with bridge ownership responsibilities include toll authorities, railroad companies, and non-public owners. Public authorities with bridge ownership responsibilities include federal and state entities identified in Table 4 Bridge Statistics by Bridge Owner and Condition, in the Agency Abbreviation section. Other government entities that may be involved in the litigation or remedy of these actions include the US Department of Transportation (US DOT), Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), National Highway Traffic Safety Administration (NHTSA), Department of Interior (DOI), Department of Defense (DOD), US Coast Guard (USCG) and the National Transportation Safety Board (NTSB). State entities include state legislatures, DOTs, counties, and municipalities. Design engineers or professionals are suppliers of services, not products. Vendors and material suppliers may be liable for defective materials or materials that did not meet contractual or engineering specifications.

49. Feld & Carper, supra note 29, at 455.
50. Feld & Carper, supra note 29, at 460.
Table 4: FHWA Bridge Statistics by Bridge Owner and Condition

<table>
<thead>
<tr>
<th>Condition</th>
<th>Agency→</th>
<th>SHA</th>
<th>CHA</th>
<th>THA</th>
<th>C/MHA</th>
<th>SPFRA</th>
<th>LPFRA</th>
<th>OSA</th>
<th>OLA</th>
<th>PrA</th>
<th>RR</th>
<th>STA</th>
<th>LTA</th>
<th>OFA</th>
<th>Unk</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structurally Deficient Bridges by Owner Totals</td>
<td>SHA</td>
<td>23,141</td>
<td>40,366</td>
<td>3,940</td>
<td>4,268</td>
<td>166</td>
<td>11</td>
<td>195</td>
<td>107</td>
<td>51</td>
<td>450</td>
<td>306</td>
<td>37</td>
<td>689</td>
<td>77</td>
</tr>
<tr>
<td>Functionally Obsolete Bridges by Owner Totals</td>
<td>SHA</td>
<td>40,889</td>
<td>23,693</td>
<td>2,447</td>
<td>8,090</td>
<td>197</td>
<td>20</td>
<td>334</td>
<td>192</td>
<td>119</td>
<td>229</td>
<td>2,358</td>
<td>194</td>
<td>1,363</td>
<td>139</td>
</tr>
<tr>
<td>Deficient Bridges by Owner Totals</td>
<td>SHA</td>
<td>64,030</td>
<td>64,059</td>
<td>6,387</td>
<td>12,358</td>
<td>363</td>
<td>31</td>
<td>529</td>
<td>299</td>
<td>170</td>
<td>679</td>
<td>2,664</td>
<td>231</td>
<td>2,052</td>
<td>216</td>
</tr>
<tr>
<td>Bridge by Owner Totals</td>
<td>SHA</td>
<td>276,056</td>
<td>230,542</td>
<td>28,995</td>
<td>50,479</td>
<td>989</td>
<td>67</td>
<td>1,128</td>
<td>1,251</td>
<td>542</td>
<td>948</td>
<td>6,495</td>
<td>578</td>
<td>8,355</td>
<td>375</td>
</tr>
</tbody>
</table>

Table includes 50 U.S. States, District of Columbia and Puerto Rico as of December 2006.

Abbreviation | Agency
-------------|------------------
SHA          | State Highway Agency
CHA          | County Highway Agency
THA          | Town or Township Highway Agency
C/MHA        | City or Municipal Highway Agency
SPFRA        | State Park, Forest, or Reservation Agency
LPFRA        | Local Park, Forest, or Reservation Agency
OSA          | Other State Agencies
OLA          | Other Local Agencies
PrA          | Private (other than railroad)
RR           | Railroad
STA          | State Toll Authority
LTA          | Local Toll Authority

Abbreviation | Agency
-------------|------------------------
OFA          | Other Federal Agencies (not listed below)
            | Indian Tribal Government
            | Bureau of Indian Affairs
            | Bureau of Fish and Wild Life
            | U.S. Forest Service
            | National Park Service
            | Tennessee Valley Authority
            | Bureau of Land Management
            | Bureau of Reclamation
            | Corps of Engineers (Civil)
            | Corps of Engineers (Military)
            | Air Force
            | Navy/Marines
            | Army
            | NASA
            | Metropolitan Washington Airports Service
            | Unknown

The personal injury remedies available as a result, include litigation, settlement negotiations, and compensation fund options. Formulae 1-5 identify variables that may be considered in the remedies available to injured parties and defenses accessible to defending parities.

**Formula 1: Injured Party (IP_{II}) Types for Bridge Failure Litigation, Settlement or Compensation.**

\[ \text{IP}_{II} = \text{PVO v FM v C}_{T}(\text{Pax}) v \text{Emp[BO(PA v PO) v BM(\text{PA v PO v PC}) v BB(\text{PA v PO v PC}) v C}_{T}(\text{MCo v MCa v TC v BC v RR v MV}) v \text{InsC}} \]

**Formula 2: Injured Party (IP_{II}) Remedies.**

\[ \text{Remedy } (\text{IP}_{II}) = \text{Li v Se v CF} = \text{Li}\{\text{Ne[Du(LD v VA v FR(In v NoD v S) v Br} v Ca(\text{Co v De v E}) v Da]} v K v SI(SW) v VL]\ v \text{Se v CF} \]

**Formula 3: Defending Party (DP_{A}) Types Subject to Suit by an Injured Party (IP_{II}).**

\[ \text{DP}_{A} = \text{BO(\text{PA v PO}) v BM(\text{PA v PO v PC}) v BB(\text{PA v PO v PC}) v BD(\text{PA v PO v DE}) v Ve v MS v C}_{T}(\text{MCo v MCa v TC v BC v RR v MV}) v \text{InsC} \]

**Formula 4: Defending Party (DP_{A}) Defenses for the Public Authority (PA).**

\[ \text{Defense } (\text{DP}_{A}(\text{PA})) = \text{Li v Se v CF} = \text{Li}\{\text{SI(G)} v K(\text{IC v RST}) v \text{CN v SOL v N}) v \text{Se v CF} \]

**Formula 5: Defending Party (DP_{A}) Defenses for the Private Owner (PO), Private Contractor (PC), Transportation Company (CT), Vendor (Ve), Material Supplier (MS) and Insurance Company (InsC).**

\[ \text{Defense } (\text{DP}_{A}(\text{PO, PC, CT, Ve, MS v InsC})) = \text{Li v Se} = \text{Li}\{\text{SI(G)} v K(\text{IC v RST}) v \text{SOL v CN v N}) v \text{Se} \]
V. Litigation Remedies

In general, personal injury remedies from a bridge accident may include causes of action such as negligence, vicarious liability and breach of contract from contributing factors including bridge design, construction, repair, maintenance and inspection activities.

From the I-35W Minneapolis Bridge collapse, the most likely causes of action will be for negligence founded:

1. in maintenance of the bridge against the State;
2. in inspection of the bridge against the contractor;
3. in the renovation of the bridge at the time of collapse against the general contractor; and
4. in the design of the bridge against the engineering firm.

In general, injured parties’ claims of action based on negligence in bridge design, construction, repair, maintenance or inspection activities will be available against public authorities, private authorities, and prime contractors.

A. DEFECTIVE DESIGN OR PLAN FOR CONSTRUCTION

A cause of action against engineers, general contractors or public or private authorities originate with the defective design or plan in construction of the bridge. The injured party may be precluded from bringing suit against the parties responsible for the defective design or plan of bridge construction based on the statute of limitations associated with construction accident claims. In addition, the injured party may be precluded from bringing suit against any public authority on the basis of governmental immunity granted such entities.

Depending on each state’s statute of limitations associated with con-
In construction accident claims, injured parties may not have a cause of action for the defective design or plan of construction of a bridge, specifically against the engineer or the approving public authority.\textsuperscript{52} Minnesota state statute limits individuals from filing claims for 10 years after substantial completion of construction.\textsuperscript{53} Hypothetically, if the statute of limitations in each state regarding such claims required filing bridge collapse claims within 10 years of the occurrence, 536,885 of the 599,766 bridges (89.5\%) in the United States would not be eligible for such claims (refer to Tables 1 and 2). Further, Table 2 does not identify any bridges which are between the ages of 0 and 9 years as being structurally deficient. Therefore, the probability of an injured party recovering from such a bridge failure on the basis of defective design or construction is very low. On this basis, the victims of the I-95 Mianus Bridge collapse in Greenwich, Connecticut in 1983 unsuccessfully pursued the architect due to the expiration of the statute for construction claims.\textsuperscript{54} Unfortunately, the Connecticut Supreme Court upheld the superior court's decision to exonerate the designer of the twenty-six year old bridge and held that the Connecticut Department of Transportation was responsible for the collapse based on deficient inspection.\textsuperscript{55}

Other state statutes may preclude liability of the public authority and other state departments involved, if the injuries occurred as a result of defective design or plan in construction of a bridge. Many states have statutes which provide immunity to governmental entities which are parties in a suit, if the design and construction of the bridge was executed according to generally accepted standards at the time the bridge was built.\textsuperscript{56} Likewise, many states possess state tort claims acts which provide absolute government immunity from liability based on the design or plan of construction of highways and bridges.\textsuperscript{57} In White, the Wyoming Supreme Court upheld the lower court's finding that the Wyoming Highway Department was immune from liability for defective design, construction and maintenance of highways based on the basis of the state's Government Claims Act.\textsuperscript{58}

Since the I-35W Minnesota Bridge was built in 1967, forty-one years ago, the argument for a defective design or plan of construction would most likely hold little merit. The Minnesota statute stating that such

\textsuperscript{52} Feld & Carper, supra note 29, at 147.
\textsuperscript{53} MINN. STAT. ANN. § 541.051 (West 2008).
\textsuperscript{55} Feld & Carper, supra note 29, at 147.
\textsuperscript{56} 39 AM. JUR. 2D Highways, Streets, and Bridges § 382 (2008).
\textsuperscript{57} Id.
\textsuperscript{58} White v. Wyoming, 784 P.2d 1313, 1322 (Wyo. 1989).
claims must be filed within ten years precludes an injured party from filing a claim against those responsible for flaws in bridge design, for defective designs and plans for construction, or for filing claims against the state highway agency responsible for bridge ownership and maintenance. On the other hand, the injured parties may have a cause of action due to the defective plan for construction based on the excessive weight on the I-35W Bridge during the public improvement bridge projects in 1998 and 2007.

B. DUTY TO REPAIR OR MAINTAIN

The duty to repair or maintain the bridge is the responsibility of the general contractor who performs the inspections or who is responsible for repair and maintenance of the bridge. Engineers are rarely tasked with the duty to repair or maintain the bridge, unless their company is asked to fulfill a role in the inspection after build. Likewise, public and private authorities also do not have the duty to repair or maintain the bridge, unless notice is provided directly to them regarding a deficiency.

Repair and maintenance work is normally under the supervision of a general contractor and engineers usually contract inspection work to the same and thereby avoid liability.59

The bridge owner is tasked with the duty to exercise ordinary care in the construction, repair or maintenance activities.60 In general, public and private authorities are responsible for the repair of defective components in bridges. Public authorities are not normally liable for damages to injured parties on the basis that such authorities by their nature act in a "quasi-judicial or legislative capacity."61 Immunity was granted to the Wyoming Highway Department when suit was brought for defective design, construction and maintenance of highways on the basis of legitimate legislative objectives.62 On the other hand, a state highway agency was denied governmental immunity when it failed to take action after receiving notice of a defect.63

The general contractor may have supervisory duties in addition to the construction, repair or maintenance responsibilities.64 Therefore, the general contractor may be subject to liability for the collapse of a bridge.65 The general contractor performing publically funded work or

61. Highways, Streets, and Bridges, supra note 56.
62. White, 784 P.2d at 1322.
63. Highways, Streets, and Bridges, supra note 56.
64. Feld & Carper, supra note 29, at 457.
65. Id.
improvements on behalf of a public authority does not receive the advantage of the associated governmental immunity. Contractors may then be subject to liability for the injuries or damages suffered by third parties resulting from the contractor's negligence in the performance of the contracted work.66

For the I-35W Minnesota Bridge collapse victims, causes of action based on the duty to repair or maintain may be viable. Engineers, those responsible for maintenance of the highway and public authorities, may be more difficult to pursue for losses sustained. Since governmental immunity does not extend to private contractors, the general contractor who performed the renovations to the I-35W Minnesota Bridge at the time of the collapse may be held liable for the associated personal injuries, deaths and property damages. The general contractor may have breached the duty to maintain the bridge. In addition, the general contractor may also be subject to claims based on negligence if there was a failure in taking proper precautionary measures in preventing a dangerous condition.67 In either circumstance, the general contractor may be determined to be a contributor or the cause of the bridge collapse by allowing the placement of excessive weight, approximately 300 tons at the time of collapse, on the bridge deck consisting in part of machinery and paving materials.68

C. Notice of Defect

The strongest claim which may be available to injured parties lies with inadequate response by the bridge owner or contractor to defects identified prior to the bridge collapse of which they may have had notice.

If there was no prior notice of the defect, the bridge owner may avoid liability for the injuries or damages resulting from a bridge collapse. If a bridge collapse arises from an internal and latent defect, the injured party may not have a sustainable action against the bridge owner if the bridge owner exercised due care.69 In Roanoke, the bridge owner exercised due care in contracting a reliable manufacturer for the construction of the bridge and performing frequent and proper inspections. Furthermore, the bridge owner was unable to physically visually inspect the defects due to the locations on the bridge.70 In Hafele, the plaintiff sustained personal injuries and damage to his vehicle when the bridge failed. Since the public authority was not provided prior notice of any defect or "unsound support" of the bridge, the appellate court dismissed

68. Rosenker, supra note 4; Frommer, supra note 37.
70. Id.
the claim. In *Jackson*, the Supreme Court of Louisiana placed the burden on the defendant railroad bridge owner to show that the bridge was inspected for timely discovery and remedy of any defects during the operation of the bridge.

For the I-35W Minneapolis Bridge collapse victims, there may be merit in a claim against the inspection contractor for failure to inform the authorities or give notice of the defects subsequently detected in the gusset plates. Photographs taken of the I-35W malformed gusset plates taken during a bridge inspection four years earlier evidence this failure. Ironically, the Structure Inventory and Appraisal (SI&A) Sheet for the I-35W Bridge, recorded during the last inspection on June 22, 2007, did not identify any defects associated with these gusset plates.

Therefore, the injured parties from the I-35W Minneapolis Bridge collapse have the following potential claims of action:

1. for negligent bridge maintenance;
2. for failure to give notice of a known defect;
3. for breach of duty in maintenance of the bridge, and
4. for not taking proper precautionary measures by limiting the weight of the equipment and construction materials on the deck of the bridge.

VI. SETTLEMENT OR ADMINISTRATIVE SOLUTIONS

Based on the facts of the case, the attorneys for the injured and defending parties may consider solutions such as settlement or binding arbitration. The families of the victims of the C-470/I-70 girder collapse opted to settle with the state of Colorado, the Colorado Department of Transportation, and the contractor and sub-contractor associated with the project. On behalf of their loved ones, they received a settlement of $1.5 million. It may be advisable for attorneys involved to consider solutions such as settlement by mediation or binding arbitration so that the injured parties can benefit from more efficient resolution and avoid the time, emotional pain and financial expense associated with litigation. As of 1997, more than ninety percent of construction disputes were settled before entering court.

73. NTSB Pics Reveal Early Warping on 35W Bridge, *supra*, note 39.
VII. Compensation Funds

In the last quarter of 2007, the Minnesota Legislature proposed a Victims' Compensation Fund (VCF) for the provision of relief to injured parties and to supplement the recovery cap limitations in existing Minnesota law. At the time of the bridge collapse in August 2007, Minnesota's liability pursuant to the Tort Claims statute was limited to $1 million per incident,\textsuperscript{77,78} only allowing for a total of $1 million to compensate victims affected by the resulting 13 deaths and 145 injuries.\textsuperscript{79} Thereafter, the injured parties have no claims remaining against the state.\textsuperscript{80}

The Minnesota Senate and House continue to negotiate various VCFs, and are attempting to model them after the Federal Victims' Compensation Fund which was set up for the World Trade Center victims after September 11, 2001.\textsuperscript{81} The Minnesota Legislature passed a bill on May 5, 2008, for $38 million toward the VCF which was sent to Minnesota Governor Tim Pawlenty.\textsuperscript{82} Under the VCF, each of the injured parties may qualify for up to $400,000.\textsuperscript{83} The more severely injured parties may receive additional compensation from a $12.6 million supplemental fund.\textsuperscript{84} The VCF would provide assistance in recovering from the economic and non-economic losses sustained from that incident.\textsuperscript{85} Injured parties receiving compensation from this fund, will be asked as a condition of receipt, to waive their rights to sue the State of Minnesota or any other governmental entities associated with the I-35W Bridge collapse.\textsuperscript{86} The recipients of this compensation will not be asked to waive their rights to sue other entities found responsible for the bridge collapse.\textsuperscript{87} Lastly, the injured parties will have until October 15, 2008 to apply for the VCF benefits, which process will be overseen by a compensation panel determined by the Minnesota Supreme Court.\textsuperscript{88}

\textsuperscript{78} \textsc{Minn. Stat. Ann.} § 3.736, subdiv. 4(e), (West 2008).
\textsuperscript{79} Author's Note: If distributed equally, the result would be just less than $6,400 per injured party. Even with varying degrees of injury, few if any injured parties would receive just compensation from the government.
\textsuperscript{80} \textit{Supra} note 78.
\textsuperscript{82} Martiga Lohn, \textit{Bridge Victim Fund Clears Legislature, Heads to Pawlenty}, \textsc{Associated Press}, May 5, 2008, http://minnesota.publicradio.org/display/web/2008/05/05/bridgefund/?rsssource=1.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} Shaw, \textit{supra} note 81.
\textsuperscript{86} Lohn, \textit{supra} note 82.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
VIII. Conclusion

The current conditions of bridges in the United States pose a major risk to travelers as evidenced by 72,524 of the 599,766 private and public vehicular and railroad bridges assessed as structurally deficient, representing 12.1% of the total. The examples provided of bridge failures due to design errors, corrosion and structural fatigue, and construction/repair/maintenance illustrate the devastating potential for future bridge failures in the United States.

In conclusion, the injured parties of the I-35W Minneapolis Bridge collapse that occurred on August 1, 2007 have potential claims of action against the state for negligence in bridge maintenance based on failure to give notice of known defects in the gusset plates; against the contractor who performed the bridge inspection and photographed the bending gusset plates for not conveying these defects to the authorities; and against the general contractor and subcontractors that were renovating the bridge at the time of collapse based on their negligence in allowing excessive weight onto the bridge with their equipment and construction materials. In lieu of pursuing judicial relief, the injured parties retain the option to accept compensation funds that are approved by the Minnesota State Legislature and are currently under review by the Governor of Minnesota. The contractors who are not subject to governmental immunity may be pursued separately via litigation, mediation or binding arbitration for additional recovery.
APPENDIX A: DEFINITIONS

"Bridge = A structure including supports erected over a depression or an obstruction, such as water, highway, or railway, and having a track or passageway for carrying traffic or other moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of openings or multiple boxes; it may also include multiple pipes, where the clear distance between openings is less than half of the smaller contiguous opening."^89

Bridge Accident = an accident caused by a mechanical component of the bridge, however, the bridge remains operative.

Bridge Failure = structural failure of bridge rendering bridge inoperative for use by ground vehicles.

Deficient bridges = bridges that require significant maintenance and repair to remain in service with eventual rehabilitation or replacement.^90

Federal Bridges = bridges managed by the federal government

Functional Obsolete bridges = based on the function of the bridges' geometrics not meeting current design standards.^91

Local Bridges = bridges managed by city and municipal governments

Private Bridges = bridges managed by toll authorities and private corporations

"Scour = erosion of streambed or bank material due to flowing water; often considered as being localized around piers and abutments of bridges."^92

State Bridges = bridges managed by the state government

Structurally Deficient bridges = bridges with reduction of load carrying capacity due to deterioration in significant load-carrying bridge elements.^93,^94

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^90. Status of the Nation's Highways, Bridges, and Transit, supra note 24 at 3-14.
^91. Id. at ES-4.
^92. Supra note 90.
^93. Status of the Nation's Highways, Bridges, and Transit, supra note 24 at 3-14.
^94. Id. at ES-4.
FedEx’s New “Employees”:
Their Disgruntled Independent Contractors

Todd D. Saveland*

INTRODUCTION

For someone who has dreamed of running their own business and has an entrepreneurial spirit, the prospect of being an independent contractor sounds appealing enough.¹ Purchase and maintain your own delivery van, contract with one of the largest and most successful expedited package delivery companies in the United States, put in an honest day’s work, and watch the money pour in. The relationship sounds like it would be win-win: the independent contractor has the freedom to run his business as he sees fit, setting his own hours, delivery schedules and whether to take on more business and employees; while the delivery company gets their packages delivered in a timely manner without having to invest the capital into the purchase and maintenance of a fleet of trucks and drivers. As envisioned, it is symbiotic.

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Often enough, however, the two parties do not enter into the arrangement and live happily ever after. One party feels he is working too hard, not making enough money, and not living the dream he had envisioned from the advertisements. The other party feels taken advantage of since there was full agreement on all terms in the contract, and it just would not be fair to change the rules half way through the game. One party files suit, and the relationship may be forever changed.

Independent contractors, as business owners, are supposed to be exempt from most labor and employment laws. If one is actually engaged in running his own business, this makes sense—an owner is not an employee. However, if the independent contractor signs on with a company that exercises significant control over every aspect of his work, he is little different than any other employee, and should be afforded the same basic protections. Thus, if the independent contractor is not, in practice, performing services free from the direction and supervision of the contracted-with company, the classification of a worker as "independent" may only be a means to deny that person rights to unionize, unemployment benefits, workers compensation, as well as exclusion from the Americans with Disabilities Act and other modern benefits which many workers may take for granted. One would think that savvy business owners, whether a one-man operation or billion dollar business, would look at all the pros and cons to entering into a business relationship prior to taking the plunge. However, more frequently, litigation arises where the one-man operation is trying to convert his status from "contractor" to "employee."

FedEx Ground ("FedEx"), since its inception, has had great success in the use of independent contractors to perform package deliveries. While the company has enjoyed huge growth and extraordinary revenues, it has also experienced an onslaught of litigation as a number of current and former driver-contractors have challenged FedEx's classification that the drivers are independent contractors and not employees. Are these just the ramblings of disgruntled workers? Or was this a systematic attempt by a multi-billion dollar company to accrue the benefits of employee labor, without the legal and financial liability?

In looking at a sampling of the recent lawsuits filed against FedEx challenging the corporation's independent contractor classification of many of their drivers, this paper will highlight the issues surrounding the independent contractor model, and argue for a change to a definition of "employee" and "independent contractor" that are both clearly defined. Thus, even though both parties willingly entered into a contract for services where the driver would be considered an independent contractor, the issues and problems go far deeper than the parties' intent, which were clearly manifested in the parties' contract.
The applicable statutory and common laws do not provide any meaningful guidance to workers, employers, unions, or even the government agencies charged with enforcement. This leaves businesses particularly vulnerable, unable to engage in any meaningful long-term business planning, since their contractual relationships may be subject to immediate dismantling by an administrative agency or trial court. The prolific use of independent contractors will undoubtedly continue, especially with their widespread use in the trucking industry, so regulation on the federal level may be the only means to provide stability to an industry which relies heavily on the use of independent contractors to move freight across the country.

THE FEDEX INDEPENDENT CONTRACTOR

FedEx Ground system began in 1998, after taking over Roadway Package System ("RPS"). FedEx would be a major non-union competitor to the heavily unionized United Parcel Service ("UPS"). Though the two companies are in the same business of picking up, transporting, and delivering small packages, the manner in which FedEx Ground would accomplish this would be far different than UPS. Rather than manage a fleet of trucks, a complement of mechanics to maintain those trucks, and a group of drivers to operate those trucks, FedEx would contract all of those responsibilities to a collection of small business owners: the FedEx independent contractors.

FedEx is a hugely successful company, not just in the United States, but worldwide. It had revenues in 2008 of $38 billion, has more than 290,000 employees (and contractors) worldwide, and ships on average more than 7.5 million packages per day. In order to deliver these millions of packages, in the United States at least, FedEx contracts with small business owners, usually a one-driver/one-truck operation, to carry out the task. Here begins our look into the FedEx "independent contractor."

Each contractor, prior to beginning operations with FedEx, must pass a physical and drug test, have a good driving record, and purchase or rent a vehicle meeting the specifications for FedEx use. These vehicles,
if purchased new, can range in price from $20,000 to $37,000.\textsuperscript{6} Thereafter, the driver must sign an "Operating Agreement" ("Agreement") with FedEx, detailing each parties' rights and responsibilities.\textsuperscript{7} Drivers cannot negotiate any of the terms of the Agreement, essentially signing the contract on a take it or leave it basis.\textsuperscript{8}

The background statement in the Agreement provides:

FedEx Ground is a duly licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States, with connecting international service. The Contractor is an owner-operator of one or more pieces of trucking equipment suitable for use in such a service. Contractor wants to make this equipment available, together with a qualified operator for each piece of equipment, to provide daily pick-up and delivery service on behalf of FedEx Ground. FedEx Ground wants to provide for package pick-up and delivery services through a network of independent contractors, and, subject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment. Contractor wants the advantage of operating within a system that will provide access to national accounts and the benefits of added revenues associated with shipments picked up and delivered by other contractors throughout the FedEx Ground system. In order to get that advantage, Contractor is willing to commit to provide daily pick-up and delivery service, and to conduct his/her business so that it can be identified as being a part of the FedEx Ground system. Both FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor and not as an employee of FedEx Ground for any purpose. Therefore, this Agreement will set forth the mutual business objectives of the two parties intended to be served by this Agreement—which are the results the Contractor agrees to seek to achieve—but the manner and means of reaching these results are within the discretion of the Contractor, and no officer or employee of FedEx Ground shall have the authority to impose any term or condition on Contractor or on Contractor's continued operation which is contrary to this understanding.\textsuperscript{9}

The agreement seems straightforward enough—both parties agree that the driver will operate as an independent contractor and not an employee for any purpose. However, the last sentence, that the contractor has the discretion to determine the manner in which he achieves his goals, is greatly restricted by other provisions of the contract, which set standards for the drivers' appearance and maintenance of their vehicles.\textsuperscript{10}

\textsuperscript{6} Id.
\textsuperscript{7} In re FedEx Ground Package Sys., Inc. & Local 177, Int'l Bhd. of Teamsters, N.L.R.B., Case 22-RC-12508, at 9 (Nov. 2, 2004) [hereinafter Local 177].
\textsuperscript{8} Id.
\textsuperscript{9} Id. at 9-10.
\textsuperscript{10} Id. at 12-14.
Drivers must wear a FedEx uniform in “good condition,” may not have any visible tattoos or earrings, and must not have their “hair falling below the middle of the ear” or a moustache protruding “beyond the corners of the mouth.”11 The drivers’ trucks must be “free from body damage and extraneous markings,” and if the driver is in violation of this standard, FedEx may prohibit the driver from working on that particular day.12

Once the Agreement is signed, the driver will then determine whether to purchase optional services from FedEx, such as a “Business Support Package” that provides the necessary equipment to comply with other provisions in the Agreement—including truck cleaning, uniforms, and most importantly, a scanner which tracks and confirms deliveries.13 According to the Agreement, FedEx does not have the authority to prescribe hours of work; what routes the drivers follow; or other details of the manner in which they perform their work.14 Drivers will generally work a Tuesday through Saturday schedule, and work upwards of 60 hours per week;15 the upper limit provided by Department of Transportation regulations, which effectively precludes them from moonlighting elsewhere.16 The drivers also must successfully complete a training course run by FedEx,17 which consists of eight days of classroom work, one day of driving with another contractor-driver, and five days of driving with a FedEx manager.18 During training, a manager will train the driver in procedures for making efficient deliveries, how to load packages on the van, and where to leave packages if nobody is home.19 FedEx maintains that the procedures and techniques reviewed during training are “merely suggestions which did not have to be followed,” but the FedEx manual given to new drivers and the training videos do not make this point clear.20

Once the driver has successfully passed the training he will be assigned a "primary service area," typically one or more zip codes as the geographic location to which they will make deliveries.21 The Agreement gives FedEx the ability to reconfigure the drivers’ “primary service area”

11. Id. at 12-13.
12. Id. at 13-14.
13. Id. at 37-38.
14. Local 170, supra note 5, at 6.
15. Id. at 7.
17. Local 170, supra note 5, at 3.
18. FedEx Ground Package Sys., Inc. & FXG-HD Drivers Ass’n, N.L.R.B., Case 4-RC-20974, at 4 (June 1, 2005) [hereinafter FXG-HD].
19. Id.
20. Id.
21. Id. at 6.
by giving the driver five days notice.\textsuperscript{22} If there is a significant loss in package volume because of the change in service area, there is a provision in the Agreement that will calculate a monetary offset that goes from the driver who gained work to the driver who lost work.\textsuperscript{23} FedEx will sometimes hire temporary employees to assist drivers if, in FedEx's assessment, the package volume is too high for the driver to handle.\textsuperscript{24} This employee would be a "helper" who would perform the deliveries while the driver stayed in the vehicle.\textsuperscript{25}

Department of Transportation regulations prohibit the operator of a vehicle leased to a regulated carrier (here, FedEx) from simultaneously transporting the goods of another regulated carrier.\textsuperscript{26} This regulation "effectively precludes Contractors from working for two package delivery services at the same time."\textsuperscript{27} Expanding on this rule, FedEx does not permit drivers to use their vehicles for any other purpose while in the service of FedEx, though a driver may use the vehicle afterhours for other personal or business use, so long as the company logo is removed or covered.\textsuperscript{28}

The driver is responsible for hiring a substitute if he takes any time off—from a vacation day, or afternoon, to absence due to injury.\textsuperscript{29} If the driver wants to expand the business to the point where he can no longer service the route by himself in one vehicle, he may rent another vehicle and hire another employee.\textsuperscript{30} These drivers are called "multiple route contractors," and they set the terms and conditions of employment of those they hire.\textsuperscript{31} The driver is paid by a weekly "settlement check" under a formula based primarily on the number of stops made, packages delivered, deliveries requiring appointments or signatures, and number of hours worked.\textsuperscript{32} The rates as of 2004 were $1.24 per stop, 22 cents per package, $6.50 for deliveries made by appointment, $2.75 for evening deliveries, and 50 cents for deliveries requiring a customer signature.\textsuperscript{33} In addition, drivers are paid a daily van availability rate, bonuses for safety, and a core zone density payment, which goes higher as the driver's pri-

\begin{itemize}
\item \textsuperscript{22} Local 170, \textit{supra} note 5, at 6.
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} FXG-HD, \textit{supra} note 18, at 7.
\item \textsuperscript{25} Local 170, \textit{supra} note 5, at 11.
\item \textsuperscript{26} \textit{See} 49 C.F.R. \textsection 376.12(c)(1) (2001).
\item \textsuperscript{27} FXG-HD, \textit{supra} note 18, at 13.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} \textit{Id.} at 7.
\item \textsuperscript{30} \textit{Id}.
\item \textsuperscript{31} \textit{Id.} at 12.
\item \textsuperscript{32} Local 170, \textit{supra} note 5, at 8.
\item \textsuperscript{33} \textit{Id}.
FedEx's New "Employees"

mary service area is less densely populated.34

BUT NOW I WANT TO BE AN EMPLOYEE!

Evidencing some discontent with their working conditions, drivers at several FedEx terminals have sought representation from the Teamsters Union, or have even created their own drivers association.35 The protections of the National Labor Relations Act (NLRA), however, do not apply to all paid workers. Specifically, the NLRA only covers "employees" and excludes all others.36 The term "employee"—while defined in the statute—lends only minimal guidance, and is somewhat outdated since its initial adoption in 1935. The term "employee" specifically excludes "any individual having the status of an independent contractor" but the Act does not define what that means.37 Thus, FedEx drivers seeking representation must prove that they are in fact employees, and these drivers, attorneys, and academics must turn to the common law tests of agency to determine who qualifies as an independent contractor.

The National Labor Relations Board ("NLRB") in Argix Direct, Inc.,38 adopted the multifactor test set forth in the Restatement (Second) of Agency, §220.39 The determination obviously requires a fact intensive inquiry by examining:

(1) the control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an em-

34. Id.
35. See FXG-HD, supra note 18, at 18-20.
37. Id. §152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed by a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.").
employment relationship; and (10) whether the principal is in the business. 40

The independent contractor versus employee issue is not a new one for the NLRB, and it has in fact been addressed three times with FedEx Ground's predecessor, Roadway Package Systems. In each case—Roadway Package Systems (Roadway I), 41 Roadway Package Systems (Roadway II), 42 and Roadway Package Systems (Roadway III), 43—the Board found the drivers not to be independent contractors, but rather, employees. Based upon these cases, five decisions issued by Regional Directors of the NLRB have found FedEx drivers to be employees, with one finding that they were independent contractors. 44 Neither party requested review of the of the independent contractor decision, giving it no precedential value.

Parties will disagree as to how the NLRB should apply the common law agency test. Thus, the petitioning union may suggest that no single factor of the ten should be given priority, while the employer could suggest that the manner and means of accomplishing the end result or opportunity for profit and loss are the most important factors. The United States Supreme Court has held that in determining employee status under common law agency principles, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 45 If this test were not already unclear, the Board has further muddled it, stating:

Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in

40. Argix, supra note 38, at 1020 n.13.
44. The five decisions finding employee status are: FedEx Home Delivery & Int'l Bhd. of Teamsters, Local Union No. 671, Decision on Objections, N.L.R.B., Case 34-RC-2205, at 1 & 5 (Aug. 2, 2007); FedEx Home Delivery & Int'l Bhd. of Teamsters, Local Union 25, N.L.R.B., Case 1-RC-22034 & 1-RC-22035, at 18 (Sept. 20, 2006); Local 170, supra note 5, at 2; FXG-HD, supra note 18, at 17; Local 177, supra note 7, at 91 & 95. The single case finding independent contractor status is: In re RPS, Inc., & Teamsters Local Union No. 355, Int'l Bhd. of Teamsters, AFL-CIO, N.L.R.B., Case 5-RC-14905, at 63 (Aug. 3, 2000) [hereinafter Local 355]. The board denied review in all cases where employee status was found.
FedEx's New "Employees"

Based upon this rather malleable precept, the Board and Regional Decisions go through the facts established at a hearing and make their decisions according to applicable law. The burden of establishing independent contractor status is upon the party asserting it, here FedEx. Using the common law test, the decisions apply the facts to the applicable factors, but there is no indication if greater weight is accorded to one over another. Moreover, each of the factors are inextricably intertwined—each one having commonalities with another. The factors are broken down as follows.

**CONTROL**

The decisions have found that FedEx exercises substantial control over the details of the driver’s performance. Examples of this are that the drivers had to provide daily service Tuesday through Saturday; deliver all packages assigned to them the day they are received in the terminal; “deliver all packages for destinations outside their route” that are assigned to them by the terminal manager; scan all packages with the FedEx scanner when the packages are loaded onto their vehicle, and then again when the packages are delivered; leave the terminal only after they are permitted by the terminal manager; “use certain approved vehicles” for their deliveries; wear FedEx uniforms and FedEx identification badges; “maintain their vehicles in a clean and presentable fashion,” free of damage and markings, and prominently displaying the FedEx logo and colors; “purchase insurance in types and amounts” specified by FedEx; allow FedEx managers “to ride along with them several times annually;” and follow FedEx’s policies and practices on how to deliver packages.

Further, even though the Agreement allows drivers to “set their own work schedules” (start time, break and lunch times, and end time), the control that FedEx has over the number of packages assigned, the requirement that they are delivered the day they are received, as well as certain specific delivery appointments, make it difficult for the driver to start work late in the day, or put off some package deliveries until the following day.

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47. See Argix, supra note 38, at 1020.
48. See FXG-HD, supra note 18, at 15.
50. FXG-HD, supra note 18, at 15.
DISTINCT OCCUPATION

The recent Regional Director's decisions found that FedEx drivers are not engaged in a distinct occupation citing evidence that FedEx will hire temporary employees as drivers to make deliveries on routes that are "not yet permanently assigned to a contract driver." Once the route is assigned, the driver must deliver packages in the same manner as any temporary driver, and "that can be identified as being part of the [FedEx] system." That is distinct from other employees at FedEx, in the sense that they do not work alongside other FedEx drivers that the company considers to be employees. The decisions did not address the fact that these drivers have a different skill set than a regular driver-employee, since the FedEx drivers have to perform the daily deliveries and run the business end of the operation—essentially acting as driver, laborer, mechanic, accountant, and any other administrative task that invariably comes up.

KIND OF OCCUPATION

The decisions seem to gloss over this factor, but it seems apparent that the drivers are engaged in an occupation that is usually done under the employer's direction. This is evidenced by the fact that FedEx hires temporary drivers when a contract route has not been filled, the drivers receive minimal training, and are not considered specialists in their line of work. As indicated elsewhere, FedEx exercises substantial control over how drivers carry out their daily assignments.

SKILL

The drivers do not need any significant skill or experience to perform the delivery functions. Rather FedEx requires only some driving experience and a brief training course provided by the company. The drivers receive some training on how to safely operate their vehicles, and how to perform package deliveries in accordance with FedEx policy. Here again, the decisions do not address the additional business skills required of the driver-contractors to successfully run a profitable business—which is far different than a driver who has none of the additional responsibilities other than making his daily deliveries.

51. Local 671, supra note 49, at 29.
52. Id.
54. Id. at 30.
55. Local 170, supra note 5, at 3.
WHO SUPPLIES THE TOOLS AND PLACE OF WORK

Other than drivers providing their own delivery vehicle, FedEx provides the necessary instrumentalities, tools, and support to carry out their business—such as general liability insurance and turn by turn directions for the deliveries on their routes.\(^{56}\) The drivers are encouraged to, and almost universally do, sign up for the “Business Support Package” which provides the scanners, badges, uniforms, and truck washings that are required by the Agreement.\(^{57}\)

LENGTH OF TIME THE DRIVERS ARE EMPLOYED

Drivers can contract with FedEx for successive one-year terms, but this agreement can be terminated by either side with 30 days notice.\(^{58}\) Although one decision indicated that there is ‘considerable turnover’ among the drivers,\(^{59}\) and another found the average length of time to be eight years,\(^{60}\) the average nationwide length of employment is unclear. FedEx has argued that—given that some drivers choose to stay with FedEx for many years, this shows that their independent contractor model is positive and workable, and that a few unhappy drivers should not be able to alter the entire model system-wide.\(^{61}\)

METHOD OF PAYMENT – BY TIME OR BY THE JOB

FedEx unilaterally determines compensation rates for all drivers, and this is not subject to negotiation.\(^{62}\) Thus, even though FedEx looks for drivers with an “entrepreneurial spirit,” the drivers actual compensation is more determined by the number of packages they are assigned by the terminal manager on any given day, rather than any personal effort on their part or entrepreneurial ingenuity.\(^{63}\) Furthermore, FedEx provides minimum compensation to the drivers with a “vehicle availability” payment to provide drivers more stable incomes during reductions in deliv-

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\(^{56}\) See id. at 13.


\(^{58}\) See Local 170, supra note 5, at 5; FXG-HD, supra note 18, at 5.

\(^{59}\) See FXG-HD, supra note 18, at 16.

\(^{60}\) Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 333 (Cal. Ct. App. 2007) [hereinafter Estrada III].


\(^{62}\) See Local 170, supra note 5, at 4.

The driver must work a minimum of seven hours in order to receive another settlement payment called a zone density payment, and anything less is prorated. Thus the driver, like many in the motor carrier industry, is paid both by time and by the job, since they are paid for every delivery they make, and extras like appointment deliveries and signature required service. While "piece rate" compensation from package deliveries comprises the majority of most driver income, they can "derive as much as 40 percent to 50 percent of their income" from their guaranteed minimum payments.

PART OF THE EMPLOYER'S REGULAR BUSINESS?

The drivers are performing a function that is a "regular and essential" part of FedEx's principal business, essentially the service paid for by customers—package delivery. The drivers must wear FedEx uniforms and adorn their vehicles with FedEx logos in the trademarked colors. And, while they have the right to use their vehicles for other private or business purposes when not working for FedEx, the practical reality is that this is not possible. Thus, the drivers must remove the FedEx logo, and determine when to find these other business opportunities, given that they must work for FedEx Tuesday through Saturday. The drivers' main task is providing the essential service that FedEx sells. In contrast, in Dial-a-Mattress Operating Corp., the customers paid primarily for the mattresses, not the delivery services, and consequently the drivers were found to be independent contractors.

INTENT OF THE PARTIES

One would think that this factor would be accorded more weight than the others, since the parties' intent is often a cornerstone of contract interpretation. However, this factor is accorded no greater weight than the others. This is the only factor that is specifically addressed in the agreement signed by a driver and a FedEx representative, where the intent is made clear: "[b]oth FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contrac-

64. See FXG-HD, supra note 18, at 16.
65. See Local 170, supra note 5, at 8.
66. Id.
67. See FXG-HD, supra note 18, at 16.
68. See Local 170, supra note 5, at 12.
69. Id. at 13.
70. Id.
tor and not as an employee of FedEx Ground for any purpose."\textsuperscript{73} The drivers certainly do have some indicia of independent contractor status: they own or lease their own delivery vehicle, may schedule their own start and end times, are free to determine the sequence of package delivery, may take breaks at their discretion, do not receive benefits, do not have taxes withheld, and are not subject to ordinary discipline.\textsuperscript{74} With the exception of the Region Five decision from 2000, all of these decisions and the \textit{Roadway I-III} trilogy of cases seem to allow the drivers to void this provision of their agreement, without affecting the other terms.

\textbf{INDEPENDENT ONE DAY, EMPLOYEE THE NEXT}

The decisions do not address in any serious manner many cogent arguments that FedEx advanced at any of the hearings where employee status was found. In their brief to the District of Columbia Circuit Court of Appeals, which has jurisdiction over the refusal to bargain and "test of certification" case,\textsuperscript{75} FedEx goes into great detail on how the Regional Director's decision does not accurately apply the common law or Board precedent to these fact situations.\textsuperscript{76} FedEx's main argument is that significant changes in their business operations have occurred since the decade-old \textit{Roadway} cases were decided, and, based on these changes, the status of its drivers has changed as well—\textit{back} to independent contractors.\textsuperscript{77}

FedEx's argument finds support in the Region Five decision from 2000, which found that the FedEx drivers were independent contractors and \textit{not} employees.\textsuperscript{78} In that case, the Regional Director accepted evidence on the changed operations that had occurred in the time between the \textit{Roadway} trilogy of cases were decided, and the time that FedEx took

\textsuperscript{73} Local 177, \textit{supra} note 7, at 10.

\textsuperscript{74} See Local 170, \textit{supra} note 5, at 14.

\textsuperscript{75} A "test of certification" case, commonly referred to as 'test of cert,' is the only way that a party can seek review in a Federal Circuit Court of Appeals. After a union is elected to represent certain employees at a facility, as was done here in Wilmington, Massachusetts, the employer will refuse to bargain with the union, and admit as much in its answer to a subsequent investigation by the NLRB. The Board will then enter a finding of a violation of the National Labor Relations Act, and the Employer can then seek review of that unfair labor practice determination, as well as the underlying unit determination by the Board. Representation case determinations are otherwise unreviewable by Circuit Courts. For a discussion of the congressional rationale behind this rather circuitous process. \textit{See} Boire v. Greyhound Corp., 376 U.S. 473, 477-78 (1964).


\textsuperscript{77} \textit{Id.} at 18.

\textsuperscript{78} Local 355, \textit{supra} note 44, at 63.
over the operations.\textsuperscript{79} This is significant. FedEx was thus entitled to show, using the Board’s decisions in the \textit{Roadway} cases as benchmarks, how the operation in the year 2000 was different than the operations in the 1990s when the operation was under the Roadway banner. Thus, FedEx presented system-wide evidence that a significant number of drivers—1,300 or about 19\% of its national driver workforce—now incorporate their businesses, even though at the Bridgeville, Maryland facility at issue, only \textit{one driver} elected to incorporate.\textsuperscript{80} Further, FedEx was able to introduce evidence that nearly half of its nationwide driver workforce uses their vehicles for outside commercial undertakings, even though there were \textit{no drivers} at the Bridgeville terminal.\textsuperscript{81} The decision also relied on the ability of drivers to buy and sell routes, the proprietary interest each driver has in his route and truck, the opportunity for both profit and loss, as well as the ability to assign another driver to the delivery route, and not show up for work on any given day.\textsuperscript{82}

FedEx further relied on the fact that all contractors have the \textit{right} to hire other drivers and helpers, even if they do not exercise that right.\textsuperscript{83} The Directors’ decision concludes that these are unrealistic opportunities.\textsuperscript{84} FedEx, however, points out that the records in the decisions show that drivers \textit{did} engage in outside business ventures, even if they were not sizeable ones—such as using their delivery “vehicle[s] to deliver equipment for a repair company, . . . operate a magazine distribution business, . . . run a landscape construction business, and to sell shrimp.”\textsuperscript{85} Similarly, any reliance on the restriction in the “manner and means” of performance of the drivers, which occur as a result of governmental regulations that FedEx and the drivers must comply with—such as Department of Transportation Hours of Service Rules, and leasing requirements restricting what the drivers can carry—cannot establish evidence of an employee relationship.\textsuperscript{86}

The decisions finding FedEx drivers to be employees all rest on a similar assumption: that the first decision to find employee status issued by Region Four in Philadelphia in 2005 applied the correct standards to a full accounting of the facts, and was the proper determination of the employee status issue. And, any decision to the contrary, like the Region Five decision issued in 2000, was dismissed out of hand by means of a
footnote. Thus, the Region One decision takes administrative notice of the fact that unreviewed decisions have no precedential value, and declines to review the Region Five decision and record in making its determination, while taking administrative notice of the fact that the Region Four decision was declined review by the Board, and relies upon that decision and record in making its determination. Such arbitrary evidentiary decisions make it appear that the battle was over before it had begun.

Having found the drivers to be independent contractors and not protected by the National Labor Relations Act, the Director for Region Five dismissed the union’s representation petition. Having won their case, FedEx did not seek a review by the Board (neither did the Union), which had the unfortunate effect—for FedEx—of not giving the decision any precedential value to later Regional Director’s Decisions. Had the Board reviewed and upheld the Region Five decision, the issues raised would have been res judicata and been binding on later Regional decisions, unless sufficient evidence was presented which would distinguish the cases—since a party can always present evidence that the National Labor Relations Board now has jurisdiction over a particular employer or a particular group of employees.

After the decisions finding employee status were handed down, the drivers still had a long way to go in order to have a union represent them. In 2005, Teamsters Local 170 filed a representation petition with the NLRB to represent twenty-one drivers at the FedEx Home Delivery terminal near Worcester, Massachusetts. After the Director issued her decision finding the single route drivers (contrasted with multi-route drivers who themselves have two or more routes and drivers) to be employees, the union filed several unfair labor practice (“ULP”) charges against FedEx. These charges alleged that FedEx, among other things: committed interrogations, made threats to close the terminal, imposed onerous working conditions, monitored union activities, created the impression of surveillance of union activities, made beneficial promises to drivers who voted against union representation, and terminated five employees.

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87. See, Local 170, supra note 5, at 1 n.7.
88. See id. at 1, n.7.
89. Local 355, supra note 44, at 63.
90. Local 170, supra note 5, at 1 n.7.
91. See id. at 2.
93. Id. at 5-9.
More than two years from the filing of the initial representation petition, the matter was settled with FedEx paying more than $253,000 to the five affected employees.\footnote{94} The settlement paved the way for the organizing election to go ahead in February 2008. However, one week prior to the vote the union withdrew the petition and cancelled the vote, which effectively prevented the union from returning for at least six months.\footnote{95}

In one of the cases where the union was successful, FedEx has refused to bargain with the union, challenging the Board’s employee status determination in the D.C. Circuit Court of Appeals.\footnote{96}

The decisions reflect the inability of parties to contract out of the National Labor Relations Act, or other state and federal statutes. There has been much litigation in the seventy plus years of the NLRB’s existence on the issue of who, or what, constitutes a “supervisor,” and simply labeling a person as such does not make it so.\footnote{97} The same can be said about independent contractors.

A Common Trend

The issues presented in the recent wave of litigation in NLRB proceedings are indicative of a trend of litigation in recent years by drivers challenging their status as independent contractors—apparently feeling that they were somehow duped into a bargain that was not as good as promised. The common issue is that the drivers, who freely entered into a bargain with FedEx to work as independent contractors, now want to be reclassified as "employees," and thus become entitled to the benefits that such status confers.

There has been an abundance of state agency litigation on the status of FedEx drivers who find themselves out of work and ineligible for state unemployment benefits. In many cases, the administrative referee has found employee status. This has occurred in part because in order to overcome the presumption of employee status, FedEx would have to defend every action filed by a former driver. In Oregon, for instance, the statute presumes that an individual who performs services for wages is an employee and not an independent contractor, and the determination of the existence of employee status is a question of law determined on the facts of each case.\footnote{98} Even though claimants had not reported any wages


\footnote{95} Id.


\footnote{98} OR. REV. STAT. § 657.040 (2005); OR. REV. STAT. 670.600 (2005).
whateover in the previous base year, the Oregon Employment Department granted benefits—resting their decision on facts similar to those found in the NLRB’s decisions.\(^9\) Similar decisions have been handed down in other states.\(^\text{100}\)

Other than the obvious problems that the drivers run into when they are denied unemployment benefits, the company itself is setting itself up for serious liabilities by misclassifying the drives. For instance in California, the Unemployment Insurance Appeals Board found in 2006, that FedEx owed the state over $7,000,000 in unpaid unemployment insurance taxes, disability, and personal income taxes for the drivers between 2001 and 2004.\(^\text{101}\) The drivers in that case established facts similar to those developed in NLRB proceedings, and the California Board rested their decision on state and federal common law principles to find that the drivers were actually employees of FedEx, and not independent contractors as FedEx maintained.

These unemployment compensation cases are only a drop in the bucket of ongoing FedEx litigation. In California, state employment laws compel an employer to pay all necessary expenses accrued while employees are discharging their duties.\(^\text{102}\) Taking the language of this statute, and the many previous decisions that have found both FedEx and its predecessor, Roadway Package Systems’ drivers to be employees, FedEx drivers once again sought an employee status determination. In a class action lawsuit, seen in *Estrada v. RPS, Inc.* (Estrada I)\(^\text{103}\) and *Estrada v.*

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102. CAL. LAB. CODE § 2802(a) (2000) (“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”).

FedEx Ground Package System, Inc. (Estrada III), the California state court determined that single work area drivers were employees. In the Estrada III decision the court wryly concluded “if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck.”

Given that the drivers in Estrada III had the same indicia as the earlier discussed cases, and had signed the same operating agreement; the court stated that the parties label of "independent contractor" is not dispositive, and will be ignored if their actual conduct establishes a different relationship. The test used in the California courts is essentially the same as the agency test used by the NLRB, and likewise led to the same finding of employee status. The effect of finding employee status in this case has had and will have far reaching consequences. Though the case is still winding its way through the appeals process, the decision for these drivers entitles them to reimbursement for the majority of their operating expenses, with the exception of the purchase price of their vehicle. Thus, the expenses that were transferred from FedEx onto the drivers—the uniforms, scanners, fuel and maintenance costs of their vehicles—are being assessed back onto the company. The trial court awarded the Estrada class participants over $600,000 in operating costs, and $12 million in attorneys' fees. The attorneys' fee award was overturned and remanded on appeal, but the finding that FedEx owes the drivers for their operating expenses was upheld, and was surely something that FedEx had not ever considered as a possibility. FedEx contended that, given that their pay structure was reflective of the cost of a driver's services as well as vehicle


105. Id. at 335.

106. Id. at 335.

107. Id. The court describes the test as "control of details" test. The test looks to whether the principal has the right to control the manner and means by which the worker accomplishes the work—but there are a number of additional factors in the modern equation, including "(1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship." Id.

108. Id. at 347-48.

109. Id. at 340.

110. Id. at 348.
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operating costs, it had already paid the drivers expenses. FedEx argued that even Plaintiff's own witnesses testified "that the payments he got from [FedEx] were only for his services and he was never told that they were intended to cover expenses." The court rejected FedEx's argument, giving the plaintiffs a large, and seemingly undeserved, windfall.

Reviewing what other delivery drivers are paid demonstrates that FedEx driver-contractors have annual gross revenues in excess of a similarly situated company driver. For instance, gross annual revenues of fourteen FedEx drivers who worked at the Worcester terminal ranged from $69,000 to $82,000—with two drivers making less than $22,000. In 2004, a UPS delivery driver would make between $13.50 and $19.80 hourly, depending on length of service. This works out to $28,080 to $41,184 annually, based on a 40-hour workweek. Clearly, FedEx is compensating their drivers in excess of the market rate (if the Union negotiated rates at UPS can be termed such), which indeed allows for the drivers to cover their expenses in addition to what the driver wants to take home as a living wage.

Since the Estrada III decision only affected "single work area" ("SWA") drivers—those that operate only one route, usually their own—FedEx decided in late 2007 that it would be moving to an all "multi-work area" ("MWA") business model in California, and will thus not renew the contracts of more than 1,000 single work area contractors. The "California Transition program" provides certain financial incentives, between $25,000 to $81,000 to SWA drivers to either become MWA operators or leave FedEx altogether. FedEx acknowledged that it was taking this action in part because of the Estrada III decision, but it would not move forward with such a plan nationwide. If the plan was applicable nationwide, it could affect as many as 9,000 SWA drivers.

With the initial success of the Estrada class action lawsuit in the trial court, other lawsuits sprang up around the country. Given the common

111. Id. at 339.
113. Estrada III, 64 Cal. Rptr. 3d at 340.
114. Local 170, supra note 5, at 8.
117. Id. at 1-2.
118. Id. at 2.
119. Id.
issue to be addressed—whether these drivers are independent contractors or employees—FedEx removed the lawsuits under the Class Action Fairness Act, avoiding the common litigation issues in different venues across the country.\textsuperscript{120} The Judicial Panel on Multi-District Litigation created a consolidated docket, which includes at least fifty-six cases which will be heard in the Northern District of Indiana.\textsuperscript{121} Their causes of action range from Employee Retirement Income Security Act (ERISA)\textsuperscript{122} claims for benefit contributions to state wage and hour claims.\textsuperscript{123}

Like the \textit{Estrada} cases, which had far reaching consequences in California, this case, or series of cases, will have wide-ranging effects on FedEx nationwide. The plaintiffs in the class were granted class-certification, for the following class of persons:

All persons who: 1) entered or will enter into a FXG Ground or FXG Home Delivery form Operating Agreement (now known as form OP-149 and form OP-149 RES); 2) drove or will drive a vehicle on a full-time basis (meaning exclusive of time off for commonly excused employment absences) [during the class period] to provide package pick-up and delivery services pursuant to the Operating Agreement; and 3) were eligible for ERISA plan benefits, absent their mischaracterization as independent contractors.\textsuperscript{124}

Unlike \textit{Estrada}, the class certification order granted in the multi-district litigation grants prospective relief to the drivers, by allowing drivers who “will enter into” a FedEx agreement to be part of the class, which could have far reaching ramifications for FedEx long term.

\textbf{WHAT'S NEXT FOR THIS BUSINESS MODEL?}

Interest in the independent contractor model has been keen in the motor carrier industry for decades, since this industry in particular sees their widespread use. In 1966 and again in 1989, Transportation Attorney James Hardman undertook a review of Board and other decisions which had questioned the legitimacy of the independent contractor model.\textsuperscript{125} Hardman argued that motor carrier companies using independent con-

\begin{thebibliography}{99}
\bibitem{124} \textit{Id.}, at 22.
\end{thebibliography}
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tractors should be aware that the classification draws close scrutiny from state and federal agencies. He suggested that carriers appoint an internal auditor whose function would be to ensure that the company is in compliance with applicable employment and labor laws regarding independent contractors, and function as a liaison with legal counsel. Since it is usually upon the party asserting independent contractor status to provide sufficient evidence to support it, the transportation attorney's job essentially was to ensure that the drivers in their daily activities would meet the common law definition. The auditor function seems like a wise idea, but this function was likely a suggestion for smaller carriers that were unaware of the nuances that the independent contractor status could bring. Obviously, FedEx being a multi-billion dollar a year business has a whole cadre of auditors, managers, contractor-relations personnel, and attorneys to help with this type of work. However, even a well funded company like FedEx is seemingly losing this battle. In addition to the NLRB decision, unemployment agency decisions, the Estrada cases, and the pending class action suit in Indiana, the Internal Revenue Service assessed FedEx with a $319 million judgment in unpaid taxes. Again, the issue was whether FedEx had misclassified their drivers as independent contractors rather than employees. Further, governors from Michigan and New Jersey have created task forces to look into the issue, not just with FedEx, but with all companies using the independent contractor model.

The decisions reviewed have consistently found that the control that FedEx exercises over their drivers is a significant factor in the determination of employee status. It is highly unlikely that FedEx wants to relinquish this control, since it is imperative that they maintain their brand image with consistent enforcement of company policies. Thus far, FedEx has shown that it is amenable to some change, as indicated by the move in California to eliminate the single work area contractors in favor of a multi-work area contractor model. Those moving to the MWA model can expect incentives of "between $5,000 and $26,000, depending

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126. Hardman, Administrative Bulls Revisited, supra note 126, at 131.
127. Id. at 130-31.
128. Id. at 122.
130. Id.
on how many routes a contractor takes on."\textsuperscript{133} While this model may reduce control that FedEx has over their drivers, it could be significant enough to show that the drivers are independent contractors. Should the drivers be found to be employees, they would likely be found to be employees of the MWA contractor. In the NLRB decisions, the MWA contractors were consistently excluded, since they were found to be employers in their own right, and exercised enough control over their subordinate drivers to be "supervisors" within the meaning of the NLRA.\textsuperscript{134}

However, the MWA contractor model might not fare any better in complying with the law than the SWA model. The Indiana Federal Court handling the multi-district litigation indicated that the MWA model does not change the control that the company exercises over the MWA contractors—they would still have to perform the same tasks, abide by the same policies, and display the same company colors.\textsuperscript{135} Further, the MWA contractor would have to sign a "Compliance Disclosure Addendum" which is to "validate compliance with applicable laws."\textsuperscript{136} All MWAs must sign the addendum as a condition of continued employment (or, business), and the contractor thereby agrees to waive all their legal claims against FedEx.\textsuperscript{137} Courts could still invalidate such an agreement, finding it to be "unconscionable" or a contract of adhesion, and FedEx could still be liable if a court or agency were to find that FedEx, along with the MWA contractor, were joint employers of drivers.

To be sure, FedEx was not intending to commit some unlawful act. A company that uses tax and labor laws to its advantage is not evidence itself of culpable conduct. FedEx has a complement of highly skilled attorneys at their disposal, and these attorneys were not intentionally leading the company down the garden path into a litany of lawsuits. Part of the problem is that, even though FedEx had the intent to shift some of the capital costs and financial burdens to its drivers, the company and its attorneys were not provided with much guidance by the laws regulating independent contractors.

The common law tests are essentially "totality of the circumstances" tests, which permit a result-oriented approach.\textsuperscript{138} As indicated in the recent NLRB decisions, there is a trend to find these drivers to be employ-


\textsuperscript{136} Id. at 4.

\textsuperscript{137} Id. at 5.

\textsuperscript{138} N.L.R.B v. Friendly Cab Co., 183 L.R.R.M. (BNA) 2385, 2388-89 (9th Cir. 2008).
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ees, even though one decision from 2000 found the drivers to be independent contractors.\textsuperscript{139} Similarly, the IRS in 1995 made the determinations that RPS drivers—working under the 1994 operating agreement, which has remained substantially the same—were independent contractors.\textsuperscript{140} Thereafter, the IRS changed its mind and declared FedEx to be in violation.\textsuperscript{141}

There has to be legislation—primarily in the federal sphere—that will provide guidance to companies, workers, courts, and administrative agencies that are making these important determinations every day.\textsuperscript{142} The tests that allow a worker to be an employee one day and an independent contractor on another have clearly outlived their utility. The changes that keep taking place do not provide the financial and workforce stability that is necessary for any successful business. Furthermore, once appropriate legislation is passed, with an actual bright-line rule for what an independent contractor is, any agency that makes the determination that a group of workers fits this definition must be bound by its decision for a certain length of time. Obviously, an IRS determination that took place in 1995 does not have to be binding forever, but a company should be entitled to some reliance on this federal agency’s determination for a pre-determined number of years.

It has been argued elsewhere that a state agency could regulate employee status, but this would only apply to benefits provided by the states, such as unemployment insurance, workers compensation, and the like.\textsuperscript{143} The suggestion that independent contractors receive collective bargaining rights is not one that a large company like FedEx would likely support.\textsuperscript{144} A federal agency, however, would be able to make the employee status determination for all questions of federal law and liability. A new agency could be charged with such determinations, or it could be bestowed on an agency that is commonly faced with the issue involving any employer that

\textsuperscript{139} Local 355, supra note 44, at 63.
\textsuperscript{140} See Roadway III, supra note 43, 854 n.46.
\textsuperscript{141} CNNMoney, supra note 130.
\textsuperscript{142} Previous attempts to amend the tax code to have a clearer definition of independent contractor have failed. "To amend the Internal Revenue Code of 1986 to clarify the standards for determining whether an employer-employee relationship exists." 143 Cong. Rec. H 8727 (Oct. 8, 1997) (by Rep. Visclosky). Even President Barak Obama was trying to make changes to the tax code when he was a Senator with The Obama-Durbin Independent Contractor Proper Classification Act of 2007 (The ICPC ACT of 2007). See Posting of Elesha, Obama Introduces Pro-Labor Legislation Today, Unions for Change Blog, Barack Obama and Joe Biden: The Change We Need, Sept. 12, 2007, http://my.barackobama.com/page/community/post/union-
\textsuperscript{144} As evidenced by their repeated refusals to bargain with one of the first certified Teamster units. See Local 25, supra note 97, at 2.
is engaged in interstate commerce: the NLRB. Agreement from the states to respect the agency's determination, along with federal preemption, would prohibit states from creating their own definitions of independent contractor, thus avoiding a patchwork of legal authority nationwide. Funding could come from companies who choose to use independent contractors, recognizing that these companies do enjoy many tax savings that companies using the traditional employer-employee relationship do not.

Further, if a party, worker, company or administrative agency wanted to challenge such determinations, it should be for prospective relief only. The *Estrada* case, NLRB decisions, and the potential liability in the federal multi-district class action litigation demonstrate that these lawsuits can result in millions of dollars of unexpected retroactive liability, and a group of workers that is suddenly subject to labor laws with many new rights. If a company could plan ahead, knowing that their workers' independent contractor status would expire on a certain date, it could maintain or introduce new controls in the workplace to keep the status alive. Thus, much of the litigation could be avoided by precluding the introduction of changed circumstances which may tend to show employee status.

The IRS has a "safe harbor" provision in Section 530, which allows companies who have a *reasonable basis* to treat its workers as independent contractors. Even if, under the common law test, the worker could be found to be an employee, so long as there is an objectively reasonable basis for the company's determination that the workers are not employees, then the company will be absolved from tax liability for those years. Among the factors that an employer is permitted to rely on is industry practice—which is evident in the trucking industry—making such a provision especially helpful in the FedEx situation. While various courts and tribunals have ruled against FedEx of late, the company's treatment of their delivery drivers as independent contractors cannot be unreasonable: the IRS determined that RPS' treatment of the drivers as independent contractors was reasonable, and the 2000 NLRB Region

145. The jurisdiction would need to comply with the commerce clause. U.S. Const. art. I, § 8, cl. 3. But, it could be quite broad. See N.L.R.B. v. Jones & Laughlin Steel Corp., 301 US 1, 31 (1937) (finding the NLRA to be constitutional, which gives the Board jurisdiction over the majority of private employers in the United States).

146. This could be accomplished by some federal "arm twisting" like withholding highway funds from states that do not agree. South Dakota v. Dole, 483 U.S. 203, 206-207 (1987).


149. Id. at § 10[b] (citing Sanderson v. United States, 862 F. Supp. 196, 198 (N.D. Ohio 1994), vacated, 876 F. Supp. 938 (N.D. Ohio 1995)).
Five decision found the drivers to be independent contractors.\textsuperscript{150} A unified approach and a one-shot determination of the independent contractor status would thus serve to eliminate the back and forth decisions being handed down by various federal and state agencies.

In the short term, however, the only bullet-proof method to avoid the repeated claims on employee status would be for FedEx to make all of their drivers "employees." Of course, this could bring on different litigation that has been partially avoided by having the drivers focus their attention on the employee status issue. Newly minted employees would not be able to challenge claims under FMLA,\textsuperscript{151} ADA,\textsuperscript{152} Title VII,\textsuperscript{153} ADEA,\textsuperscript{154} as well as other labor and employment statutes. Former FedEx drivers are already bringing such challenges to company policies designed to increase worker performance, alleging that they violate the ADEA by favoring younger workers over older ones.\textsuperscript{155}

Truly, no matter what direction FedEx decides to move in they will not be immune from suit. But in the absence of legislation providing proper guidance, it is perhaps time to change a business model that has plagued the company in recent years. At the very least, FedEx needs to reexamine and rewrite their operating agreement, to show that it is making material changes in order to address the issues that the various courts and administrative agencies have found determinative of employee status. Such changes would permit the company to focus more on maintaining and increasing their share of the package delivery market, rather than their share of lawsuits and payouts to their newest "employees."

\textsuperscript{150} See Roadway III, \textit{supra} note 43, 854 n.46.
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I. INTRODUCTION

It is beyond argument that ocean freight forwarders assist in the furtherance of global commerce. The U.S. Senate has recognized that "many [export shippers] could hardly continue in foreign commerce without the operations of the independent ocean freight forwarder." However, as status of a forwarder has been the source of much confusion within the jurisprudence with one court recognizing that "[t]he precise status of a forwarder is a matter not free from doubt." The confusion is partly due to the many functions which a freight forwarder may perform and the fact that the role of the freight forwarder in ocean transportation can be described in many different ways depending on the particular duties or responsibilities that the forwarder as undertaken. The courts have attempted to generally categorize freight forwarder status and the holdings of the relevant cases do not always comport either with the language of the applicable statutes or with the specific, actual duties or legal obligations of the freight forwarder at issue. Also, the cases discussing forwarder status are hesitant to apply traditional agency law to forwarder activities, and commonly attempt to find a compromise between a traditional agency role and something else, for which there is not either a sound precedential or conceptual basis, and which may conflict with the applicable federal regulations. The determination of forwarder status is of particular importance in ascertaining whether or not the forwarder was acting in the capacity of an agent of the merchant in matters concerning contractual negotiation and accordingly, had the authority and ability to contractually bind the merchant. Further, in certain circumstances, the forwarder may incur additional liability as a carrier.

This article will review the functions and duties of ocean freight forwarders along with reference to the applicable federal regulations as well as consider the differences between the activities of an ocean freight forwarder and domestic forwarders. This article also will discuss the relevant jurisprudence with respect to determination of forwarder status and spec-

3. See Black & Geddes, Inc. Dampskibsselskabet AF 1912 Aktieselskab v. Black & Geddes, Inc., 35 B.R. 830, 834 (Bankr. S.D.N.Y. 1984) ("There are numerous cases addressing various aspects of the carrier-forwarder-shipper triad. Many of these cases reach inconsistent conclusions ... The court has concluded that the confusion initially created by the case law is more apparent than real. Fundamentally the relationship is one of contract. ... "). Respectfully, the court did not recognize that such relationships are also determined by reference to federal regulation as well as equitable principles. Many of these cases are determined by U.S. district courts sitting in admiralty and it has long been recognized that courts of admiralty are also courts of equity.
cifically the U.S. courts' discussions of the application of agency concepts to a freight forwarder's role in ocean transport. The article then will provide a brief comparison with English law. Lastly, this article will examine under what circumstances an ocean freight forwarder may have undertaken additional obligations so that the forwarder would be considered to be a carrier.

II. Freight Forwarders' Role in Ocean Transport

Freight forwarders arrange for transportation of goods from one place to another for someone else. As succinctly stated by the English Court in *Jones v. General Express*, freight forwarders are: "willing to forward goods for you... to the utmost ends of the earth. They do not undertake to carry you and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work...".

Concerning the carriage of goods by sea, forwarder functions have been described and defined by customary practice, case law and federal regulation. Depending on the factual situation, freight forwarders have been determined to be intermediaries, independent contractors, agents, and possibly principals or carriers in a contract for carriage of goods by sea or a carriage of goods which includes ocean transport.

A. Freight Forwarders as Intermediaries

With respect to U.S. Federal regulation, freight forwarders are designated as ocean transportation intermediaries, and are required to be bonded, licensed, and otherwise regulated by the Federal Maritime Commission (FMC) pursuant to the Shipping Act of 1984, specifically incorporated into the provisions 46 C.F.R. Part 515, et seq. These regulations provide that the definition of an ocean freight forwarder is as follows:

1. *Ocean freight forwarder* means a person that-
   (i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and
   (ii) processes the documentation or performs related activities incident to those shipments.

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4. (1920) 4 L.L. Rep 127.
5. Id.
6. See 46 app. § 1701-1702 (2006). Formerly, ocean freight forwarders were regulated by The Shipping Act 1916, Section 1 (46 U.S.C. app. § 801 as "other person subject to this Act." The Shipping Act 1916 further defined forwarding as "carrying on the business of forwarding means the dispatching of shipments by any person on behalf of others by ocean going common carriers. . .").
In the aspect of federal regulation, freight forwarders are different from other ocean transport intermediaries in shipping such as shipbrokers, which are not regulated by statute in the United States and accordingly do not have to pose a bond or have any reporting requirements.\(^8\) While shipbrokers may also perform many of the functions of freight forwarders, the legal treatment of freight forwarders and shipbrokers under U.S. law is significantly different in that shipbroker activities are largely governed by agency law,\(^9\) and shipbroker activities are not considered to fall within a U.S. court's admiralty jurisdiction,\(^10\) as shipbroker activities have been held to be not "sufficiently maritime in nature to come within the maritime jurisdiction."\(^11\) In contrast, U.S. courts are oftentimes hesitant to apply the principals of agency law to freight forwarders\(^12\) and forwarder activities almost always fall with the admiralty jurisdiction of U.S. courts.\(^13\)

\(^8\) Shipbroker services are defined in 46 C.F.R. § 515.2(n) (2009), which states that an "Ocean freight broker is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions, and other terms of transportation." 46 C.F.R. § 515.4 (2009) further specifies that a license is not required for ocean freight brokers. This situation is different from brokers involved in trucking and motor carriage in that such brokers must obtain a license from the Federal Motor Carriers Safety Administration. See 14 U.S.C.S. § 13904 (1995) (amended by Pub. L. No. 104-88, Title IV, Subtitle A, § 4142(c) (2005)). See generally James C. Hardman, Legal Practical and Economic Aspects of Third Party Motor Carrier Services: An Overview, 34 TRANP. L.J. 237, 238 (2007).

\(^9\) See e.g., W. India Indus., Inc. v. Vance & Sons AMC-JEEP, 671 F.2d 1384, 1386 (5th Cir. 1982) and MTO Mar. Transp. Overseas, Inc. v. McLendon Forwarding Co., 837 F.2d 215, 218 (5th Cir. 1988). Additionally, the Association of Shipbrokers and Agents (USA), Inc. has stated that "[l]egally speaking, a shipbroker is an agent and subject to the laws of agency." Basic PRINCIPALS OF CHARTERING 60 (Peter D. Scott, ed., 1990). With respect to the application of agency law, the position under English law is similar to U.S. law. See e.g., Harper & Co. v. Vigers Brothers, (1909) 2 K.B. 549, 562 (explaining that "...a shipbroker is only an agent to make a charter.").


\(^11\) Shipping Fin. Serv. v. Drakos, 140 F.3d 129, 133 (2d Cir. 1998). Drakos involved the Second Circuit's review of shipbroker activities after Exxon v. Cent. Gulf Lines, Inc. 500 U.S. 603 (1991). In Exxon, the Supreme Court held that the per se rule, in which certain activities would per se fall outside the U.S. Court's admiralty jurisdiction, would no longer be applicable. Instead, a "subject matter" test should be applied to the activities in question in order to determine if they would qualify for admiralty jurisdiction. Id. at 611-13.

\(^12\) See e.g., Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 34 (2004) (holding that reliance on agency law was misplaced with respect to the relationship between the forwarder and the shipper who retained the forwarder.)

\(^13\) See e.g., Ingersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293, 301 (2d Cir. 1987) (noting with approval the district court's holding that "[f]ederal courts have traditionally exercised admiralty jurisdiction over shipper's claims against forwarders." (quoting Ingersoll Milling Mach. Co. v. M/V Bodena, 619 F. Supp. 492, 503 (S.D.N.Y. 1985)).
The applicable federal regulations define and delineate freight forwarder functions as follows:

(i) Freight forwarding services refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:
(1) ordering cargo to port;
(2) preparing and/or processing export declarations;
(3) booking, arranging for or confirming cargo space;
(4) preparing or processing delivery orders or dock receipts;
(5) preparing and/or processing ocean bills of lading;
(6) preparing and/or processing consular documents or arranging for their certification;
(7) arranging for warehouse storage;
(8) arranging for cargo insurance;
(9) clearing shipments in accordance with United States Government export regulations;
(10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees as required;
(11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
(12) coordinating the movement of shipments from origin to vessel; and
(13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargo's dispatch.14

When discussing the role of a freight forwarder, case law emphasizes the intermediary aspects of a forwarder's functions. For example, in *Scholastic Inc. v. M/V Kitano*,15 a case in which a party's status was in dispute, the Court noted that "[a] freight forwarder 'simply facilitates the movement of cargo to the ocean vessel.'"16 Likewise, the U.S. Supreme Court in *Norfolk Southern Railway Company, v. Kirby*17 noted that "[a] freight forwarding company arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo."18

Defining a freight forwarder as an intermediary or a facilitator may be generally descriptive with respect to a freight forwarder's role as a logistics service provider. However, these descriptions do not convey the exact relationship a forwarder may have to the other parties involved in the shipment and may be in conflict with the actual duties a forwarder has.

18. *Id.* at 19.
undertaken for a particular shipment. Furthermore, such definitions may also create uncertainty regarding when a forwarder may act as an agent to one of the parties, or even when a forwarder may assume the role of principal or carrier in a contract for ocean carriage.

For the sake of clarity, it must be mentioned that ocean freight forwarders are governed by different federal regulations than freight forwarders involved with trucking or motor carriage and accordingly, the term 'freight forwarder' used for motor carriage encompasses different functions from an ocean freight forwarder. Specifically, 49 U.S.C §13102 (8) provides that a forwarder in the context of motor carriage is defined as:

"a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business -
(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;
(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and
(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle. "The term does not include a person using transportation of an air carrier subject to part A of subtitle VII."19

Freight forwarders for motor carriage are regulated by the Surface Transportation Board of the U.S. Department of Transportation, while ocean freight forwarders are regulated by the Federal Maritime Commission. It is important to note that the critical distinction is that a freight forwarder for motor carriage "assumes responsibility for the transportation,"20 while an ocean freight forwarder dispatches shipments "on behalf of others."21 Accordingly, a freight forwarder for motor transportation according to the Department of Transportation definition engages in similar activities, undertakes similar responsibilities, and is generally analogous to a Non-Vessel Operating Common Carrier with respect to Federal Maritime Commission regulations and the international carriage of goods by sea.22

U.S. Courts are extremely hesitant to apply the principles of agency law to freight forwarders in order to determine whether or not the forwarder may be considered to be an agent of either the Carrier or the Merchant. One of the seminal cases concerning forwarder status is *Farrell Lines, Inc. v. Titan Industrial Group.* The facts in *Farrell Lines* are representative of the Merchant-Carrier-Forwarder triad which forms the basis of many of the disputes involving forwarders. In *Farrell Lines,* Titan Industrial Group (Titan) would book cargo with various carriers through the forwarder, Baltimore Dispatch Corporation (Baltimore Dispatch). In this particular instance, Titan booked three shipments of steel from Baltimore to Africa on two vessels in Farrell Lines' fleet through Baltimore Dispatch. Titan paid the freight to Baltimore Dispatch which went bankrupt before and without paying the freight to Farrell Lines. Farrell Lines then sued Titan, claiming that Titan statutorily and contractually owed the freight to Farrell Lines even though Titan had paid the freight to Baltimore Dispatch. Titan defended, in part, alleging that Baltimore Dispatch had actually been Farrell Lines' agent. The Court held in favor of Titan based on the actions of the parties indicating that the Farrell Lines was looking to Baltimore Dispatch as "the principal and obligor on the freight contract." Although it was not dispositive to the holding, with respect to the agency issue, the Court noted that

"[t]he forwarder was paid for these services [selecting the carrier, booking the carriage of the cargo, arranging delivery of the cargo to the vessels, preparing bills of lading] based on a percentage of freight charges. Neither the shipper nor the carrier however, had any control over the manner in which the forwarder performed these services. Moreover, the forwarder would deal with many other carriers and shippers besides the parties. Absent the critical


24. *See id.* at 1349. In accordance with the Shipping Act of 1916, 46 U.S.C. §§ 812, 814-817, the Transportation Act, 49 U.S.C. §§ 6(7), 906 (c), mandates that the carrier receive full freight. The provisions are designed to prevent common carriers from giving preferable or favored treatment to particular shippers such that all shippers may book carrier with the carrier pursuant to the rates and terms of the carrier's public tariff. The Court held that "as long as someone is liable for the full amount of the freight, so there is no overcharge or undercharge, the public interest is protected and the statutes are satisfied." *Id.* (citing *Louisville & Nashville R.R. Co. v. Cent. Iron & Coal Co.*, 265 U.S. 59, 66 (1924)).

25. *See id.* Farrell Lines relied on a provision of its Bill of lading which stated that "the shipper and consignee shall be jointly and severally liable to the carrier for payment of all freight." *Id.* The Court held that Farrell Lines could not rely on this provision as it had issued Freight Prepaid Bills of lading and had otherwise dealt with Baltimore Dispatch as a shipper, stating that "allowing the carrier to recast the transaction in a different mold because of the forwarder's insolvency would be most unjust." *Id* at 1351.

26. *Id.*
elements of control and exclusivity, we find that the forwarder was neither
the carrier’s agent for receipt of payment, nor the shipper’s agent in the
transactions with the carrier, but rather an independent contractor.”

Since Farrell Lines, freight forwarders have been frequently held to
be independent contractors by U.S. Courts. In Koninklijke Nedlloyd BV
v. Uniroyal, Inc.,28 (Nedlloyd) the Court followed the rationale of Farrell
Lines. In Nedlloyd, the Merchant, Uniroyal, Inc. (Uniroyal) booked space
directly with the Carrier, Koninklijke Nedlloyd BV (Nedlloyd) on the
Carrier’s vessels. There was a credit agreement between Uniroyal and
Nedlloyd which stipulated that freight would be payable within 15 days
after the vessel had departed the port of loading. Eastern Cargo Forward-
ers (Eastern) would prepare the bills of lading with the information sup-
plied by Uniroyal and for which Uniroyal would pay Eastern a fee.29
Eastern would deliver the bill of lading drafts to Nedlloyd’s general agent
in New York who would check the bills of lading against the mates’ re-
ceipts and then issue the Bills of Lading along with the freight invoice, or
Due Bill. The Due Bill would be released to Eastern after Eastern’s mes-
enger initialed the Due Bill. Uniroyal would pay Eastern the freight who
would then pay the freight to Uniroyal.

Eastern became late in payment of freight to Nedlloyd and subse-
quently defaulted on several freight payments. Nedlloyd then sued Uni-
royal for the freight due, arguing inter alia that Eastern was Uniroyal’s
agent and that “Uniroyal is therefore bound by the contracts entered into
by the forwarder on its behalf.”30 Further, Nedlloyd argued that “[s]ince
Eastern was the defendant’s [Uniroyal’s] agent, [Nedlloyd] reasons that
Uniroyal must be responsible for the failure of its agent to remit the
funds.”31

The Court held that:

The precise status of a forwarder is a matter which is not free from doubt,
and it would serve no useful purpose to attempt here to reconcile all of the
conflicting cases. In the Court’s opinion, the most persuasive reasoning is
contained in Judge MacMahon’s decision in Farrell Lines, supra. He held
that a forwarder was an independent contractor, and was thus not an agent
of either the shipper or the carrier. The evidence in this case certainly sup-
ports such a holding here.32

With respect to the merits of the case, Nedlloyd relied on the word-
ing of the credit agreement with Uniroyal which stipulated that “[w]e[the

27. Id. at 1350.
29. See id. at 123. Eastern was not a party to the lawsuit.
30. Id. at 128.
31. Id.
32. Id.
Shippers] will be absolutely and unconditionally responsible to the Carrier for the payment of all freight . . ."\(^{33}\) as well as clause 12 of the bill of lading which provided that "[i]n all circumstances the shipper remains responsible for the freight, primage and charges until same have been paid."\(^{34}\) The bill of lading listed Uniroyal as the shipper and Eastern as the forwarder.

Similarly to the holding of Farrell Lines, the Court held that an examination of the course of dealing between the parties for the shipment indicated that Nedlloyd had treated the Eastern as a shipper in that Nedlloyd had attempted to collect freight from Eastern and issued the Due Bills over Eastern's signature. Therefore, "Eastern was thus the principal obligor on the freight invoice and was responsible to Nedlloyd for payment."\(^{35}\) Accordingly, the Court essentially disregarded the contractual terms in favor of the Court's interpretation of the parties' actions.

A more equitable result from the Carrier's point of view was obtained in Strachan Shipping Co., v. Dresser,\(^{36}\) in which the Fifth Circuit also followed Farrell Lines with respect to the rejection of agency principles for freight forwarder relationships with the Carrier and Merchant. The facts of Strachan are similar to Nedlloyd. In Strachan four shipping lines and their agent, Strachan Shipping Co (Strachan) sought to recover freight and stevedoring expenses from the shipper, Dresser Industries, Inc (Dresser) after the forwarder, Sierra went bankrupt. Dresser had paid Sierra, but Sierra had not remitted the funds to the carriers. The carriers initially attempted to collect the funds from Sierra but then when these collection efforts proved futile, the carriers proceeded to attempt collection from Dresser. As in Nedlloyd, Dresser as the shipper had signed a conference credit agreement stipulating that "[w]e will be absolutely and unconditionally responsible to see that all freights and charges due are paid . . ."\(^{37}\) in consideration of receiving "Freight Prepaid" bills of lading.

The carriers argued that although Dresser had paid the forwarder, Dresser would still be liable to the carriers based on the language of the credit agreement as well as agency theory in that Sierra was Dresser's agent and that a failure of the agent to remit the funds to a third party does not relieve the principal of the obligation to pay.\(^{38}\) The District Court had found that Sierra was in fact the carriers' agent and that payment had been satisfied as the payment to an agent fulfilled the obliga-

\(^{33}\) Id. at 126.

\(^{34}\) Id. at 127. (quoting The Bill of Ladings on file with the FMC).

\(^{35}\) Id. at 128.

\(^{36}\) Strachan Shipping Co. v. Dresser Indus., Inc., 701 F.2d 483, 488-89 (5th Cir. 1983).

\(^{37}\) Id. at 485.

\(^{38}\) Id.
tion to pay freight in accordance with the terms of the credit agreement.\textsuperscript{39} The Fifth Circuit noted that the forwarders' activities benefitted both parties\textsuperscript{40} at various times during the shipment and that therefore, "[i]f Sierra is neither the shipper's nor the carrier's agent throughout, instead of making the left hand the agent of one and the right hand the agent of the other we view Sierra as an independent contractor."\textsuperscript{41} In so holding the most important factor in the Court's determination appears to be the lack of control exhibited by both the carrier and the shipper over a forwarders' activities. The court reasoned that "[w]hile the forwarder performs a variety of functions benefitting both shipper and carrier, neither the shipper nor the carrier retains substantial control over the forwarder's performance."\textsuperscript{42} Concerning the merits, the Court held that as the shipper "guaranteed to pay even if the forwarder failed to remit the funds, and we cannot alter this obligation."\textsuperscript{43}

While there is a reluctance to analyze the forwarder principal relationship under agency, a Court may use agency law to determine the rights and obligations between the principals if there is another factor present that would lead to the application of agency law. For example, if there is an agency contract between the forwarder and the principal, then agency law may be applied to the entire relationship between the forwarder and its principal. In \textit{MTO Maritime Transport Overseas, Inc. v. McLendon Forwarding Co., et al.}\textsuperscript{44} the merchant and Principal, Umm Al Jawaby Petroleum Company ("Jawaby") instructed McClendon, its forwarder, to arrange for the carriage of two rigs from Houston to ports in the Arabian Gulf. The rigs were to be shipped at different times and accordingly, on different vessels. The first rig was booked by McClendon

\begin{footnotesize}

\textsuperscript{39}. \textit{See id.} at 487. In \textit{Strachan Shipping Co. v. Dresser Indus., Inc.}, 534 F. Supp. 205, 208, the district court succinctly stated "I find that in this case the facts established that Sierra was plaintiff's agent for receiving payment." The Fifth Circuit noted the faulty reasoning in the district court's analysis stating that "after finding that Sierra was the carriers' agent, the district court construed the transaction in question as an extension of credit by the carriers to Sierra. However, if Sierra were the carriers' agent, then the credit nature of the transaction never arises because Dresser has paid the carriers themselves." \textit{Strachan Shipping Co.}, 701 F.2d at 487 n3.

\textsuperscript{40}. The Fifth Circuit reviewed the legislative history of 46 U.S.C. § 841b, which was enacted to enable carriers to compensate forwarders through the payment of commission without contravening the provisions of the Shipping Act 1916, § 44, which in turn prohibited the payment of rebates. \textit{See Strachan Shipping Co.}, 701 F.2d at 487.

\textsuperscript{41}. \textit{Strachan Shipping Co.}, 701 F.2d at 488.

\textsuperscript{42}. \textit{Id.} at 488-89.

\textsuperscript{43}. \textit{Id.} at 489. Concerning the contractual construction of the credit agreement and the shippers guarantee of the payment of freight therein, the Court held that "both the lower court and the \textit{Uniroyal} [Nedlloyd] court gave this agreement an unduly narrow interpretation." \textit{Id.} at 486.

\textsuperscript{44}. \textit{MTO Maritime Transp. Overseas, Inc. v. McLendon Forwarding Co.}, 837 F.2d 215, 217 (5th Cir. 1988).

\end{footnotesize}
with a carrier, World Navigation in September, 1983 and was carried without incident.

In December, 1983, McLendon confirmed the booking for the second rig with World Navigation and the rig was delivered to the carrier's terminal. At some time, it became apparent that World Navigation could not perform and McLendon then booked the rig with another carrier, MLS. World Navigation refused to release the rig to MLS and the rig was eventually carried by a third carrier.

MLS sued Jawaby and McLendon jointly and severally in the U.S. District Court for the Southern District of Texas for breach of contract. MLS was successfully and Jawaby appealed to the U.S. Fifth Circuit, arguing, inter alia that McLendon had not had the requisite authority to contract for the carriage of the second rig with MLS.

First, the Fifth Circuit found that an agency contract existed between McLendon and Jawaby.45 Then, the Court noted that Jawaby’s two-prong analysis concerning agency law was inconsistent with respect to the facts of the case. First Jawaby asserted that McLendon did not have authority to enter into a contract with MLS as “the preexisting written booking agreement with World Navigation in some sense obviated McLendon’s authority to enter into another agreement with a separate [carrier].”46 The second prong of Jawaby’s argument was that the contract with MLS could not be valid unless and until MLS released the cargo. Thus, the court noted that the assertion that the contract with MLS was based on a condition precedent was inconsistent with the assertion that the contract was invalid due to the lack of McLendon’s authority. With respect to the issue of agency and authority, the Court stated when it became apparent that a second vessel was needed, “Mclendon was acting within the scope of its authority in arranging alternate carriage.”47

Mclendon potentially illustrates the difference in treatment between brokers and forwarders with respect to the application of agency law and actual authority. With respect to shipbrokers, in the 1984, four years prior to McLendon the Fifth Circuit noted that “[b]y custom among New York shipbrokers, each broker must have a separate and express grant of authority from the principal each time a firm offer is made or confirmed on behalf of the principal.”48 Thus, if McLendon had simply been a shipbroker, then the Court could have held that there was no actual authority to contract with MLS. Furthermore, McLendon demonstrates the “lack of control” the principals exercise over a forwarders’ functions. If there had been no agency agreement, considering the precedent, a different result

45. Id. at 218.
46. Id. at 219.
47. Id. at 219 n8.
could have been obtained in McLendon if the court had determined that McLendon was acting in the capacity of independent contractor.

Absent an agency contract or other indicia of the agency relationship, courts continue to be hesitant if not hostile to the application of agency law to freight forwarder activities. This hesitancy is further evident in the most recent U.S. Supreme Court decision to discuss freight forwarders and agency law. In *Norfolk Southern Railway v. Kirby*,49 the United States Supreme Court considered the agency relationship of forwarders and their ability to bind parties. In *Kirby* an Australian cargo owner, James N. Kirby, Pty, Ltd., (Kirby) hired an Australian freight forwarder, International Cargo Control (ICC) to ship 10 containers of machinery parts from Sydney, Australia to Huntsville, Alabama. ICC issued Kirby a through bill of lading designating Sydney as the load port, Savannah as the discharge port and Huntsville as the ultimate destination. The ICC bill of lading provided Kirby with a “fair opportunity” to declare the value of the cargo,50 but Kirby accepted the contractual limitation of liability and insured the cargo for its full value with Allianz Australia Insurance Ltd. (Allianz).51 Further, the ICC bill contained a Himalaya clause52 which read as follows:

“[t]hese conditions [for limitation on liability] apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract.”53

ICC then contracted with Hamburg Sudamerikanische Dampfschifffahrts Gesellschaft Eggert & Amsinck (Hamburg Sud) to carry the cargo from the port of loading to the destination. Hamburg Sud then issued its own bill of lading to ICC.54 The bill of lading contained a clause para-

52. The clause is named after the English case, Adler v. Dickson, *The Himalaya* [1955] 1 Q.B. 158 (C.A. 1954), in which the Court of Appeals held that a crewmember could not rely on an exceptions clause in the contract between the shipowner and a passenger due to the lack of privity of contract. After this decision, exception and limitation clauses were drafted to include a shipowner’s or carrier’s agents and servants.
54. If ICC had been a US freight forwarder under 46 C.F.R. § 515.3, then the bill of lading issued to ICC as the shipper rather than Kirby as the shipper and ICC as the freight forwarder, would contravene 46 C.F.R. § 515.42(a), which mandates that “[t]he identity of the shipper must
mount, adopting the US COGSA limitations and extending the limitations after discharge and until delivery of the cargo.\textsuperscript{55} The Hamburg Sud bill of lading also contained the standard Himalaya clause which provided that all limitations would extend to "all agents... (including inland) carriers... and all independent contractors whatsoever."\textsuperscript{56}

Hamburg Sud contracted with Norfolk Southern Railway Company (Norfolk) to deliver the cargo from Savannah to Huntsville.\textsuperscript{57} The Norfolk train carrying the cargo derailed causing damage to the cargo in an alleged amount US $1.5 million.\textsuperscript{58} Allianz paid Kirby and then Kirby and Allianz sued Norfolk in the United States District Court for the Northern District of Georgia. Norfolk defended alleging, \textit{inter alia}, that it was protected by the limitation and the Himalaya clause both in the ICC and the Hamburg Sud bills of lading.\textsuperscript{59}

The Eleventh Circuit found that Norfolk could not rely on the terms of the ICC bill of lading for two reasons. First of all, the language of the Himalaya was "too vague to include Norfolk"\textsuperscript{60} and other parties that were not in privity with ICC when the bill of lading was issued by ICC.\textsuperscript{61} Secondly, the Court held that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier."\textsuperscript{62} With respect to the Himalaya clause in the Hamburg Süd bill of lading, the Eleventh Circuit held that this would apply "only if ICC was acting as Kirby's agent when it received the Hamburg Süd bill."\textsuperscript{63}

In reversing the Eleventh Circuit and noting that admiralty jurisdiction would apply to the controversy\textsuperscript{64}, the Supreme Court first held that utilizing the principles of contract interpretation, the ICC bill's Himalaya clause would include an inland carrier because "the parties must have anticipated that a land carrier's services would be necessary for the contract's performance."\textsuperscript{65} The Court did not have to consider agency law in arriving at this conclusion. However, with respect to the Hamburg Süd

\begin{footnotes}
\item[55] See Ingersoll, 829 F.2d at 293. US COGSA as well as the Hague/Visby Rules apply from the time the cargo is loaded until the cargo has been discharged.
\item[56] Norfolk S. Ry. Co., 543 U.S. at 14.
\item[57] The court characterized Norfolk's commercial relationship with ICC as that of a subcontractor. See Norfolk S. Ry. Co., 543 U.S. at 30.
\item[58] Norfolk S. Ry. Co., 543 at 30.
\item[59] Id.
\item[60] Id. at 31.
\item[61] Norfolk S. Ry. Co. v. Kirby, 300 F.3d 1300, 1308-09 (11th Cir. 2002).
\item[62] Id. at 1310.
\item[63] Id. at 1305.
\item[64] See Norfolk S. Ry. Co., 543 U.S. at 27.
\item[65] Id. at 32.
\end{footnotes}
bill, the Court had to consider to what extent agency law would apply to the actions of the freight forwarder, ICC. As the Court noted "[t]he question arising from the Hamburg Süd bill of lading is more difficult. It requires us to set an efficient default rule for certain shipping contracts, a task that has been a challenge for courts for centuries." First, the court held that there was no agency relationship between Kirby and ICC. The Court noted that "reliance on agency law is misplaced here. It is undeniable that the traditional indicia of agency, a fiduciary relationship and effective control by the principal, did not exist between Kirby and ICC." Then, the Court held that precedent did not require the consideration of agency between ICC and Kirby, "in the classic sense. It only requires treating ICC as Kirby's agent for a single, limited purpose: when ICC contracts with subsequent carriers for limitation on liability... here we hold that intermediaries entrusted with goods are "agents" only in their ability to contract for liability limitations with carriers downstream." The Court further held only that "[w]hen an intermediary contracts with a carrier to transport goods... the intermediary is certainly not automatically the cargo owner's agent in every sense. That would be unsustainable." The Court did not explain how such agency can be readily applied to one type of intermediary, shipbrokers, and not freight forwarders.

Aside from the failure to provide a rationale for the different application of agency law with respect to other intermediaries, there are three other major problems with the Court's ruling. First and foremost, the Court's decision that a forwarder is only an agent for a "single limited

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66. The limitation of liability in the Hamburg Süd bill of lading was lower than the limitation in the ICC bill, and, thus, Norfolk wanted the protection of the limitation clause in the Hamburg Süd bill of lading. See Norfolk S. Ry. Co., 543 U.S. at 32.

67. Id.

68. Id. at 14. With respect to the fiduciary relationship, although not articulated by the Court, it is important to note that a forwarder does not hold funds in trust. As noted by the bankruptcy court in Black & Geddes, Inc., 35 B.R. at 832, while FMC regulations require the forwarder to pay the monies received from the shipper to the carrier, "the freight forwarder is under no obligation to, and does not, turn over to the carrier the actual check received from the shipper, or exact funds represented by the check." Accordingly, the Court would not let a steamship company recover freight owed by a shipper from the forwarder's bankruptcy estate. It could be argued that if a fiduciary relationship existed, the exact funds would have to be submitted to the carrier and a trust would be created between the forwarder and the shipper. See Id. at 34.

69. Id. at 14. The Court further discussed two reasons why the application of the limited agency rule is pragmatic and beneficial. The Court noted that "First, we believe that a limited agency rule tracks industry practices. In intercontinental shipping, carriers may not know if they are dealing with an intermediary... The task of information gathering might be very costly or even impossible... Second, if liability limitations negotiated with cargo owners were reliable while limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates." Id. at 34-35.

70. Id. at 33.
purpose” when a limitation of liability is negotiated with downstream carriers specifically contradicts the FMC policy and the language of the federal statutes and code provisions which stipulate that the freight forwarder is acting “on behalf of shippers.”71 Secondly, this holding contradicts U.S. Supreme Court precedent. In Chicago, Milwaukee, St. Paul & Pac. R. Co. et al v. Acme Fast Freight, Inc.,72 the Supreme Court considered the issue of when a freight forwarder would be liable for cargo damaged during truck transport that was initially carried by train. At issue was the applicability of the provisions Freight Forwarders Act,73 an act regulating domestic forwarders consolidating shipments by truck and not applicable to ocean freight forwarders. If, after having issued a bill of lading to the shipper as required by the Act, the forwarder were to be considered a carrier, then the 9 month time limit in the railroad bill of lading would not apply as the forwarder would have an indemnity action against the rail carrier. However, if the forwarder were to be considered as a shipper under the rail bill of lading, then the 9 month limit would apply. In holding that the 9 month time bar was applicable against forwarders, the court examined the relationship between the forwarders and the shippers. The court noted:

“The term [forwarder] was originally applied to persons who... as agents of the shipper, went no farther than procuring transportation by carrier and handling the details of shipment... Later, a different type of forwarding service was offered... [the forwarder] held itself out not merely to arrange with common carriers for transportation of the goods, but to deliver them safely to the consignee... When goods handled by an agent-forwarder were lost or damaged, it was liable to the shipper only for its own negligence, including negligence in selecting a carrier. If, on the other hand, the shipment had been entrusted to a forwarder of the second type... the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault.”74

Thus, the Court examined a forwarder’s possible status with the idea that the forwarder would either be an agent for the shipper, or a carrier. While this case was considered under the Interstate Commerce Act, the Court’s discussion with respect to the different activities of freight forwarders is still germane to ocean freight forwarders in respect of the Court’s discussion of the evolution of forwarding. In short, the Court determined that only when forwarders took responsibility for the shipment

73. 49 U.S.C. § 1001 et seq. was referred to as the Interstate Commerce Act, and Part IV of the Act was commonly referred to as the Freight Forwarders Act.
of the goods, would the forwarders fall under the provisions of the Act. The Court thereby recognized the dichotomy of forwarder functions as either forwarder-carrier or forwarder-agent. The reasoning of the Court in *Acme Fast Freight* was not considered by the *Kirby* Court.

Thirdly, concept of a forwarder as an independent contractor in U.S. jurisprudence does not provide for international uniformity with respect to forwarder law. The U.S. courts' hesitancy to use agency can be contrasted with the consideration of the freight forwarders role under English law and as the law of other jurisdictions. Under English law, a forwarder is generally considered to act as an agent when the forwarder negotiates a contract of carriage between the principals, and as a carrier when the forwarder has undertaken to carry the goods to their destination.\(^{75}\) As noted by David Glass, a recognized scholar on the English law of freight forwarders and multimodal contracts, "when considered to act as an agency, the forwarder will commonly be taken to create privity of contract between his principal and a third party, as well as assuming the duties normally associated with an agency role."\(^{76}\) While English Courts have noted that a forwarder may have a role that is between that of agent and principal, this is neither usual not customary.\(^{77}\) With respect to *Kirby*, the U.S. Supreme Court does not explain how ICC would be acting as an agent and create contractual privity for only one contractual term (and not create such privity for the remainder of the contract) and then act essentially as carrier in all other circumstances. While providing a practical remedy, the theoretical basis for *Kirby* is thereby strained and inconclusive.

The legal rationale for the hesitancy to use agency law with respect to forwarder activities is not well-articulated within the jurisprudence, but there are some factual scenarios which give rise to concern and are frequently discussed. As mentioned by the courts in *Farrell Lines*, *Nedlloyd* and *Strachan*, a major concern for the application of agency law to forwarder activities originates from the fact that a freight forwarders may undertake tasks for both parties. This is not problematic under the general principles of agency law. Specifically with respect to agency and English law, David Glass noted that "[i]n relation to a movement of goods, therefore, the forwarder may act as agent for the customer in respect of one segment and agent for a carrier in respect of another segment or for

\(^{75}\) See DIANA FABER, MULTIMODAL TRANSPORT: AVOIDING LEGAL PROBLEMS (1997) at 19. ("Traditionally the freight forwarder did not assume liability for his function as a carrier. He merely acted for the purpose of connecting the shipper with the carrier as n agent for the shipper, or, alternatively, as an agent for the carrier.")

\(^{76}\) DAVID A. GLASS, FREIGHT FORWARDING AND MULTIMODAL TRANSPORT CONTRACTS 49-50 (2004).

different parts of the process of preparation for shipment.”\textsuperscript{78} Such dual agency has been recognized in shipbroker cases by English courts. In \textit{Maracan Shipping (London), Ltd. v. Polish Steamship Co. (The “Manifest Lipkowy”),}\textsuperscript{79} the English High Court held that “if [the broker] becomes involved as a sole intermediary with the knowledge and consent of both parties then [the broker’s] role will involve negotiating with both principals on behalf of the other, in turn, and doubtless he will owe duties to both.”\textsuperscript{80} Likewise, under U.S. law, such a position of dual agency is supported in the Restatement (Second) of Agency in § 14L(1) which provides that “a person who conducts a transaction between two others may be an agent of both of them in the transaction, or the agent of one of them only...”\textsuperscript{81} There has been a lack of an analysis by the U.S. Courts as to why agency law is not applicable to freight forwarder activities. It is submitted that agency law could provide a sound theoretical base for most contracts negotiated by or with freight forwarders, although the Court ethereally achieves the practical solution for one of the most critical terms of contracts of affreightment, limitations of liability, through its adoption of the limited agency default rule.

C. Freight Forwarders as Carriers

1. Carrier Liability

Because a freight forwarder’s default status is that of an independent contractor, the issue which arises with respect to carrier status is what additional actions has the freight forwarder committed or what further obligations has the freight forwarder undertaken which would elevate the freight forwarders’ obligations to that of a carrier. In other words, the principal issue is whether the freight forwarder has maintained its traditional and customary role by only arranging to transport the goods and undertaking to conclude associated matters, or weather the freight forwarder has actually undertaken to transport the goods and deliver them to consignee. The distinction is important because absent carrier status, a freight forwarder is only liable for its own negligence, and the burden of proof is on the party asserting forwarder negligence,\textsuperscript{82} while a carrier would be liable for damage to the goods in accordance with any applica-
ble International Convention which has been incorporated into the applicable law. As the Court in Zima Corp. v. M.V. Roman Pazinski\textsuperscript{83} noted,

"[discussion of precedent]...a freight forwarder is liable for lost or damaged goods only for its own negligence, including negligence in choosing a carrier; but a forwarder who contracts to deliver the goods to their destination, as well as or instead of arranging for their transportation, becomes liable as a common carrier for loss or damage to the goods, whether the fault or other basis of liability for damage lies with that forwarder or with the underlying carrier actually transporting the goods."\textsuperscript{84}

While it is doubted that an ocean freight forwarder's ability to limit in accordance with U.S. COGSA or otherwise would be affected by decisions subsequent to Kirby, the recent Second Circuit jurisprudence should be addressed. Since the U.S. Supreme Court's decision in Kirby, the Second Circuit has attempted to establish rules to determine which liability scheme would apply between the Carmack amendment,\textsuperscript{85} which applies to domestic road and rail shipments, and U.S. COGSA when a through bill of lading is issued.\textsuperscript{86} In the latest decision, Rexroth Hydraudyne B.V. v. Ocean World Lines,\textsuperscript{87} Rexroth Hydraudyne B.V. (Rexroth) contracted with Ocean World Lines (OWL), a non-vessel operating common carrier (NVOCC) to ship 27 packages from Rotterdam to Englewood, Colorado through Houston. OWL in turn contracted with COSCO Container Lines (COSCO), a vessel-owning common carrier for the execution of the carriage. Contrary to the Rexroth's instructions, the cargo was released in Denver before Rexroth had confirmed payment had been received for the cargo. The receiver subsequently took delivery of the goods and became insolvent. OWL and COSCO filed a declaratory action in the U.S. District Court for the Southern District of New York but this action was dismissed without prejudice. Subsequently, Rexroth partially recovered from the receivers' bankrupt estate and sued the defendants for the remaining amount of US $297,630.81.\textsuperscript{88} Rexroth argued,
inter alia, that the Carmack amendment should apply because the incident at issue occurred during the inland portion of the voyage.\footnote{The Merchants relied heavily on Sompo Japan Ins, Co., 456 F.3d at 75 (holding that the Carmack amendment would apply instead of U.S. COGSA to a claim asserted against a railroad). The court further "determined that Carmack applies to the domestic rail portion of an international shipment originating in a foreign country and traveling under a through bill of lading, even where the parties have extended COGSA's liability provisions to domestic rail carriers."}.\footnote{Rexroth Hydraudyne B.V., 547 F.3d at 360.}

The Second Circuit disagreed, holding that the determination of the Carmack's amendment applicability requires a two part analysis:

(1) Is the shipment covered by the Amendment?
(2) Is the carrier covered by the Amendment?\footnote{See 49 U.S.C § 11706 (2006) (liability regime).}

The determination is significant because of Carmack's liability regime which provides that the carrier is liable for the actual damage, unless "alternative terms" have been negotiated.\footnote{See Rexroth Hydraudyne, 547 F.3d at 363. The Second Circuit took issue with a Southern District of New York case, Sompo Japan Ins. Co. of Am. v. Yang Ming Marine Transp. Corp., 578 F.Supp. 584, 590 (S.D.N.Y. 2008) (holding that an intermediary was a "rail carrier" under the applicable provision of Carmack, i.e., 49 U.S.C. § 10102(5)). The Second Circuit further held that "it is difficult to see how, for example, a freight forwarder could use a rail or motor carrier for transportation (thus qualifying itself as a rail or motor carrier under Sompo II's definition) while also "holding itself out to the general public" as something "other than" a rail or motor carrier. "We believe the better view is that "providing" transportation as a rail carrier under §§ 10102(5) and 11706(a) entails being actively involved in transporting, or "carrying," the cargo." Id. at 362-63. Thus, even if an ocean freight forwarder holds itself out as a carrier, it cannot be a Carmack carrier unless it is the actual, physical carrier.}

2. Determining Carrier Status

There is no bright line test to determine carrier status either under US or English law. U.S. Courts considering the issue generally have utilized four factors in order to determine carrier status:\footnote{See, e.g., Zima Corp., 493 F. Supp. at 273 and Hoffman-LaRoche, Inc. v. M/TFL Jefferson, 731 F. Supp. 109, 111 (S.D.N.Y. 1990).}
(a) the way in which the obligations are described in the relevant documents. However, a party's self-description is not controlling; (b) the history of dealing between the parties; (c) the issuance of a bill of lading, although a document described as a "bill of lading" is not determinative; (d) the method of charging for the services, especially if the forwarder charged a commission.

An examination of each of these factors is in order.

a) Description of the Parties in the Documents

When discussing the way in which the parties are described in the relevant documentation, courts are quick to emphasize that parties' "self-description is not always controlling." Such documents may include the forwarder's standard trading terms, booking notes and bills of lading. Some forwarder bills of lading may include such provisions describing the forwarder as an agent or stating that the forwarder will act as a carrier. A court will examine exactly what a party's undertakings were in order to determine if the party acted as carrier. As the Second Circuit noted in *Prima U.S., Inc. v. Panalpina*, "Of course a party calling itself a freight forwarder might in fact be performing functions of the carrier, in which case function would govern over form." Such was a situation which occurred in the U.S. Fifth Circuit decision of *Sabah v. M/V Harabel Tapper*. In that case, a gas turbine was shipped from Houston to the receiver Sabah's facilities in Labuan, Malaysia via Singapore. The bill of lading, issued by Industrial Maritime Carriers (Bahamas), Inc. (Industrial) specified that the port of loading was Houston, the port of discharge was Singapore and that Labuan was "the place of delivery on-carrier." When the M/V HABEL TAPPER arrived in Singapore, the turbine was discharged onto a barge, the Asia Mariner 5, which took on water, damaging the turbine. Clause 6 of the Industrial bill of lading pro-

95. See e.g., The International Federation of Freight Forwarders' Association, Standard Trading Terms, http://www.fiata.com/uploads/media/A_Guide_to_Logistics_Agreements.pdf (last visited April 14, 2009). The acronym of the Association is FIATA (Fédération Internationale des Transitaires et Assimilés) and there is a national affiliated organization in the United States.
97. *Id.* at 129.
98. *Sabah Shipyard SBN. BHD. v. M/V Harbel Tapper*, 178 F.3d 400 (5th Cir. 1999). A full disclosure is warranted. The author was an in-house counsel for the commercial managers, Intermarine Inc., and for the time charterers, Industrial Maritime Carriers (Bahamas), Inc., at the time of the incident and also when the decision was rendered. The author was responsible for negotiating several of the terms in the time charter party between Industrial and the owners of the M/V Harbel Tapper. The author also drafted many of the terms of the bill of lading at issue.
99. *Id.* at 403.
vided for forwarder status for on carriage, stating "When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as a Forwarding Agent only." The plaintiff, Sabah Shipyard, argued *inter alia* that COGSA's limitation of liability would not apply to this incident as Industrial was acting merely as a forwarder. Further, as a forwarder, Industrial would be liable for its own negligence in selecting an unseaworthy barge. The U.S. District Court found that Industrial had been negligent in selecting the barge in question and that as a freight forwarder, Industrial was not entitled to the U.S. COGSA package limitation of US $500 per package. Thus, the U.S. District Court awarded a judgment in favor of Sabah and against Industrial and the owner of the M/V Harbel Tapper in the amount of US $9,125,565.78. Industrial appealed asserting status as a COGSA carrier.

The Fifth Circuit reversed the district court’s ruling and held that despite the language in clause 6 of the bill of lading, according to U.S. COGSA, a carrier “includes the owner or the charterer who enters into a contract of carriage with a shipper” and that a contract of carriage is “covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea.” The Fifth Circuit found that the bill of lading issued by Industrial was such a contract of carriage and in accordance with precedent and the plain language of COGSA and therefore, Industrial was a carrier and entitled to the COGSA package limitation. Accordingly, statutory reference and precedent took priority with regard to contractual interpretation over the self-description contained in the documents.

b) History of Dealing Between the Parties

Naturally, the court will examine the past relationship between the parties and whether there was an expectation that, due to the past dealings between the parties, the forwarder would assume the role of the carrier. English courts also will consider the course of dealings between the parties as relevant in the determination of carrier status.

100. *Id.* at 405.
102. *Sabah Shipyard*, 178 F.3d at 405 (quoting 46 U.S.C. app. § 1301(a) (2006)).
103. *Id.* (quoting 46 U.S.C. app § 1301(b) (2006)).
104. *Id* at 405.
106. *Glass, supra* note 76, at 62.
c) The Issuance of a Bill of Lading

In considering this factor, the courts emphasize that issuing a document called a bill of lading is not determinative. Presumably, though if the document was actually a bill of lading, performing all functions of a bill of lading including a document of title, presumably this would be indicative of forwarder status. The Second Circuit in *Prima*\textsuperscript{107} emphasized that the major difference between a carrier and a freight forwarder was that "[u]nlike a carrier, a freight forwarder does not issue a bill of lading and is therefore not liable to the shipper for anything that occurs to the goods being shipped."\textsuperscript{108} However, a bill of lading labeled "house bill of lading" used "to facilitate arrangements between related freight forwarders on either ends of the voyage" will not constitute a contract for carriage equivalent to a bill of lading,\textsuperscript{109} although if the house bill lists the forwarder as is executed by the forwarder as a carrier, the document may be considered as a bill of lading in some jurisdictions.\textsuperscript{110} Likewise, if the purported bill of lading contains language establishing that the forwarder is acting in a different capacity from a carrier, then the document will not be considered to be a bill of lading even if described as such.\textsuperscript{111} Moreover and in any event, a court will examine extrinsic evidence if the document is considered to be ambiguous.\textsuperscript{112}

There has been no definitive case on the issue of what constitutes a bill of lading that would elevate a forwarder's status to that of carrier. Presumably though, a court would find that the document is bill of lading and the forwarder is the actual carrier if (1) the forwarder is listed on the bill of lading as the carrier, (2) there is no other language on the document indicating that the forwarder should not be considered to be carrier, and, critically (3) the document issued is a document of title as stipulated by U.S. COGSA.\textsuperscript{113} The court in *Kirby*\textsuperscript{114} appears to treat the bill of

\textsuperscript{107} Prima U.S. Inc., 223 F.3d at 126.

\textsuperscript{108} Id. at 129.

\textsuperscript{109} See *Zima Corp.*, 493 F. Supp. at 275.

\textsuperscript{110} See *Glass*, supra note 76, at 29 with respect to English law. "The House BL will be acceptable under Article 30 of the Uniform Customs and Practice for Documentary Credits 1993, however, where it indicates on its face the name of the forwarder as a carrier and is signed by him as a carrier or multimodal transport operator." Id.

\textsuperscript{111} See *J.C. Penny v. The Am. Exp. Co.*, 102 F. Supp. 742, 474 (S.D.N.Y. 1951) (holding that a document titled "bill of lading" was not, in fact, a bill of lading attaching liability to the forwarder because the document contained a term stating that the forwarder was undertaking shipping "to act as shipping agent for the Shipper.").

\textsuperscript{112} See, e.g., *Zima Corp.*, 493 F. Supp. at 274 ("Even if it is assumed that the document's heading and form as a bill of lading creates a sufficient ambiguity to warrant examination of extrinsic evidence, the extrinsic evidence is consistent with defendant's assumption of liability as a freight forwarder only.").

\textsuperscript{113} See 46 U.S.C. § 1300 (2006) ("Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports in the United States, in
lading issued by the forwarder ICC as a carrier's bill of lading, but the Court's position is somewhat ambiguous. Further and more problematic is the fact that issuing a bill of lading under COGSA is only upon the shipper's request. Accordingly, the forwarder may be a carrier under a contract of carriage where no bill of lading has been issued as the bill of lading is only evidence of the contract of carriage.

The Method of Charging for Services.

Freight forwarders have two methods of charging for their services. First, a forwarder may charge a commission on the freight charged by the underlying carriers. This is the traditional method of compensation. The forwarder may also charge a lumpsum amount for the entire carriage and, accordingly, the merchants will not know what the underlying carriers are charging.

The fact that a lumpsum, or all inclusive amount is charged may indicate that the forwarder is acting as a carrier, although U.S. courts usually do not consider this to be a strong factor and will consider the totality of the circumstances. In Hoffman-LaRoche v. M/V Tel Jefferson, the court noted that "regarding the manner in which [the forwarder] made its profit on this shipment, plaintiff is correct that the evidence points more strongly to carrier status. . . .resolution of the other three criteria [documents issued, course of dealing, and description of the parties in the documents], however militates toward forwarder status." In contrast, in many juris-

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115. The Kirby court first notes that ICC issued a bill of lading and states that "a bill of lading records that a carrier has received goods from the party that wishes to ship them." Id. at 19. The court further states that ICC, as a forwarder, "arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo." Id.
116. 46. U.S.C.§ 1303(3) (2006) ("After receiving the goods into his charge the carrier, or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading. . . ").
119. Id. See also Zima Corp., 493 F. Supp at 275.
121. Glass, supra note 76, at 61.
dictions, such a method of charging is indicative of carrier status. For example, the German Commercial Code (Deutsches Handelsgesetzbuch or "HGB") provides that if a forwarder charges a single, definite rate as opposed to a commission to be added to carrier freight charges, then the forwarder has taken on the rights and responsibilities of a carrier.\textsuperscript{122}

III. Conclusion

A forwarder’s status will be of relevance especially in two cases, (1) where the carrier has not been paid freight and (2) when there is cargo damage. In the case of unpaid freight, a determination of the forwarder’s status may also be determinative of the merchant’s obligation with respect to the carrier. In the event of cargo damage, a forwarder will not be liable except for the forwarder’s own negligence unless the forwarder has acted as a carrier. The ascertainment of carrier status will require a four-part inquiry into the transaction including most importantly, whether the forwarder has issued a bill of lading which is also a document of title and the method of compensation. The inquiry into the issuance of a bill of lading is further complicated by the fact under U.S. COGSA, a bill of lading is only evidence of the contract\textsuperscript{123} of carriage and is issued only upon request of the shipper.\textsuperscript{124}

Freight forwarder status under U.S. law requires reference to both federal statute as well as case law. These sources may conflict due to the jurisprudential precedent that a forwarder is an independent contractor while the FMC considers the forwarder to be an agent of the shipper\textsuperscript{125}. The courts should consider the application of agency law in order to provide international uniformity in this area of legal inquiry.

\begin{itemize}
\item \textsuperscript{122} The applicable HGB provision reads as follows:

\begin{Verbatim}
1 HGB §459 Spedition zu festen Kosten Soweit als Vergütung ein bestimmter Betrag vereinbart ist, der Kosten für die Beförderung einschliessen, hat der Spediteur hinsichtlich der Beförderung die Rechte und Pflichten eines Frachtführers oder Verfrachters. In diesem Fall hat er Anspruch auf Ersatz seiner Aufwendungen nur, soweit dies übich ist.
\end{Verbatim}

\textit{Freight forwarder charging a fixed rate-} As far as a definite sum has been agreed upon as the compensation for the carriage, the Forwarder has taken on the rights and responsibilities of a carrier toward the carriage. In this case has the forwarder has a claim for expenses only as far as customary.

\textsuperscript{124} 46 U.S.C § 1303(3) (2006).
\textsuperscript{125} 46 C.F.R. § 515.2(o)(1)(i) (2009).
\end{itemize}
Loss and Damage Freight Claims - Rail

William P. Byrne*

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I. INTRODUCTION

“This is a maritime case about a train wreck.”¹ So stated the unanimous United States Supreme Court in Norfolk S. Ry. Co. v. Kirby, expressing in an economy of words the confluence of ocean and rail intermodal transportation that has led to a number of conflicting decisions related to the Carmack Amendment,² the Carriage of Goods by Sea Act³ and the international nature of today’s intermodal transportation by sea, rail and road.⁴ In order to grasp fully the evolution of the treatment of loss and damage claims in rail transportation, this article will address the historical development of the Carmack Amendment and its application to railroad loss and damage claims, the effect of deregulation, the current treatment of railroad loss and damage claims in common carriage, contract carriage and exempt transportation and the sea-change intermodalism has had upon both the practical and legal aspects of rail transportation. Lastly, this article will address what will become the new Rotterdam Rules and the effect they are likely to have upon intermodal transportation in the United States.

II. HISTORICAL DEVELOPMENT OF THE CARMACK AMENDMENT

Historically, railroads were considered common carriers.⁵ Common carriers were insurers of the cargo entrusted to them. “That railroad companies are common carriers cannot be disputed, and, being so, they are bound and controlled, as a general principal, by all the common law

⁴. See infra Section V.
⁵. McCoy v. Pac. Spruce Corp., 1 F.2d 853, 855 (9th Cir. 1924) (“A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges.”).
rules applicable to such a position – they becoming, in fact, insurers.”

The only defenses available to the carrier were acts of God or acts of the public enemy.

The Interstate Commerce Act (“ICA”), passed in 1887 as “An Act to Regulate Commerce,” created the Interstate Commerce Commission (“ICC”) and made railroads the first federally regulated industry in the United States. The thrust of the ICA in 1887 was not cargo loss and damage; but instead, was to require just and reasonable rates and effective freight and passenger rail service. The thrust towards a uniform system for handling loss and damage claims in rail carrier transportation arose as a consequence of non-uniform state law governing limitations on liability. This became clear in Penn. R.R. Co. v. Hughes, where the Supreme Court upheld a Pennsylvania state court’s determination that Pennsylvania state law prohibited the application of a limitation of liability that would be valid under New York law, the place of shipment. In doing so, the Supreme Court acknowledged (i) the power of Congress to preempt the subject; and (ii) that Congress has not done so in the ICA:

It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provisions as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation.

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While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has

6. JAMES W. ELY, JR., RAILROADS & AMERICAN LAW 181 (University Press of Kansas 2001) (quoting Ill. Cent. R.R. Co. v. Morrison & Crabtree, 19 Ill. 135, 136 (1857) (“A carrier, although not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by an act of God, the public enemy, the act of the shipper himself, public authority, or inherent vice or the nature of the goods.”); see also Mo. Pac. R. Co. v. Elmore & Stahl, 377 U.S. 134 (1964).

7. OLIVER WENDELL HOLMES, JR., THE COMMON LAW & OTHER WRITINGS 180, 199-200 (The Legal Classics Library 1982). (“A common carrier is liable for goods which are stolen from him, or otherwise lost from his charge except by act of God or the public enemy.”)

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“The language of Coggs v. Bernard is, that ‘the law charges the person thus intrusted to carry goods as against all events but acts of God and the enemies of the king.’ This was adopted by solemn decision in Lord Mansfield’s time, and it is now settled that the common carrier ‘is liable for all losses which do not fall within the excepted cases.’ That is to say, he has become an insurer to that extent, not only against the disappearance or destruction, but against all forms of damage to the goods except as excepted above.”); see also SAUL SORKIN, GOODS IN TRANSIT §5.02 (Matthew Bender & Co. 1988).


10. Id.
prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy [limitation of liability].

Accordingly, the Supreme Court concluded:

The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding.

Subsequent to Hughes, Congress enacted the Carmack Amendment as part of the Hepburn Act of June 29, 1906. The purpose and effect of the Carmack Amendment on the issue raised in Hughes became apparent in Adams Express Co. v. E. H. Croninger, a case involving the loss of a ring and the lower court's holding that the limitation of liability alleged by the defendant common carrier railway was invalid under Kentucky state law. In reviewing the law, the Supreme Court noted:

Prior to [the Carmack Amendment], the rule of carriers' liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law, as declared by this court and enforced in the Federal courts throughout the United States or that determined by the supported public policy of a particular state, or that prescribed by statute law of a particular state.

The Supreme Court then considered the Carmack Amendment and held that Congress intended by that amendment to "take possession of the subject," and that any continued enforcement of the patchwork of state law on the subject would effectively defeat the very uniformity the amendment was intended to achieve. Accordingly, the court held that

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11. Id. at 488.
12. Id. at 491.
13. The Carmack Amendment has been said to be the codification of common law. See Elmore & Stahl, 377 U.S. at 137; for a compilation of various iterations of the Carmack Amendment including the Hepburn Act of June 29, 1906, as amended by the Cummins Amendment of March 4, 1915, the second Cummins Amendment of August 9, 1916, the Transportation Act of 1920, the Act of July 3, 1926 and the Newton Amendment of March 4, 1927; see Ward v. Allied Van Lines, Inc., 231 F.3d 135, 139 (4th Cir. 2000); WILLIAM J. AUGELLO, TRANSPORTATION LOGISTICS AND THE LAW, app. 6 at XXXX (George Carl Pezold ed., Transportation Consumer Protection 2001).
15. Id. (internal citations omitted).
16. Id. at 506.
17. Id. at 513 (The text of the Carmack Amendment relied upon by the Court in Adams Express provided:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or
the Carmack Amendment preempted state law on the subject and allowed a carrier to limit its liability to a lower value related to a lower rate of transportation.\textsuperscript{18} The Court then considered the validity of the limitation of liability in the bill of lading. While recognizing the common law liability of a carrier for "...any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. ..."\textsuperscript{19} the Court also stated:

> It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.\textsuperscript{20}

The Court also turned to a decision of the ICC and stated:

> That a carrier rate may be graduated by value, and that a stipulation limiting recovery to an agreed value, made to adjust the rate, is recognized by the Interstate Commerce Commission, see Re Released Rates, 13 Inters. Com. Rep. 550.\textsuperscript{21}

Ultimately, the Court held:

> We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

> “That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.”

\textsuperscript{18} \textit{Id.} at 504 (According to the U.S. Supreme Court, the effect of the early iterations of the Carmack amendment was:

> “First. It affirmatively requires the initial carrier to issue ‘a receipt or bill of lading therefor,’ when it receives ‘property for transportation from a point in one state to a point in another.’

> Second. Such initial carrier is made ‘liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it.’

> Third. It is also made liable for any loss, damage, or injury to such property caused by ‘any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass.’

> Fourth. It affirmatively declares that ‘no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.’

\textsuperscript{19} \textit{Id.} at 509.

\textsuperscript{20} \textit{Id.} at 510.

\textsuperscript{21} \textit{Id.} at 512.
here in question.\textsuperscript{22}

In 1915 the Cummins Amendment provided that the carrier was liable for the "full actual loss or damage or injury" to the goods covered by the receipt or bill of lading.\textsuperscript{23} The Second Cummins Amendment, in 1916, codified that rates related to the value of the property had to be filed as part of a carrier's tariff.\textsuperscript{24}

Continuing in this vein, in \textit{Mo., Kan. & Tex. Ry. Co. of Tex. v. J. H. Ward},\textsuperscript{25} Justice Brandeis stated that the purpose of the Carmack Amendment was to "create in the initial carrier unity of responsibility for the transportation to destination."\textsuperscript{26} In referring to that portion of the Carmack Amendment that made the receiving carrier liable to the holder of the bill of lading for loss or damage occurring anywhere on the route, and even in the hands of another carrier performing part of the transportation, Justice Brandeis explained that the purpose of the Carmack Amendment "was to relieve shippers of the difficult, and often impossible, task of determining on which of the several connecting lines the damage occurred."\textsuperscript{27} The Carmack Amendment, as amended, also provides for the carrier paying a claim to recover from the carrier on whose line the loss occurred the amount paid in respect of the loss plus reasonable expenses incurred in defending the claim.\textsuperscript{28}

Subsequent amendments and deregulating legislation led ultimately to the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995) ("ICCTA") which reorganized the ICA and recodified the Carmack Amendment at 49 U.S.C. § 11706.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{22} \textit{Id.}; \textit{see also id.} at 508. The text of the limitation of liability under consideration by the Court provided:
\begin{quote}
In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding $50 unless a greater value is declared, the shipper agrees that the value of said property is not more than $50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than $50 if no value is stated herein.
\end{quote}
\item \textsuperscript{23} Act of Mar. 4, 1915, Ch. 176, 38 Stat. 1196 (1915); \textit{see also} Sorkin, \textit{supra} note 7, at 2 § 13.02.
\item \textsuperscript{24} Act of Aug 9, 1916, Ch. 301, 39 Stat. 441 (1916); \textit{see also} Sorkin, \textit{supra} note 7.
\item \textsuperscript{25} Mo., Kan. & Tex. Ry. Co. of Tex. v. J.H. Ward, 244 U.S. 383, 386 (1917).
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 387; \textit{See also} Reider v. Thompson, 339 U.S. 113, 119 (1950) (the purpose of the Carmack Amendment was to "relieve shippers of the burden of searching a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.").
\item \textsuperscript{28} \textit{See} Interstate Transportation, \textit{supra} note 3 at § 11706 (b). (Additionally, ICCTA sunset the ICC and transferred what remaining regulation still existed to the newly-created STB).
\item \textsuperscript{29} The iterations leading up to the present Carmack Amendment essentially required (1) the carrier to issue a bill of lading or receipt for property received for interstate commerce; (2) made more than one carrier liable for the loss or damage to alleviate the shipper's difficulty determining which carrier is responsible for the loss; (3) enabled the carriers to seek indemnity
\end{itemize}
III. Carmack Liability in Common Carriage

(A) Jurisdiction

The jurisdiction of the Secretary and the Board\textsuperscript{30} is set forth in Title 49 U.S.C. § 10501:

§ 10501. General jurisdiction
(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—
(A) only by railroad;
(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—
(A) a State and a place in the same or another State as part of the interstate rail network;
(B) a State and a place in a territory or possession of the United States;
(C) a territory or possession of the United States and a place in another such territory or possession;
(D) a territory or possession of the United States and another place in the same territory or possession;
(E) the United States and another place in the United States through a foreign country; or
(F) the United States and a place in a foreign country.\textsuperscript{31}

\begin{itemize}
\item from one another;
\item (4) imposed outside ranges of time limits on notice of claims; and
\item (5) commencement of actions and
\item (5) made the railroad liable for the actual loss or injury to the property subject to certain specific methods by which a rail carrier could limit its liability.
\end{itemize}

30. 49 U.S.C. § 10102 (2006) contains a number of useful and relevant definitions:

(1) “Board” means the Surface Transportation Board

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(5) “rail carrier” means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

(6) “railroad” includes—
(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
(B) the road used by a rail carrier and owned by it or operated under an agreement; and
(C) a switch, spur, track, terminal, terminal facility, and freight depot, yard, and ground, used or necessary for transportation;

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(9) “transportation” includes—
(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;

31. With respect to the absence of the word “adjacent” before “foreign country,” see infra note 96 and accompanying text.
The application of the Carmack has been held to be co-extensive with the jurisdiction of the Board.32

(B) CARMACK LIABILITY AND ALTERNATIVE TERMS

Title 49 U.S.C. §11706, the embodiment of the Carmack Amendment, provides in pertinent part:

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by –

1. the receiving rail carrier;33
2. the delivering rail carrier; or
3. another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.34

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

(b) The rail carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued.


33. Kyodo U.S.A. Inc. v. COSCO N. Am., Inc., No. 01-CV-499, 2001 WL 1835158 at *4 n.7 (C.D. Cal. 2001) ("The 'initial' or 'receiving' carrier within the meaning of the Carmack Amendment is ordinarily the 'one who first contracts to transport the shipment,' because it is that carrier 'with which the shipper does business and to which it looks.'") (quoting Miss. Valley Barge Line Co. v. Miss. Valley Barge Line Co., 285 F.2d 381, 393 (8th Cir. 1960)); see Sompo Japan Ins. Co. of Am. v. Yang Ming Marine Transp. Corp., 578 F. Supp. 2d 584, 593 (S.D.N.Y. 2008) (hereinafter Sompo III) (discussing an ocean carrier's role as a receiving carrier under § 11706) ("Although there is no specific definition of 'receiving rail carrier' in the statute, as there is for 'delivering rail carrier,' the common sense meaning of 'receiving rail carrier' is an entity providing rail transportation for compensation that receives the cargo from the shippers or, alternatively, arranges for it to be received by the railroad operator. Therefore, under [Fed. R. Civ. P.] 12(b)(6)'s plausibility standard, Yang Ming may alternatively be held liable under Carmack because it is a receiving rail carrier."); but cf. Rexroth, 547 F.3d at 364; Regal-Beloit, 557 F.3d at 993-994; discussed infra Section V.

34. Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 552 n.2 (2d Cir. 2000) ("A 'through bill of lading' is defined as, "one by which a carrier agrees to transport goods from origin to destination, even though different carriers (such as a railroad, trucker, or air carrier) may perform a portion of the contracted shipment." (citation omitted)); see also Kirby, 543 U.S. at 19 (defining "through" transportation as "end-to-end").
Loss and Damage Freight Claims - Rail

ing was issued is entitled to recover from the rail carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

With respect to the means by which a rail carrier may limit its liability, § 11706 provides, in pertinent part:

(c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.
(2) A rail carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on trains carrying passengers.
(3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which –
(A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or
(B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

As a result of § 11706(c), most railroads offer “alternative terms,” that is, terms that are an alternative to Carmack liability under § 11706. The usual way in which the alternative is offered is for the rail carrier to offer one rate, say $X if Carmack is to apply and another rate that is often equivalent to 1/2$X for a “release” value far less than the “actual value” of the loss. Courts have tended to strictly construe the ability of a railroad to limit its liability by offering alternative rates.

In Tamini Transformatori S.R.L. v. Union Pac. R.R., the court held that the failure of the railroad to include the limitation of liability language in the bills of lading or the waybills issued contemporaneously with the shipment was fatal. Tamini may be contrasted with Ferrostaal.

35. See also infra Section V.
37. Id at *5 (“A bill of lading, also known as a waybill [. . .] is the document [that] contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and the shipowner.” (citing Jessica Howard Ltd. v. Norfolk So. Ry. Co., 316 F.3d 165, n.1 (2d Cir. 2003) (citations omitted))); Regal-Beloit, 557 F.3d at 988 n.3 (“A bill of lading is a contract that ‘records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage. ‘Through’ bills of lading specifically cover both oceanic and inland legs of a journey in a single document.’” (internal citations omitted)).
Inc. v. Union Pac. R.R. Co., In Ferrostaal the court upheld the non-Carmack terms (one-year filing period versus two-year filing period under Carmack). The court found that in exchange for a lower freight rate, plaintiff “affirmatively opted for the one year limitations period” that was contained in “UP Exempt Circular 4-D” and applicable to the shipment. Plaintiff did not dispute that it was offered Carmack.

In common carriage, it is customary for alternative terms to be offered. Where the offer of alternative terms complies with Title 49 U.S.C. § 11706(c), the alternative terms are customarily enforced.

(C) Time Limitations

Title 49 U.S.C. § 11706(e) provides, in pertinent part:

(e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection—

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier’s insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

It is important to note that Title 49 U.S.C. § 11706(e) does not establish a statute of limitations but instead establishes minimum time periods of nine (9) months from a notice of a claim to be given to the carrier and two (2) years from written denial of the claim or any part of it to file suit.

The process governing the prosecution and handling of claims arising in regulated or common carrier rail carrier transportation for loss or damage has been prescribed by regulations issued by the ICC.

39. See supra Section III(b).
40. See infra Section IV for a discussion on “Exempt Circulars.”
41. Ferrostaal, 109 F. Supp. 2d at 150.
42. See Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, 49 C.F.R. § 1005 (2008). Note, although these regulations were published pre-ICCTA, the Savings Clause of ICCTA, Section 204, provides:

(a) Legal Documents. — All orders, determinations, rules, regulations, permits, grants, loans, contracts, agreements, certificates, licenses, and privileges—

(1) that have been issued, made, granted, or allowed to become effective by the Interstate Commerce Commission, any officer or employee of the Interstate Commerce Commission, or any other Government official, or by a court of competent jurisdiction,
these regulations address the applicability of the regulations, the filing, acknowledgment, investigation, and disposition of claims, processing of salvage and using weight as a measure of loss.

(D) Venue

Title 49 U.S.C. § 11706(d) provides, in pertinent part:

(d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.
(2)(A) A civil action under this section may only be brought –
(i) against the originating rail carrier, in the judicial district in which the point of origin is located;
(ii) against the delivering rail carrier in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and
(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.
(B) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

In Royal & Sun Alliance, the ocean bill of lading between the vessel operating common carrier (VOCC) and a non-vessel operating common carrier (NVOCC) provided for the exclusive jurisdiction of English courts and the application of English law. The NVOCC bill of lading issued to the cargo interests provided for U.S. law to apply and selected the Southern District of New York as the forum. The VOCC argued that because the NVOCC could only sue the VOCC in England, the NVOCC's customer was similarly restricted. The court rejected this argument, holding that Kirby required "intermediaries entrusted with goods are 'agents' only in their ability to contract for liability limitations in the performance of any function that is transferred by this Act or the amendments made by this Act; and (2) that are in effect on the effective date of such transfer (or become effective after such date pursuant to their terms as in effect on such effective date), shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the Board, any other authorized official, a court of competent jurisdiction, or operation of law. The Board shall promptly rescind all regulations established by the Interstate Commerce Commission that are based on provisions of law repealed and not substantively reenacted by this Act. PL 104-88, 109 Stat. 803. Comparable regulations have been published with respect to motor carrier claims at 49 C.F.R. § 370.

44. Id. at 396.
45. Id.
with carriers downstream. Nothing in Kirby can be read to extend that ruling to a forum selection clause and a covenant not to sue.”

The Sompo III, case also contains a very interesting discussion of the venue provisions of Title 49, particularly in light of that court’s holding that the ocean carrier may be considered a rail carrier even though it does not operate trains:

“There appears to be a gap in the venue provision. As discussed above, Carmack permits claims against rail carriers who are not the delivering rail carrier, receiving rail carrier, or the rail carrier who caused the loss. As a result, Carmack permits liability against shipping companies like Yang Ming, yet fails to guarantee plaintiffs a proper venue for pursuing claims against them unless they are also construed to be the receiving or originating rail carrier, as they are in this case.”

(E) PRIMA FACIE CASE

A prima facie case against a rail carrier for loss or damage under § 11706 is made when the plaintiff establishes:

1. The good condition of the goods when tendered to the carrier;
2. The damaged condition of the goods at delivery; and
3. The amount of damages.

Under the Carmack Amendment, damages are to be measured by “actual loss or injury to the property.” “[T]he general rule for measuring damages is the market value at destination. . . .”

With respect to common carriage, once a plaintiff establishes a prima facie case, the burden shifts to the carrier to show that it was not negligent and that the loss arose as a result of an exception to liability identified in the bill of lading. The terms of the bill of lading governing common carriage, including the defenses that may be contained therein, are prescribed by 49 C.F.R. 1035.1, which provides in pertinent part:

46. Id. at 397 (quoting Kirby, 543 U.S. at 34 (emphasis in original)).
47. Sompo III, 578 F.Supp.2d at 596 n.7 (Note, however, that Sompo III was decided before the Second Circuit’s decision in Rexroth); see also the Ninth Circuit’s decision in Regal-Beloit, 557 F.3d at 1003; See supra Section III(c).
48. See Mo. Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964) (“[U]nder federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages.”).
50. CPCI v. Tech. Transp., Inc., 393 F. Supp. 2d 1087, 1088 (W.D. Wash. 2005); see also Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co., 213 F.3d 1118, 1120 (9th Cir. 2000) (holding that the measure of damages under Carmack is “the difference between the market value of the property in the condition in which it should have arrived at its destination and its market value in the damaged condition in which it did arrive.”).
Sect. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

IV. Exempt Transportation and Contract Carriage

As noted, the foregoing discussion only applies as a matter of law to common carriage or regulated transportation. However, not all cargo is regulated and not all carriage is common. During the period of deregulation, Congress enabled the ICC, now the STB, to exempt certain transportation from regulation. Although deregulation was primarily directed towards freedom to contract and the abolition of tariffs other than in specific cases, deregulation also affected loss and damage claims.

Contract carriage or exempt transportation is usually provided pur-
suant to a private contract between the railroad and the shipper or pursuant to a railroad's "Exempt Circular." An "Exempt Circular" is a name usually given to the terms and conditions of carriage published by a railroad together with the statement that it governs the transportation by the railroad of exempt commodities under Title 49 U.S.C. § 10502 discussed in subsection (a), below, or contract carriage under 49 U.S.C. § 10709 discussed in subsection (b), below.

(A) EXEMPT TRANSPORTATION

Title 49 U.S.C. § 10502(a) provides:

Sec. 10502. Authority to exempt rail carrier transportation
(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
(1) is not necessary to carry out the transportation policy of section 10101 of this title; and
(2) either—
(A) the transaction or service is of limited scope;
(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

Of course, § 10502(a) cannot be read in a vacuum. Title 49 U.S.C. § 10502(e) provides:

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

The result of these provisions is to exempt the transportation of certain goods by a rail carrier from the provisions of Part A, provided that the rail carrier offers Carmack liability or alternative terms that comply with § 11706. As noted earlier, such alternative terms usually include a reduced rate in exchange for reduced liability.

(B) CONTRACT CARRIAGE

Another section of Title 49 that arose from Congress's efforts to deregulate the rail industry by removing impediments to negotiated con-

55. See infra note 114 and accompanying text.
56. 49 C.F.R. § 1300.2 (a) (2009).
tracts is § 10709. Title 49 U.S.C. § 10709, which was intended to allow market forces to govern negotiated agreements between shippers and rail carriers, provides, in pertinent part:

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28, United States Code.\(^5\)

Although 49 U.S.C. § 10709(c)(2) provides that subject matter jurisdiction in the federal courts is not conferred by § 10709, subject matter jurisdiction for claims arising under § 11706 has been granted to the U.S. District courts in 28 U.S.C. § 1337 in cases in which the amount in controversy with respect to each bill of lading exceeds $10,000.00.\(^5\) Ancillary or supplemental jurisdiction has been exercised over lesser amounts in controversy where plaintiffs allege a mixed assortment of claims, some of which meet the jurisdictional threshold and some of which do not.\(^5\)

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58. 28 U.S.C. § 1337 (2009) states:

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11706 or 14706 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

The interplay of 49 U.S.C. § 10502 and 49 U.S.C. § 10709 has given rise to a number of conflicting points of view. In Tamini, the court held that § 10709 did not immunize a common carrier railroad from the obligation under § 10502 to offer Carmack prior to establishing a non-Carmack contractual relationship with the shipper:

"... while it is true that Carmack protections do not apply to 49 U.S.C. § 10709 contracts, the existence of such a contract presupposes that the shipper turned down Carmack terms." 60

On the other hand, in Mitsui Sumitomo Ins. Co. v. Evergreen Marine Co., the District Court held that § 10709 did not require the rail carrier to offer alternative terms. 61 As discussed in the next section of this article, recent cases as well as the STB itself, have begun to focus additional attention on this issue.

V. INTERNATIONAL INTERMODALISM

(A) COGSA v. CARMACK DEBATE

The decisions in Norfolk S. Ry. Co. v. Kirby 62, and Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., ("Sompo I") 63 and the competing arguments concerning the application of COGSA, versus the Carmack Amendment, to cargo loss and damage occurring during the inland portion of multi-modal transportation under a through ocean bill of lading have given rise to a great debate. 64 Essentially, Kirby held that an intermediary between the cargo interest and a carrier, and each succeeding intermediary with respect to any downstream carrier, has a limited agency to bind the cargo interest to a limitation of liability agreed to between the intermediary and the carrier. 65 Kirby also enforced the extension by contract pursuant to Himalaya clause of a limitation of liability

63. Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54 (2d Cir. 2006) [hereinafter Sompo I].
64. Kirby, 543 U.S. at 25 (explaining that "Multimodal" and "Intermodal" are used interchangeably to describe the transportation of cargo by more than one mode of transportation); Multimodal is the more common by used phrase outside of the US, whereas in the US, intermodal is more popular. "Intermodal" refers to the use of more than one method of transport during a single shipment.
65. Kirby, 543 U.S. at 16, 33; see also Werner Ent., Inc. v. Westwind Mar. Int'l, Inc., 554 F.3d 1319, 1323 (11th Cir. 2009) (applying the "limited agency" rationale of Kirby to motor carrier transportation under Part B of subsection IV of Title 49, explaining that "when an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed").
66. A Himalaya clause is a clause in an ocean bill of lading that purports to extend by
under COGSA to a subcontracting inland rail carrier providing inland rail transportation under a through ocean bill of lading.

On the contrary, Sompo I, stating that Kirby did not address the application of the Carmack Amendment, held that the Carmack Amendment applied as a matter of law to the inland transportation and that COGSA's permissive extension of its terms by contract had to yield to the compulsory application of Carmack unless Carmack was waived according to its terms. Subsequent cases have held that various entities, including VOCCs and NVOCCs could be considered "rail carriers" subject to the Carmack Amendment under Sompo I. This extension of the Carmack Amendment to non-motor carrier / non-rail carrier defendants was addressed by the Second Circuit in another case involving transportation similar to that in Sompo I that allowed the Second Circuit to revisit Sompo I.

In Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., the Second Circuit revisited its decision in Sompo I. In Rexroth, the court stated that the Sompo I case held that "Carmack trumps a conflict between itself and a contractual extension of COGSA inland for transports covered under Carmack." The question resolved by Rexroth was whether Carmack also defines the liability for losses to shipments that occur on the inland leg of a continuous international shipment. The Second Circuit contract the benefits of the bill of lading to contractors of the ocean carrier. Its name is derived from a case involving a ship named Himalaya. See Adler v. Dickson ("The Himalaya") (1955) 1 Q.B. 158 (C.A).

67. Sompo I, 456 F.3d at 71; but see Royal & Sun Alliance Ins., PLC. v. Ocean World Lines, Inc., 572 F. Supp. 2d 379, 392-398 (S.D.N.Y. 2008) (appeal pending 2d Cir. No. 08-4324-cv(L)) (where the District Court declined to apply Sompo I, under substantially identical transportation arrangements holding that it was bound by Kirby. The District Court stated that the critical question is whether the Carmack Amendment regulates the liability of companies like OWL - NVOCCs that engage ocean carriers, and then inland rail and motor carriers, to perform multimodal carriage of goods. The court said that OWL, unlike the rail carrier in Sompo I, was an NVOCC and was not subject to Carmack liability or benefits, because it does not "provid[e] transportation or service" under subchapter I or III of chapter 135 of title 49 United States Code. The Court said that "COGSA, not Carmack, governs the liability of NVOCCs, not only with respect to damages occurring to merchandise in transit during the ocean portion of a multimodal carriage of goods, but as well to the inland portions of carriage contemplated by the bill of lading issued by the NVOCC." In reaching this decision, Judge Hellerstein stated that the only point of distinction between Kirby and Sompo I is the absence of a discussion regarding Carmack in Kirby. The court stated that:

[on that omission, the Second Circuit felt free to depart from the rule of Kirby. But how can it be said that the nine Justices simply forgot about Carmack? If, as the Supreme Court ruled, COGSA extended with the intermodal shipment to govern the scope of liability of rail and truck carriers, Carmack perforce does not govern that same scope of liability.]

68. Rexroth, 547 F.3d at 355-356; see also Regal-Beloit, 557 F.3d 985.
69. Rexroth, 547 F.3d at 355.
70. Id. at 359.
found that it did not.\textsuperscript{71}

The Second Circuit focused its decision on the jurisdictional reach of the STB including the qualifications necessary for a party to constitute a “rail carrier.” In doing so, the court also noted that both defendants before it were subject to the regulations of the Federal Maritime Commission (“FMC”), not the STB.

The court reiterated its holding in Sompo I with respect to rail carriers, stating:

"... when a rail carrier is charged with damage... its liability is defined by [Carmack] and that alternative contractual provisions of the accompanying intermodal bill of lading – even when authorized by [COGSA] – are ineffective as to the rail carrier unless they satisfy the requirements set forth by Carmack and [Staggers]."\textsuperscript{72}

Having said this the Second Circuit then held:

"... defendants here [NVOCC; VOCC and its agent] do not fall within the statutory grasp of Carmack and are therefore entitled to employ the contractual limitations of liability set out in the through bills of lading."\textsuperscript{73}

The court in Rexroth thus held that the defendants were not “rail carriers” subject to STB jurisdiction and distinguished earlier case law as relying only on the “nature of shipment” rather than the “character of the carrier.”\textsuperscript{74} The court also acknowledged “modern intermodal international shipments” and distinguished earlier Supreme Court case law.\textsuperscript{75}

The court pointed out that the plaintiff’s argument that the defendants were rail carriers was based in large part on an unpublished district court case, rather than on the actual language of Carmack.\textsuperscript{76} The Kyodo court reasoned that the application of Carmack must turn on the “nature of the shipment,” rather than on the “character of the carrier.”\textsuperscript{77}

The Second Circuit found, however, that both of these criteria were necessary and established a “binary” test.\textsuperscript{78} First, “is the shipment covered by the [Carmack] Amendment?” And second, “is the carrier covered by the [Carmack] Amendment?” The Second Circuit rejected Kyodo holding that it “would extend the reach of the statute without Congress lifting a finger. . ..”\textsuperscript{79}

\textsuperscript{71. Id.}
\textsuperscript{72. Id. at 353.}
\textsuperscript{73. Id. at 354.}
\textsuperscript{74. Id. at 259}
\textsuperscript{75. Id. at 357; see also Royal & Sun Alliance, 572 F. Supp. 2d at 388.}
\textsuperscript{76. Rexroth, 547 F.3d at 358; and Kyodo, 2001 WL 1835158, at *4.}
\textsuperscript{77. See Kyodo, 2001 WL 1835158, at *4-5.}
\textsuperscript{78. Rexroth, 547 F.3d at 360.}
\textsuperscript{79. Id.}
Although the court recognized the importance of uniformity, the court held that Carmack imposes uniformity only on carriers covered by the statute, such as rail and motor carriers.\(^{80}\)

The court then cited numerous examples of the characteristics of a traditional rail carrier. Central to each example was a focus on "a carrier's ability to carry or operate rail transportation in determining its status as a 'rail carrier' under the Carmack Amendment."\(^{81}\) On the basis of this analysis, the court concluded (i) that arranging transportation by rail was not the same as providing rail carrier transportation;\(^{82}\) and (ii) that the NVOCC was not a rail carrier.\(^{83}\)

The Ninth Circuit has recently reached a different conclusion in *Regal-Beloit*. There, the court referred to the definition of "transportation" in Title 49 as "including 'a bridge, car float, lighter, ferry and intermodal equipment used by or in connection with a railroad'".\(^{84}\) The court reaffirmed that the "Board's jurisdiction is co-extensive with Carmack," and described that jurisdiction as including 'transportation that is by railroad and water, when the transportation is under common control, management or arrangement for a continuous carriage or shipment.' 49 U.S.C. § 10501(a)(1)(B)\(^{86}\) The Court then held that the ocean carrier that shipped the cargo from China to the United States, under a through bill of lading from origin to destination, and "contracted with [the railroad] to ship the cargo [inland] through its agent, provided 'continuous carriage on shipment' that was 'by railroad and water' via 'intermodal equipment..."

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80. Id.
81. See id. at 363-364 (citing Nevada v. Dep't of Energy, 457 F.3d 78 (D.C. Cir. 2006) (emphasizing that the "principal test is whether there is a bona fide holding out [as a common carrier] coupled with the ability to carry for hire") (citations omitted); Hanson Natural Res. Co.-Non-Common Carrier Status-Petition for a Declaratory Order, Fin. Dkt. No. 32248, 1994 WL 673712, at *14 (S.T.B. Nov. 15, 1994) (holding that "'ability to carry' is evidenced by an 'an ostensible and actual movement of traffic'"); Am. Orient Express Ry. Co. v. Surface Transp. Bd., 484 F.3d 554, 556 (D.C. Cir. 2007) (focusing on the plaintiff's "actual operation of trains" to conclude that it was a "rail carrier" under the Amendment even though it did not own the tracks over which it carried passengers); Simmons v. ICC, 871 F.2d 702 (7th Cir. 1989) (holding that a new company that was acquiring a rail line, but had not commenced operations was not yet a "rail carrier" providing railroad transportation)).
82. Rexroth, 547 F.3d at 364; cf. 49 U.S.C. § 13102(2) (2006) ("broker" in the motor carrier context means "means 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"). There is no similar defined term in Part A of subtitle IV defining a rail broker.
83. Rexroth, 547 F.3d at 364; but see Mitsui, 578 F. Supp. 2d 575 and Sompo III (both reaching contrary decisions, but also decided prior to Rexroth or Regal-Beloit).
84. Regal-Beloit, 557 F.3d at 992 (emphasis in original).
85. Id.
86. Id.
used by or in connection with a railroad, and was therefore subject to the Carmack Amendment.

The Court further opined that applying Carmack to the ocean carrier was consistent with one of the original purposes earlier discussed in this article quoting Reider v. Thompson, "to relieve shippers of the burden on searching out a particular negligent carrier from among the often numerous carriers handling . . . goods." 88

The Ninth Circuit characterized the Second Circuit’s holding in Rexroth as addressing transportation arranged by an NVOCC, a “middleman” that provided “no services on any vessel it owned nor did it otherwise physically handle the shipment itself.” 89 With respect to the distinction made by the Second Circuit between one that “arranges” transportation and one that “provides” transportation the Ninth Circuit stated:

Even if we were to accept this reasoning, it would not apply to [the ocean carrier’s] arrangements because there was no middleman between the ocean carrier and Plaintiffs. Rather, Plaintiffs dealt directly with [the ocean carrier], who actually transported the cargo on its ocean liner and had sustained contact with the shipped goods. 90

In addition, the Ninth Circuit questioned the Second Circuit’s reference to the jurisdiction of the FMC over the ocean carrier stating, “[t]he Second Circuit also seemed to suggest that because ocean carriers fall under the jurisdiction of the [FMC], they cannot also be regulated by the Board. . . . Nothing in the FMC’s jurisdictional statute makes its jurisdiction exclusive.” 91

The Ninth Circuit touched upon the arguments that Carmack does not apply to the international shipment to the United States under a through bill of lading unless there is a separate bill of lading issued for the inland move, 92 concluding that the Second Circuit’s decision in Sompo I...
and its own decision in *Neptune Orient Lines Ltd. v. Burlington N. & Santa Fe Ry. Co.*,93 foreclose that argument and clearly hold that "the language of [Carmack] also encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading."94

However, and critically, when the Carmack Amendment was recodified in 1978, the term "adjacent" was omitted from the text of the jurisdictional grant.95 Prior to the 1978 recodification, the jurisdictional grant of the Carmack Amendment provided:

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed . . . 96

456 F.3d at 57, 60-69 (holding that Carmack applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country even where the transport was under a single through bill of lading that incorporated COGSA beyond the tackle-to-tackle phase). Despite this weight of authority, our own precedent expressly forecloses Defendants' argument in this circuit. In *Neptune*, 213 F.3d at 1119, we held that "the language of [Carmack] also encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading. . . ."; see *Nippon Yusen Kaisha v. Burlington & N. Santa Fe Ry. Co.*, 367 F. Supp. 2d 1292, 1298 n.4 (C.D. Cal. 2005); Chubb Group of Ins. Companies v. H.A. Transp. Systems, Inc., 243 F. Supp. 2d 1064, 1068 n.3 (C.D. Cal. 2002). Contrary holdings in the Fourth, Sixth, Seventh and Eleventh Circuits rest on the notion that the Board lacks jurisdiction over intermodal shipments into the United States from a point in a foreign country under a through bill of lading; see e.g. *Am. Road Servs. Co.*, 348 F.3d at 568 ("The [Board]'s jurisdiction does not extend to a shipment under a through bill of lading unless a domestic segment of the shipment is covered by a separate bill of lading."). The Second Circuit has disagreed, holding that a plain reading of the Board's jurisdictional statute applies Carmack to any rail transportation in the United States, even if it originated in a foreign country under a through bill of lading; *see Sompo I*, 456 F.3d at 64. As we noted above, Carmack's reach is coextensive with the Board's jurisdiction, *see 49 U.S.C. § 11706(a);* therefore our conclusions regarding the extent of the Board's jurisdiction, expressed in Neptune, determine Carmack's reach as well. Crucially, *Neptune* interpreted our precedent and Carmack's language to apply to "shipments to or from overseas ports" without any requirement for a separate domestic bill of lading for the inland carriage. *Neptune*, 213 F.3d at 1119 (citing F.J. McCarty Co. v. S. Pac. Co., 428 F.2d 690, 692 (9th Cir. 1970)).

93. *Sompo I*, 456 F.3d at 60; *Neptune*, 213 F.3d 1118.

94. *Regal-Beloit*, 557 F.3d at 995 (citations omitted).


The 1978 recodification was intended to clarify that the Carmack Amendment was not limited to transportation "to" an adjacent foreign country but "to and from" an adjacent foreign country.\footnote{See Galveston H. & S. A. Ry. Co. v. Woodbury, 254 U.S. 357, 359-60 (1920) (explaining that "a carrier engaged in transportation by rail to an adjacent foreign country is, at least ordinarily, engaged in transportation also from that country to the United States. The test of the application of the act is not the direction of the movement but the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission"); see also Reider v. Thompson, 339 U.S. 113, 115-117 (1950) (discussing "through" bills of lading from a non-adjacent country compared to a bill of lading from a non-adjacent country that ends upon arrival in the United States); and Octavio Berlanga v. Terrier Transp., Inc., 269 F. Supp. 2d 821, 826-827 (N.D. Tex. 2003).}

The decisions addressing the compulsory jurisdiction of the Carmack Amendment have not emphasized the recodification of the Carmack Amendment in 1978, the purpose of which was stated in the introduction to the recodification to be:

"To revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV of Title 49, United States Code, "Transportation."\footnote{H.R. Res. 10965, 95th Cong. (1978).}

In 1981, the Second Circuit addressed the intent of Congress not to change the substance of the Carmack Amendment:

Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.\footnote{In re Roll Form Prods., Inc., 662 F.2d 150, 153 n.5 (2d Cir. 1981).}

Despite the foregoing, the Second Circuit in \textit{Sompo I} held that it was foreclosed from considering the adjacency argument (which the court raised sua sponte) by its own decision in \textit{Project Hope v. M/V IBN SINA}.\footnote{Project Hope v. M/V IBN SINA, 250 F.3d 67 (2d Cir. 2001); \textit{Sompo I}, 456 F.3d at 68.}

This objection, however, is foreclosed by our decision in \textit{Project Hope} (citation omitted). Focusing solely on the post-codification language, we held in \textit{Project Hope} that Carmack applied to the domestic motor carriage portion of an international shipment originating in Virginia and destined for a non-adjacent country, Egypt. Although \textit{Project Hope} involved motor, rather than rail, carriage, the post-codification language governing the Board's jurisdiction, and therefore Carmack's applicability, is identical regardless of
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the mode of transport. Thus, we find ourselves bound by Project Hope's holding, which effectively extended Carmack's applicability to international shipments involving non-adjacent foreign countries.\(^{101}\)

It would appear from the jurisdictional grant language that Carmack was intended by Congress to apply to water transportation only in that limited category of circumstances defined as the non-contiguous domestic trade of the United States.\(^{102}\) COGSA on the other hand appears to have been written to govern ocean bills of lading with the express permission to extend that application by contract to transportation beyond its compulsory application.\(^{103}\)

The Ninth Circuit addressed § 30701(7) by referring to § 30701(12) and § 30701(13) and holding that the Carmack Amendment was outside of COGSA and constituted an "other law which would be applicable in the absence of this [Act]."\(^{104}\) However, when "adjacent" is returned to the jurisdictional grant in the Carmack Amendment, and because it does appear in 49 U.S.C. § 11706(a)(3), the Carmack Amendment is not, by its terms, applicable to transportation from a non-adjacent country to the United States under a through bill of lading. It would appear inconsistent for Congress, in 1936, to include in COGSA a means of extending its application by contract if the contractual extension was statutorily foreclosed by the existing Carmack Amendment unless a carrier subject to COGSA also satisfied the waiver provisions of § 11706(c). In light of the continuing COGSA v. Carmack debate there is some reason to believe that the Supreme Court will grant certiorari in an appropriate case, as it did in Altadis two years ago.\(^{105}\)

The Court in Regal-Benoit also addressed the policy considerations

101. Sompo I, 456 F.3d at 68 n.13 (internal citations omitted); The author gratefully acknowledges the contribution of fellow Transportation Law Association member and Holland & Knight LLP partner, Chester D. Hooper, and partner Francesca Morris and associate Warren Gluck to the discussion of the adjacency argument further developed in the Amicus Brief identified in footnote 129, infra, Section IV. For argument that Project Hope is not precedential because it did not address the recodification and therefore did not rule on the issue, see p. 7 of that brief.

102. See 49 U.S.C. § 13102(17) (2006) ("The term ‘noncontiguous domestic trade’ means transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States").

103. 46 U.S.C. § 30701(7) (2006) ("Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.").

104. 49 U.S.C. § 30701(12) (2006); Regal-Beloit, 557 F.3d at 996.

105. Altadis USA, Inc. v. Sea Star Line LLC, 549 U.S. 1106 (2007), cert. dismissed, 549 U.S. 1189 (2007) (an interesting aspect in Altadis is that the transportation was from Puerto Rico to Florida and the loss occurred on land between Tampa and Jacksonville. On its face, this would appear to be part of the non-contiguous domestic trade of the United States, governed by Title 49, not Title 46.; see 49 U.S.C. § 13102(17) (2006); 49 U.S.C. § 13501 (2006); see also 46 U.S.C.
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discussed in Kirby, particularly the need for uniform law in international maritime trade. On this point, the Ninth circuit stated:

Nonetheless, and mindful of these policy considerations, Kirby does not control here. There, the Court held that state law did not apply to a bill of lading that extended COGSA inland, where COGSA and the state law conflicted. Focusing as it did on the need for state law to yield to federal law in the maritime context, the Court did not have occasion to consider which of two conflicting federal laws should govern a maritime shipment with an inland leg. The policy of uniformity in maritime shipping, however compelling, must give way to controlling statutes and precedent. Given Neptune's holding that Carmack applies and the conspicuous absence in COGSA of language allowing parties to give superseding statutory force to their contractual extensions of COGSA inland under Section 7, we hold that a mere contractual extension of COGSA is not alone sufficient to overcome Carmack.

The Court then addressed the means under Carmack by which the parties may avoid the statutory application of the Carmack Amendment, § 10502 and § 10709.

As noted earlier, Title 49 U.S.C. § 10502 permits the STB to exempt certain transportation from regulation by the STB or the Secretary of Transportation. Intermodal transportation is one category of exempt transportation. However, as also noted earlier, exempt transportation remains subject to the liability provisions, including the Carmack Amendment. Cases that have considered § 10502 alone generally hold that claims concerning intermodal traffic moving under 49 U.S.C. § 10502(f), which requires a rail carrier to offer full Carmack Amendment liability under § 10502(e), are governed by Sompo I.

The more interesting argument is whether § 10709 allows for “contract carriage” that is wholly exempt from Part A of the Interstate Commerce Act. On this point, the Court in Mitsui Sumitomo stated:

Contracts entered into pursuant to 49 U.S.C. § 10709 are expressly made not subject to ‘this part’—i.e. to Part IV (Interstate Transportation) of the

§ 30701(13) (2006) (which allows parties to adopt COGSA to domestic water transportation by express statement in the bill of lading).

106. Regal-Beloit, 557 F.3d at 992 (internal citations omitted).

107. Kirby, 543 U.S. at 28-29.

108. See Sompo I, 456 F.3d at 75. ("We cannot interpret the Kirby Court's language concerning the policy underlying COGSA... as implying that a contract extending COGSA inland should supersede an otherwise applicable federal law.").

109. 49 U.S.C. § 10502(f) (2006); 49 C.F.R. § 1090 (2009) ("transportation that is provided by a rail carrier as part of a continuous intermodal movement").

110. Mitsui, 578 F. Supp. 2d 575 (decided prior to Rexroth or Regal-Benoit).


112. Mitsui, 578 F. Supp. 2d at 581. (Interestingly, "Part" as used in Title 49 refers to "Part A—Rail." The reference to "IV" in Title 49 is to subtitle IV, Interstate Transportation.).
Interstate Commerce Act. Both Carmack and Section 10502(e), which limit the ability of the STB to exempt carriers from Carmack unless they offer shippers the alternative Carmack coverage, are found in Part VI of the Act. Therefore a § 10709 contract is subject to neither section.113

Nevertheless in Mitsui Sumitomo, the court held that the shipper was not a party to the "§ 10709 contract" and therefore the shipper's rights continue to be governed by Carmack, as held in Sompo I. In reaching this determination, the court reviewed the sea waybill and commented:

Not only does the sea waybill fail to disclose the terms of the ERTA114 (and the MITA115 that it incorporates), it does not even disclose the fact that there was a contract between [the ocean carrier] and [the rail carrier]! Rather, it states, "in the event there is a private contract between the Carrier and a Sub-Contractor, responsibility for such Through Transportation will be governed by the terms and conditions of said contract which shall be incorporated herein . . . ." (emphasis in original). As this court concluded on remand in Sompo I, the sort of five-times-removed-incorporation-by-reference, to a contract whose existence is purely hypothetical as far as the shipper is concerned, fails to charge the shipper with notice of what it is that he is "agreeing" to, and cannot be relied on to bind the shipper.116 Such a conclusion is compelled by the longstanding rule that contractual provisions purporting to limit a carrier's liability are enforceable only if they are reasonably communicative so as to result in a fair, open, just and reasonable agreement.117

Additional discussion on the interplay of § 10502(f) and § 10709 may be found in Sompo II, a companion case to the Yang Ming case discussed in Section III (c). In that case, Judge Chin reviewed a number of cases struggling with the appropriate means of identifying a § 10709 contract and concluded that:

"[I]t would be nonsensical for (1) § 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full

113. Id.
114. Evergreen-UP Exempt Rail Transportation Agreement.
115. UP's Exempt Circular Master Intermodal Transportation Agreement.
117. Nippon Fire & Marine Ins. Co. Ltd. v. Skyway Freight Sys., Inc., 235 F.3d 53, 59-60 (2d Cir. 2000) (The court rejected the argument that the shipper should have asked for the rules circular. In doing so, the court referred to the affirmative obligation under the circular for the ocean carrier to inform its customers of terms of the rail circular. At least one Class 1 freight railroad has amended its intermodal circular to provide that if the railroad's customer fails to notify its own customer of the limitations of liability in the circular and the limitations are not upheld, the railroad's customer shall indemnify the railroad for the delta between the damages awarded and what the damages would have been had the limitation been upheld); see also Mitsui, 578 F. Supp. 2d at 583 (Where the court noted that contractual indemnification for the difference between COGSA and Carmack is not precluded.).
Carmack liability and (2) § 10709 to permit the same category of rail contracts to offer specific rates and terms with no such requirement of an initial offer of full Carmack liability.”

In addressing this interplay, the Ninth Circuit adopted the argument that a § 10709 contract cannot be made with respect to transportation made exempt by the STB.119

“We therefore hold that a carrier providing nonexempt transportation may contract under § 10709 without offering Carmack protections, but a carrier providing exempt transportation must proceed under § 10502, which does require such an offer.120 Accordingly, Defendants here could not have entered into a § 10709 contract notwithstanding the MITA’s clause declaring otherwise. Defendants accept that § 10502 covers exempt transportation, but argue that carriers providing exempt transportation could nevertheless still choose to contract under § 10709. Our interpretation of the relationship between § 10502 and § 10709 forecloses this argument.”

One question not seemingly addressed in the various arguments made with respect to the interplay of § 10502 and § 10709 is what is meant by “exempt.”122 It is not necessarily clear that exempt transportation is exempt from the “jurisdiction” of the Board rather than exempt from the authority of the Board to regulate that transportation. In other words, the movement of intermodal containers is exempt from the regulations of the Board but remains within the broad grant of jurisdiction under § 10501. A similar interpretation has been made with respect to the jurisdiction of the Board over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to

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119. Regal-Beloit, 557 F.3d at 1002 (emphasis added).

120. Id.

121. Id. (Because the district court analyzed the case under § 10709 and not § 10502, the Ninth Circuit remanded the case to the District Court to determine in the first instance whether alternative terms were properly offered by Defendant).

122. Sompo I, 540 F. Supp. 2d at 498 (In rejecting both parties’ contentions and adopting its own, the Ninth Circuit noted “The parties’ confusion is understandable given the ‘muddled state of the law.’”) (citing “[s]everal courts [that] have noted that this issue has not been adequately addressed”) (Congress has not provided any guidance regarding how to read § 10502 and § 10709 in tandem and very few courts have squarely confronted the question.” The Court also cited case law in support of each of the parties’ arguments “The parties have therefore been forced to rely on unpublished district court decisions to support their respective arguments); see Tamini, 2003 WL 135722 (supporting plaintiffs’ argument); see Tokio Marine, No. 2003 WL 23181013 (supporting defendants’ argument).
be located, entirely in one State” under § 10501(b)\textsuperscript{123} but its inability to regulate spur, industrial, team, switching, or side tracks under § 10906. Title 49 USC 10906 provides:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.\textsuperscript{124}

Thus, although 49 U.S.C. § 10501(b) states that the Board has jurisdiction over spur, industrial, team, switching, or side tracks, 49 U.S.C. § 10906 states that the Board does not have authority to regulate spur, industrial, team, switching, or side tracks. The absence of authority to regulate has not been interpreted to mean the absence of jurisdiction.\textsuperscript{125} Similarly, the exemption of the Board’s regulation of intermodal transportation does not necessarily mean that it is outside the jurisdiction of the Board under the broad definition of transportation upon which the Ninth Circuit relied in its analysis of the ocean carrier’s status. Interpreting § 10501 as enlarging the jurisdiction of the STB to ocean carriers in foreign trade from non-adjacent countries while simultaneously interpreting § 10502 as exempting that transportation from the jurisdiction of the

\textsuperscript{123} 49 U.S.C. § 10501(b) (2006) states:

b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive.


\textsuperscript{125} Port City Props. v. Union Pac. R.R. Co., 518 F.3d 1186 (10th Cir. 2008); United Transp. Union III – Lelis Bd. v. Surface Trans. Bd., 183 F.3d 606, 612 (7th Cir. 1999); see also County of Dutchess v. CSX Transp., Inc., No. 7:09-cv-05606-CS (S.D.N.Y. filed Sept. 10, 2009) (“At first blush this provision [49 U.S.C. § 10906] seems to contradict Section 10501(b), which gives the STB exclusive jurisdiction over such tracks, but most courts have reconciled these provisions as follows: "When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management." Port City Props., 518 F.3d at 1188 (quoting Cities of Auburn & Kent, 2 S.T.B. 330, 1997 STB LEXIS 143, at *23 (1997)) (alteration in original). Thus, while the STB has exclusive jurisdiction over these tracks, and thus no other entity may regulate them, even the STB may not exercise authority over such tracks, and rail companies may dispose of them as they see fit. See id. at 1189 (STB authorization not required to abandon spur and industrial tracks).”)
STB (and thus prohibiting the parties from agreeing to a § 10709 contract) appears internally inconsistent.

If, instead, the jurisdictional grant, exemption and contract sections were read together, (i) intermodal transportation would be within the jurisdiction of the STB under § 10501 but (ii) free from regulation by the STB under § 10502, other than the default application of § 10502(e) (the obligation to offer Carmack), as with all exempt transportation, and (iii) the parties to exempt transportation, including intermodal transportation, could act affirmatively and electing to contract out of § 10502 and the entirety of Part A – Rail as provided by § 10709. Allowing the parties to do so would also be consistent with the de-regulatory policy of the United States since the late 1970s.

(B) THE STB AND § 10709

Although arising apart from the competing court decisions described in this article, it is noteworthy that the STB has also been addressing the issue of how to define a § 10709 contract. In a decision served March 12, 2008, the STB discontinued STB Ex Parte 669, in which the STB had sought public comments on its proposal to interpret the term “contract” in 49 U.S.C. § 10709 as embracing “any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities.”

The STB explained that in reviewing the comments of both carriers and shippers in STB Ex Parte 669, it was “…persuaded that the proposed rule would not adequately resolve the concerns that motivated the proposal, and could well result in unintended consequences that are best avoided.”

Instead, the STB instituted a separate rulemaking proceeding to consider imposing a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under §10709. According to the STB:

“The statement would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board. Moreover, it would advise the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly,

127. Id.
and such a rate might be open to challenge before the Board. The proposal would also require that, before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options."\(^{128}\)

It is noteworthy that in its notice the Board (i) stated that transportation subject to a § 10709 contract would “not be subject to a regulation by the Board,” not that the Board had abandoned its jurisdiction over the transportation entirely, and (ii) said nothing that would indicate that exempt transportation cannot be the subject of a § 10709 contract.

IV. THE ROTTERDAM RULES

The United States played an active role in negotiating a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which was recently completed by the United Nations Commission on International Trade Law (UNCITRAL) and approved on December 11, 2008 by the United Nations General Assembly.\(^{129}\)

The United States proposed to the working group that drafted the treaty, UNCITRAL Working Group III on August 7, 2003, in A/CN.9/WG.III/WP.34\(^ {130}\) that the law governing the door-to-door carriage of goods should be as uniform as possible.

The United States stated its position as follows with reference to the 2003 draft of the Convention at A/CN.9/WG.III/WP.21:

I. Scope of application and performing parties
5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier’s liability to the cargo interests would always be resolved under the Instrument’s own substantive liability provisions (including the Instrument’s own limitation and exoneration provisions) except when the network principle.

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128. Comments by various shippers, rail carriers and others may be found at the STB website http://www.stb.gov.

129. The text of the Convention, which will be known as the Rotterdam Rules after a September 2009 signing ceremony in Rotterdam, The Netherlands, may be found at Annex 1, pages 86-132 of the Report of UNCITRAL, Forty-first session (16 June-3 July 2008) to the General Assembly, http://www.uncitral.org (follow “Commission Session” hyperlink; then follow “41st session” hyperlink). The General Assembly’s approval of the Convention was announced by the General Assembly at http://www.uncitral.org (follow “Highlights” hyperlink; then follow “12/12/2008: General Assembly adopts Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea” hyperlink). Holland & Knight partner Chester D. Hooper was a member of the United States delegation to UNCITRAL Working Group III. Much of this Section IV is quoted verbatim from the Brief Amicus filed by Holland & Knight LLP in the appeal to the Second Circuit of Judge Hellerstien’s decision in Royal Sun & Alliance.

applies to supersede these provisions. To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.

Proposal by the United States of America, A/CN.9/WG.III/WP.34 (Aug. 7, 2003). The “network exception” referred to a desire by European Nations to have their road and rail conventions, CMR and CIM/COTIF, govern damage or loss on European roads or rails.

While the Convention will govern a multimodal carrier’s liability during U.S. inland carriage, it will not apply directly to the railroad or trucking company acting as subcontractor to the carrier. The United States indicated that the carrier’s Himalaya Clause should preserve uniformity by applying the carrier’s defenses to the railroad or motor carrier:

7. With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention such as CMR. In others, it may be a mandatory or nonmandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier’s rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.131

Inland United States carriers should be able to rely on Himalaya clauses in the bills of lading issued by multimodal carriers. To interpret Carmack contrary to the clear meaning and intent expressed by Congress in the 1978 Recodification bill would severely harm the uniformity sought by the United States in the future Rotterdam Rules, and would increase the expense of U.S. foreign trade. It is obviously far more efficient and preferable to govern multimodal carriage with one law rather than many. If the law were to change with the geographical location of the cargo or with the mode of transportation, the liability would not be uniform or predictable. The cost of insurance and the cost of international trade would increase.132

131. Id.

The century old Carmack Amendment has survived regulation, deregulation, and a debate over its applicability to inland transportation of goods originating in a non-adjacent country. It remains a steadfast embodiment of common law, if not Roman law. Just as rail transportation is experiencing a Rail Renaissance, so, too, is the Carmack Amendment and the jurisprudence that has accompanied its development, including the debates fostered by the interplay of *Sompo* and *Kirby*, and now the interplay of § 10502 and § 10709. Although the field of loss and damage in rail carrier transportation remains a vibrant one, we can look forward to the Supreme Court’s granting of a writ of certiorari in a proper case and, perhaps, the resolution of one or more of the many issues only touched upon in this article.
# The Evolution of Motor Carrier Liability Under the Carmack Amendment Into the 21st Century

Wesley S. Chused*

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VIII. Conclusion

"The interstate shipment of goods is a complicated business."¹

I. INTRODUCTION

When Congress enacted the Motor Carrier Act of 1935² it extended federal regulation for the first time over what was then a relatively young but fast—growing trucking industry that had been fraught with disparate and discriminatory pricing and practices, subject only to the law of the streets. The original Interstate Commerce Act of February 1887,³ enacted to regulate interstate rail transportation, was extensively amended by the Hepburn Act of June 29, 1906, which included what became known as the Carmack Amendment.⁴ It became applicable to the motor carrier industry when Congress passed the Motor Carrier Act of 1935. The Carmack Amendment, which codified the common law, prescribed the rights, duties, and liabilities of shippers and carriers with respect to interstate cargo loss and damage claims, and has been revised and recodified without substantive change over the years. The latest iteration of the statute took effect on January 1, 1996 with the enactment of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"),⁵ which today, as to motor carriers, is codified at 49 U.S.C. §14706.

The current motor carrier edition of the Carmack Amendment provides, as pertinent:

(1) Motor carriers and freight forwarders. A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 [49 USCS §§13501 et seq. or §13531] shall issue a receipt or bill of lading for property it receives for transportation under this part [49 USCS §§13101 et seq.]. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III chapter 135 or chapter 105 [49 USCS §§13501 et seq. or §13531 or §§10501 et seq.] are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

(2) Freight forwarder. A freight forwarder is both the receiving and deliver-

¹. REI Transp., Inc. v. C.H. Robinson Worldwide, Inc., 519 F. 3d 693, 695 (7th Cir. 2008).
One of the purposes of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods. As such, the Carmack Amendment is a strict liability statute, and our courts—in both motor and rail cases—have applied it accordingly. The ICCTA version of the Carmack Amendment also continues to preserve the right of motor carriers to limit their liability for interstate cargo loss or damage. With the evolution of the trucking industry over the last 75 years, shippers and motor carriers have persistently challenged these early cargo liability principles in their respective efforts to establish, avoid, or limit interstate cargo loss and damage liability.

Moreover, in the last 20 years alone there have been significant changes to the parties in the supply chain and the standing of those involved in the interstate transportation of goods by truck. Whereas once upon a time there were only “shippers” and “motor common carriers” litigating Carmack Amendment issues, today the roster of those involved in the supply chain is longer and more complicated with the evolution of property brokers and logistics providers whose services often affect any attempt to identify with any certainty the respective parties’ rights, duties, liabilities, and defenses in a motor truck cargo claim. Add to this the proliferation of shipper/carrier/broker contracts, the expansive definition of "transportation" and the elimination of the filed rate doctrine; and the stage is set for a complex mix of facts and relationships that continually test shippers, carriers, brokers, their counsel, and the judicial system as they try to sort things out in a Carmack Amendment dispute. It is hoped this article will help identify issues, principles, and precedents as a guide to resolving (or avoiding) motor carrier cargo disputes under the Carmack Amendment as we head into the 21st Century.

II. Origins of Interstate Motor Carrier Liability; Burdens of Proof and Defense

The Carmack Amendment codified the common law rule making a carrier liable, without proof of negligence, for all damage to the goods it transports, unless it affirmatively shows that the damage was occasioned by an act or omission of the shipper, an act of God, the public enemy, public authority, or the inherent vice or nature of the goods trans-
The Carmack Amendment was adopted to achieve uniformity in rules governing interstate shipments, including the rules governing injury or loss to property shipped. Since the motor carrier version of the Carmack Amendment is substantively identical to the rail version (and, in fact, there was only one version until the two modes were split into two different sections of Title 49 with the passage of the ICCTA in 1995), the principles laid down by early rail cases interpreting the statute apply as well to motor carriage.

As noted by Justice Frankfurter, "[t]he common law, in imposing liability [on a carrier], dispensed with proof by a shipper of the carrier's negligence in causing the damage." There is no burden on a shipper to prove negligence on the part of the carrier. The Carmack Amendment is a strict liability statute. When a shipper shows delivery of goods to a carrier in good condition, and non-delivery or delivery to the consignee in damaged condition, there arises a prima facie presumption of liability. Liability is not imposed upon carriers based on negligence. Rather liability is imposed upon carriers because, as insurers, they are required to deliver the goods entrusted to them in the same condition as received.

A shipper/plaintiff's burden of proof and a defendant/carrier's burden of defense, infra, have been exhaustively litigated and—one would think—settled by now. Since the Carmack Amendment was originally enacted in 1906, numerous court decisions have also established the principle of Carmack Amendment preemption of all state law and common law claims. Nonetheless, creative shippers and plaintiffs continue undeterred in attempting to invent new theories of motor carrier liability for goods lost or damaged in transit, as they seek ever-expanding forms of relief, and challenge the motor carrier industry to fit traditional defenses into the modern cargo loss and damage claim process.

A. Shipper's Burden of Proof

The Carmack Amendment entitles the beneficial owner of goods to

14. See id.
16. See Adams Express, 226 U.S. at 505-06.
recover "for the actual loss or injury to the property caused . . . by the receiving carrier, . . . delivering carrier, or . . . [other] carrier over whose line the property is transported." In the Supreme Court's landmark decision in *Elmore & Stahl*, a rail case, the Court held that under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes its *prima facie* case when it shows delivery of the goods to the carrier in good condition, arrival in damaged condition and the amount of its damages. Thereupon, the burden of proof is upon the carrier to show both that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability and that it was free of negligence. The same principles apply to motor carriers. As the *Plough* Court has noted:

In fact, the carrier's delivery of damaged goods which were in good condition when it received them created a presumption of negligence, not a mere inference. The burden which shifts to the carrier once a shipper makes out a *prima facie* case is not the burden of going forward with the evidence. It is the burden of proof which 'shifts to the carrier and remains there.'

That seems simple enough, right? All a shipper-plaintiff need do is come up with evidence of good origin condition, damaged destination condition, and the amount of its damages and it has thereby met its burden of proving a *prima facie* case. It then will have fixed upon the defendant motor carrier the burden of proving (1) that the loss was caused by one of the five exceptions to motor carrier liability and (2) that the motor carrier was free of negligence. Well, history has taught that there is more to proving a *prima facie* case than meets the eye.

### B. Good Origin Condition

A Carmack Amendment claimant or plaintiff, whether shipper or consignee, theoretically, should not have too much trouble proving the "good" origin condition of its shipment. This can be done easily enough through shipper witnesses involved in the manufacturing, testing, quality control, packaging, and shipping operations at point of origin. But, what if such witnesses are unavailable? And why go to the expense of identifying and contacting such witnesses, preparing affidavits, or preparing them to testify at trial, if the plaintiff has in his file the motor carrier's bill of lading? The terms and conditions of the industry-standard Uniform Straight Bill of Lading, state, *inter alia*, as follows:

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19. *Id.*
Received, subject to individually determined rates or contracts that have
been agreed upon in writing between the carrier and shipper, if applicable,
otherwise to the rates, classifications and rule that have been established by
the carrier and are available to the shipper, on request; . . . the property
described below, *in apparent good order*, except as noted (contents and con-
dition of contents of packages unknown) marked, consigned and destined as
shown below.  

Over the years, the "in apparent good order" language in the Uni-
form Straight Bill of Lading has taken on a life of its own and has been
relied on extensively by shipper/plaintiffs and their counsel to prove good
origin condition. This has resulted in an evidentiary conundrum in which
our courts are not in consonance: whether, with respect to goods in pack-
ages not open to inspection and visible, the bill of lading alone is suffi-
cient to establish good origin condition. Courts disagree on this. "[T]he
acknowledgment in a bill of lading that a shipment is in apparent good
order is *prima facie* evidence of delivery in good condition only as to
those parts open to inspection and visible."  

In those cases, plaintiffs relied unsuccessfully on the bill of lading alone to establish good origin
condition.

Other jurisdictions considering the issue have lowered the bar as to
the quantum of proof a plaintiff must elicit to prove good origin condi-
tion. The Third Circuit, which had rendered the *Bluebird* decision, subse-
quently liberalized the shipper’s burden of proving good origin condition
in a Carmack Amendment lawsuit and ruled that its prior decision in
*Bluebird* was “simply directed at making shippers produce evidence,
other than a clean bill of lading, to establish the condition of goods which
were not open and visible for the carrier’s inspection. Accordingly, we
reject the view that *Bluebird* renders all circumstantial evidence irrele-
vant with the goods not open and visible.”  

The court then noted:

> Although a bill of lading, by itself, is not sufficient to establish the condition
of goods that were neither visible nor open to inspection, a shipper may rely
on other reliable evidence—direct or circumstantial—which is 'sufficient to

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21. *Uniform Straight Bill of Lading, in Commodity Classification Standards Board, National Motor Freight Classification STB NMF 100-AI*, at 230 (2009) (empha-
sis added).


23. Beta Spawn, Inc. v. FFE Transp. Serv., Inc., 250 F.3d 218, 224 (3d Cir. 2001). *See also* Fine Foliage of Fla., Inc. v. Bowman Transp., Inc., 901 F.2d 1034, 1038 (11th Cir. 1990) (“We find no support for [the carrier’s] assertion that a judge may not rely on circumstantial evidence to establish the original condition of goods when that evidence is substantial and reliable.”).
establish by a preponderance of all the evidence the condition of the goods upon delivery.' . . . Thus, even assuming that the shipment in the present case was not open and visible, the only difference between . . . [the shipper's] evidentiary burden here, as opposed to in a case where goods are open and visible, is that . . . [the shipper] cannot rely solely on the bill of lading to establish the [original] condition.24

Similarly, another court held that where a motor carrier's driver signed the shipper's Order Form document as an acknowledgment that a machine had been "received in apparent good order" and noted no exception on the form—and although the court found that the order form was not a bill of lading and that no bill of lading had even been issued—the court ruled that "it is not inappropriate to view the Order Form in this case as analogous to the bill of lading," and thus found that it was reasonable to determine that the shipment was in good condition when the carrier received it.25

Prudence would dictate that regardless of the jurisdiction in which a case is litigated, a Carmack Amendment claimant should obtain all available evidence, documents, and witnesses to establish good origin condition without relying solely on the bill of lading. Conversely, defending motor carriers will seek to exclude or disqualify origin condition evidence. Thus, while the good news for shippers is that although they need to prove only three elements to establish a prima facie Carmack Amendment case, the bad news for shippers—and the good news for defending motor carriers—is that the defendant need only prevent a plaintiff from proving one of those three elements in order to defeat the lawsuit.

C. Damage at Destination

The second element in a Carmack plaintiff's burden of proof—proving that the shipment was delivered damaged at destination—though less frequently litigated, nonetheless makes for evidentiary challenges on both sides. The simplest cases are those in which a shipment is signed for as damaged or short at destination or is lost in transit, and the carrier has little basis on which to challenge such evidence from the consignee. However, the plot thickens substantially where a shipment is signed for clear—with no exception noted on the delivery receipt—and as having been delivered "in good order and condition except as otherwise noted," per the standard preprinted language on the delivery receipt. In these so-called "concealed damage" cases, a plaintiff has the task of overcoming the clear delivery receipt with other admissible evidence.

24. Beta Spawn, 250 F.3d at 225 (quoting Pillsbury Co. v. Ill. C.G. R.R., 687 F.2d 241, 244 (8th Cir. 1982)).
A leading concealed damage case is *Vacco Industries v. Navajo Freight Lines, Inc.*\(^26\) In *Vacco*, the defendant motor carrier, Navajo, was found liable to the shipper, Vacco, for damage to a shipment of machinery Navajo had delivered to the United States Navy in Rhode Island.\(^27\) The shipment had been accepted and signed for by a naval shipping clerk without exception as to the external condition of the packaging materials, but subsequently, two of the units were found to have been badly damaged.\(^28\) Navajo appealed, contending, *inter alia*, that the shipper had failed to prove the second element of its *prima facie* case, namely, delivery in damaged condition.\(^29\) The Court of Appeal of California disagreed and held that the fact that no exception was taken at the time of delivery:

cannot be deemed, however, to foreclose any showing of in-transit damage, especially since such a receipt went only to the exterior crating, a detailed inspection of the contents of the crates being reserved until later. . . . \(^30\) It was not necessary for the respondent to *rule out* the possibility of damage to the crates after they were removed from the truck, as long as some evidence was presented upon which it could reasonably be concluded that due care was exercised by the consignee in handling the merchandise.\(^30\)

In *U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc.*,\(^31\) a case involving a concealed damage fact pattern similar to that in *Vacco*, the parties again tested whether the plaintiff had adequately established the second element of its *prima facie* case. Plaintiff's insured had shipped a jet engine by truck from Alabama to Virginia via defendant Yellow.\(^32\) Yellow delivered the engine and obtained the consignee's signature on its delivery receipt under the legend "[r]eceived in good condition except as noted," with no damage notation or exception.\(^33\) One day later, following transportation of the engine to another area via forklift, an employee of the consignee noticed the engine was damaged.\(^34\) Although Yellow argued the undisputed evidence demonstrated that the shipment had been delivered in good condition, the court nonetheless ruled that "reliable, substantial circumstantial evidence of condition [at time of delivery] will suffice to prove a *prima facie* case."\(^35\) The court continued "[s]ubstantial and reliable circumstantial evidence, direct evidence or a combination of the two may be employed

\(^{27}\) *Id.*
\(^{28}\) *Id.* at 268.
\(^{29}\) *Id.* at 269-70.
\(^{30}\) *Id.* at 271.
\(^{32}\) *Id.* at 1326-327.
\(^{33}\) *Id.* at 1327.
\(^{34}\) *Id.* at 1328.
\(^{35}\) *Id.* at 1340.
to prove the second element of the claim.\textsuperscript{36} Timing, as they say, is everything. So, too, is it important to examine the evidence as to the existence of damage at the time of delivery, and if there is subsequent handling of the goods, the burden will be on the plaintiff to show with convincing evidence that it was unlikely to have happened after delivery by the carrier.

In \textit{Fuente Cigar}, the court reversed the lower court's finding in favor of the appellee motor carrier, Roadway, who had been sued for damage to a shipment of cigars that was misrouted during transportation from Florida to New Jersey.\textsuperscript{37} Following the misrouting of the shipment, Roadway tendered delivery on July 10, 1986, but the consignee refused the shipment, without inspecting it, because the extended transit time would have caused the cigars to dry out.\textsuperscript{38} It was not until about six weeks after tender of delivery to the consignee that the shipment was returned to the shipper, Fuente, where the cigars were found to have been dried out and damaged.\textsuperscript{39} In reversing the district court, the Eleventh Circuit, citing \textit{Fine Foliage}, held that the second element of a Carmack Amendment plaintiff's burden of proof "can also be satisfied by substantial and reliable circumstantial evidence alone. . . . It takes very little direct evidence to satisfy the second element, while it takes a much greater degree of circumstantial evidence."\textsuperscript{40}

The quantum of evidence offered by a plaintiff to prove damaged destination condition also is critical. This was demonstrated in \textit{Design X Manufacturing, Inc.} where the plaintiff, Design X, sued the defendant motor carrier, ABF, for damage to a shipment of custom-made commercial furniture transported from Connecticut to Michigan.\textsuperscript{41} Under a "turnkey" agreement between Design X and ABF, the furniture was supposed to have been delivered to the second floor of the consignee's facility.\textsuperscript{42} Instead, a large desk was left on the first floor by ABF's delivering agent because it would not fit up the stairway.\textsuperscript{43} ABF's delivering agent then obtained the signature of an unidentified person on the delivery receipt, with no exceptions noted.\textsuperscript{44} In its motion for summary judgment,

\begin{flushright}
\textsuperscript{36} \textit{Id.} (citing \textit{Fuente Cigar, Ltd. v. Roadway Express, Inc.}, 961 F.2d 1558, 1561 (11th Cir. 1992)).
\textsuperscript{37} \textit{Fuente Cigar}, 961 F.2d at 1559.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 1561, 1561 n.6.
\textsuperscript{42} \textit{Id.} at 465.
\textsuperscript{43} \textit{Id.} at 465-66.
\textsuperscript{44} Plaintiff's Objection to Defendant's Motion for Summary Judgment, \textit{Design X Mfg., Inc.}, 584 F. Supp. 2d 464 (No. 3:06cv01381 (MRK)).
\end{flushright}
ABF contended Design X had failed to prove delivery in damaged condition, although Design X had offered hearsay accounts attributed to its customer/consignee that the desk was damaged at the time of delivery. Design X also claimed it had photographs showing the delivery damage and e-mails from its customer recounting the alleged damage. Nonetheless, the Court excluded such statements as inadmissible hearsay. After Design X, despite being given additional opportunities in which to submit supplemental affidavits had failed to do so, the Court ruled it had failed to establish its prima facie case by failing to prove damaged condition at destination and entered summary judgment for ABF.

To limit their exposure in concealed damaged claims, motor carriers often publish in their tariffs, classifications, or rules circulars a concealed damage rule—an example of which provides as follows:

When damage to contents of a shipping container is discovered by the consignee which could not have been determined at time of delivery it must be reported by the consignee to the delivering carrier upon discovery and a request for inspection by the carrier's representative made. Notice of loss or damage and request for inspection may be given by telephone or in person, but in either event must be confirmed in writing by mail. If more than fifteen days pass between date of delivery of shipment by carrier and date of report of loss or damage, and request for inspection by consignee, it is incumbent upon the consignee to offer reasonable evidence to the carrier's representative when inspection is made that loss or damage was not incurred by the consignee after delivery of shipment by carrier. While awaiting inspection by carrier, the consignee must hold the shipping container and its contents in the same condition they were in when damage was discovered insofar as it is possible to do so.

It is surprising to see how often motor carrier claim personnel of carriers large and small operate under the mistaken belief that because they have a clear delivery receipt they are home free for any cargo damage claims. Not so fast. It is defense counsel's job to educate his client in the nuances of burdens of proof and the rules of evidence which are especially critical in proving—or not—damaged condition at destination.

D. Damages

On its face, the Carmack Amendment seems simple and straightforward: the liability imposed "is for the actual loss or injury to the property" caused by the motor carrier. An in-depth analysis of the scope

45. Design X Mfg., Inc., 584 F. Supp. 2d at 468.
46. Id.
47. Id.
48. Id. at 468-69.
49. Commodity Classification Standards Board, supra note 21, at 729 (Item 300135).
Evolution of Motor Carrier Liability

and types of damages a motor carrier may be liable for under the Car-
mack Amendment could easily be the subject of an entire article, if not a
book. However, for present purposes, it is appropriate to identify gener-
ally the damages a shipper may recover for the loss, damage, or delay to
an interstate shipment versus those for which a motor carrier is not liable.

Under the Carmack Amendment carriers generally are liable for the
market value of the shipment at the place of destination. The statute
incorporates common law principles of damages. However, such recov-
erable damages are limited to the reasonable foreseeability of the plain-
tiff's actual injury at the time of entry into the bill of lading contract.
“Damage is foreseeable by the carrier if it is the proximate and usual
consequence of the carrier's action.” “Within the meaning of the Car-
mack Amendment, ‘actual loss or injury to the property’ is ordinarily
measured by the reduction in market value at destination or by replace-
ment or repair costs occasioned by the harm.”

The task of identifying what constitutes market value for lost or dam-
aged goods has always been challenging. In an early rail case, Illinois
Central Railroad Company v. Crail, the Court established a guideline to
help calculate shipper's damages. The case involved the determination
of damages recoverable by the dealer and consignee of a carload of coal
weighing 88,700 pounds that was delivered 5,500 pounds short. The
dealer had not resold any of the coal but added it to his stock for future
resale, and the shortage did not interfere with his business. The evi-
dence indicated that before and after the shipment, the dealer purchased
c-coal of like quality in carload lots of 60,000 pounds or more at a price of
$5.50 per ton, and that the retail price of coal sold at less-than-carload
lots was $13.00 per ton. In the district court, the dealer obtained judg-
ment for the wholesale value of the coal not delivered, but the Court of
Appeals reversed, holding that it should have been for the retail value, as
the plaintiff contended. The Supreme Court then reversed again, noting
that the plaintiff's contention “ignores the basic principle underlying
common-law remedies that they shall afford only compensation for the
injury suffered.” The court then held, “[t]he test of market value is at

53. Id. at 109.
54. Id.
55. Camar Corp. v. Preston Trucking Co., Inc., 221 F.3d 271, 277 (1st Cir. 2000).
57. Id. at 62.
58. Id.
59. Id.
60. Id. at 62-63.
61. Id. at 63.
best a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable."62

A similar result was reached in Robert Burton Associates, Inc. v. Preston Trucking Company, Inc.63 In Robert Burton, the plaintiff shipped eighty-one cases of cigarette papers from its New Jersey warehouse to one of its customers, but the shipment was lost in transit.64 As a result, Burton sent a replacement shipment to its customer for which it received payment in full.65 The question was whether the defendant motor carrier, Preston, was liable for the market (retail) value of the goods or the replacement (wholesale) cost of the goods.66 The evidence showed that the replacement shipment consisted of products that were identical to those in the lost shipment, that Burton's cost to purchase, procure, warehouse, and ship the goods was $17,591; and that Burton had a sufficient quantity of replacement goods on hand both to replace the lost shipment and to fill orders for its other customers.67 The district court had rejected Preston's argument that replacement cost was the appropriate measure of damages and entered judgment against Preston for $55,928, the invoice value of the original shipment.68

On appeal, the Third Circuit vacated the judgment on damages, noting that Burton had not lost any sales as a result of the loss of the original shipment.69 It ruled that if Preston met its burden of proving that the loss of the first shipment did not cause Burton any loss of sales, then the district court should enter judgment for Burton's wholesale cost, $17,591.70 "But if Preston cannot establish that Burton did not lose any sales by reason of the loss of the goods, the district court will enter judgment against Preston for $55,928.71

Another case illustrating a motor carrier's exposure to damages under Carmack is Paper Magic Group, Inc. v. J.B. Hunt Transp, Inc.72 Paper Magic involved a shipment of greeting cards and seasonal paper goods tendered to the defendant motor carrier, Hunt, on October 16, 1998 for transportation from Pennsylvania to Wisconsin.73 The invoice

62. Id. at 64-65.
64. Id. at 219.
65. Id.
66. Id. at 219-20.
67. Id. at 221.
68. Id. at 219-20.
69. Id. at 220-21.
70. Id. at 221.
71. Id.
73. Id. at 460.
value of the shipment was $130,080.74 The shipment became lost in Hunt's system, but about four months later Hunt found it and notified Paper Magic (who had been unaware of the delay because its customer had not been scheduled to pay for the goods until March 1999).75 Under an agreement in place between Paper Magic and Hunt, Hunt's liability for "lost, damaged or destroyed [goods]" was defined as "the price charged by [Paper Magic] to its customers," with reasonable salvage deducted.76 Hunt sold the goods at salvage for $49,645 and Paper Magic sued for the full amount, $130,080, which was awarded by the district court.77

On appeal, the Third Circuit affirmed.78 It ruled that under the Carmack Amendment, the measure of damages in the event goods are damaged or delayed is "the difference between the market value of goods at the time of delivery, and the time when they should have been delivered."79 In particular, the Court in Paper Magic distinguished "special" and "general damages" and found that Paper Magic was not seeking special damages such as damages for loss of use, lost future profits, or additional labor.80 The court noted, "[Paper Magic] is seeking actual damages: the loss in value of the shipment due to Hunt's delay. We do not think that the District Court erred in concluding that Hunt can be charged with foreseeing that a four month delay would cause harm to Paper Magic."81

A recurring damages theme in Carmack Amendment litigation against motor carriers is the shipper's effort to recover special damages such as lost profits or business opportunities. This is especially common in trade show shipments. Generally, courts stick to the foregoing established legal principles and focus on issues of foreseeability on the part of the defendant motor carrier and the certainty the shipper's claimed damages—or lack thereof. An instructive case on lost profit damages is Camar Corporation v. Preston Trucking Company, Inc.82 Camar was in the business of purchasing U.S. Government surplus equipment and then selling the equipment at huge mark-ups.83 In the case at hand, Camar was the successful bidder at a price of $215 for 156 pieces of U.S. Navy surplus equipment, which the Navy had originally purchased for

74. Id.
75. Id.
76. Id.
77. Id.
78. Id. at 465.
79. Id. at 461.
80. Id. at 461-62.
81. Id. at 462.
82. Camar Corp. v. Preston Trucking Inc., 221 F.3d 271 (1st Cir. 2000).
83. Id. at 273.
$275,000.\textsuperscript{84} Camar hired Preston to transport the equipment by truck from Oakland, California to Camar's Worcester, Massachusetts facility.\textsuperscript{85} The shipment disappeared. Initially, Camar submitted a claim to Preston for $137,500, representing one half of what the Navy had originally paid, but after reviewing its records of past sales of similar goods, Camar amended its complaint to seek damages of $353,370; claiming that it could have sold the equipment for that sum.\textsuperscript{86} The district court entered summary judgment limiting Preston's liability to the $215 that Camar had actually paid for the goods.\textsuperscript{87}

On appeal the First Circuit affirmed, ruling that Camar's evidence of past sales at huge mark-ups was too speculative to form the basis for a damage award greater than the $215 purchase price.\textsuperscript{88} The Court noted that no evidence of subsequent customer demand was submitted.\textsuperscript{89} Nor did Camar submit evidence tending to prove that it lost any customers or good will as a result of Preston's loss of the equipment.\textsuperscript{90} Camar's would have, should have, could have argument was insufficient. It failed to meet its "responsibility to produce sufficient evidence of its lost profits with reasonable certainty."\textsuperscript{91}

E. ATTORNEY'S FEES

Let there be no ambiguity on this point: the Carmack Amendment contains no provision allowing for the recovery of attorney's fees as an element of damages by a shipper of general freight.\textsuperscript{92} Claims for attorney's fees in a Carmack Amendment lawsuit based on state law generally have been held to be preempted, as with other forms of state and common law relief.\textsuperscript{93} Any state law claim that imposes liability on carriers, based on the loss or damage of shipped goods, that increases the liability of the carrier is preempted.\textsuperscript{94} In other words, plaintiffs are entitled to recover only their actual damages for the damaged freight under the statute; no more, no less—and no attorney's fees.

However, in one case involving individual shipper-plaintiffs who had

\begin{itemize}
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. at 274.
\item \textsuperscript{88} Id. at 277.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id. at 279.
\item \textsuperscript{92} But, see 49 U.S.C. §14708(d) (2005), which allows shippers of household goods to recover attorney's fees under certain circumstances.
\item \textsuperscript{94} Rini v. United Van Lines, Inc., 104 F.3d 503, 506 (1st Cir. 1997).
\end{itemize}
shipped their car from California to Iowa via the defendant motor carrier, an award of attorney's fees was upheld.\textsuperscript{95} The attorney's fee award in \textit{Caspe} obviously was driven by the fact that the plaintiffs were individual consumers and by the defendant's pre-suit conduct which the Court determined to have been "most vexatious" and egregious.\textsuperscript{96} \textit{Caspe}, however, does not represent the general rule on the subject. Attorney's fees are not recoverable as an element of a plaintiff's damages under the Carmack Amendment (unless the shipment consisted of household goods, and even then, only under certain conditions).\textsuperscript{97}

So what kinds of "damages" may shippers seek, and will motor carriers be liable for under the Carmack Amendment? Generally, courts stick to the program and hold motor carriers liable only for the actual value of the lost or damaged article or the cost of repairing it—damages that were foreseeable to the motor carrier when it received the shipment for transportation—with the objective of restoring the shipper to the position he would have been in. No more, no less. A shipper seeking "special" damages has a substantially greater burden of proof in terms of foreseeability.

\section*{F. MOTOR CARRIER DEFENSES}

Under the Carmack Amendment, a motor carrier's defenses are the same as those of a rail carrier. "[A] carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by (a) the act of god; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods."\textsuperscript{98}

Motor carriers defending Carmack Amendment claims, contrary to the beliefs of some, actually do have defenses, although their two-fold burden of proof is onerous. During the claims stage, motor carriers commonly take the position that they are not liable because the damage resulted from a defense articulated by the Supreme Court: "there was a flood;" "the truck was stolen;" "this was a shipper's load and count shipment;" "this load was perfectly tarped and we're not liable for any rust on the machine." All of these defenses indeed are available to motor carriers, with one major caveat that claim personnel often overlook: in addition to proving the applicability of one of these defenses, the carrier also must prove it was free of negligence in handling the shipment. This can be especially difficult where a less-than-truckload shipment is transferred to/from several vehicles and terminals in route to final destination.

\begin{footnotes}
\item[96] See \textit{Id.} (citing Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 254-59 (1975)).
\item[97] 49 U.S.C. §14708(d).
\item[98] Elmore \& Stahl, 377 U.S. at 137.
\end{footnotes}
The Act of God is a good example of a misunderstood and misapplied defense. Although most cases dealing with this defense are in the ocean or rail context, the principle and definition is the same for motor carriers. An Act of God has been defined (in a maritime context) as a "loss happening in spite of all human effort and sagacity." Accordingly:

...[t]his defense has been widely defined as any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented; and/or a disturbance . . . of such unanticipated force and severity as would fairly preclude charging . . . [Defendants] with responsibility for damage occasioned by the [Defendants'] failure to guard against it in the protection of property committed to its custody.100

In *Southern Pacific Company v. Loden*, the plaintiff sued the railroad for damage to a shipment of perishable produce delayed in transit.101 The railroad claimed the delay was caused by an Act of God due to unusually heavy rains and flood conditions, which damaged its track and rail facilities.102 However, the court rejected the defense because of evidence showing it knew of a weeklong rain but offered no evidence of precautions taken to avoid consequences of this rainfall.103 The defendant railroad thus had failed to prove it was free of negligence in connection with the flood damage.

Compare that to the result in *Ismert-Hincke Milling Company v. Union Pacific Railroad Company*.104 In *Ismert-Hincke*, the shipper sued the railroad for damage to its goods while the rail cars were held at the railroad's Topeka, Kansas yard during the 1951 flood.105 Evidence showed that the most devastating previous flood had occurred in 1903, following which there had been much improvement and flood prevention work along the banks of the river.106 However, in July 1951 after several days of heavy rain, the dike protecting the carrier's yard broke, flooding the rail yard.107 During this time the railroad exerted all of its efforts towards strengthening the embankment.108 The court found that it could not have carried on its operations of strengthening its tracks and the dike

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100. Id.
102. Id. at 349.
103. Id. at 352.
105. Id. at 15.
106. Id. at 16.
107. Id. at 17.
108. Id.
and at the same time undertake to evacuate the rail cars in its yard.\textsuperscript{109}

According to the court:

the Carrier was faced with the decision whether it would try to protect its tracks, strengthen the dike and its approaches, or abandon all such efforts and evacuate. . . . The flood was much more severe and came much sooner than was anticipated by anyone. . . . Under these facts we are not prepared to say . . . that the carrier acted imprudently. . . . We are forced to conclude that the Court was well within the exercise of sound discretion in concluding that the Carrier was not guilty of actionable negligence and that its acts did not contribute to the loss.\textsuperscript{110}

The railroad had successfully proved it was free of any negligence.\textsuperscript{111}

Perhaps because trucks are more mobile than rail cars and ocean vessels, cases involving the Act of God defense in Carmack Amendment motor carrier cases are rare. Nonetheless, the same principles apply.

By far, the most commonly litigated Carmack Amendment motor carrier defense (apart from preemption and limitation of liability, \textit{infra}) is the act or default of the shipper. This can be based on any number of shipper misdeeds, but most commonly this defense involves improper packing, labeling, or loading of the goods. Invariably, the success of this defense will depend on the strength of the defendant's expert testimony as to the loading or packaging defect.\textsuperscript{112} Motor carriers also have the benefit of the following language commonly found in uniform straight bills of lading:

This is to certify that the above named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Department of Transportation.\textsuperscript{113}

Shame on the shipper who uses and signs such bills of lading without taking necessary steps to see to the proper packaging requirements for its goods. When a shipper delivers goods to a motor carrier for transportation, it impliedly warrants that they are fit for transportation and properly packed.\textsuperscript{114}

Two leading cases in the area of improper loading on the part of the

\begin{footnotes}
\footnote{109. \textit{Id}.}
\footnote{110. \textit{Id}.}
\footnote{111. \textit{Id}. at 18.}
\footnote{112. \textit{See, e.g., National Motor Freight Classification, supra note 21.}}
\footnote{113. \textit{Uniform Bill of Lading Terms and Conditions, in National Motor Freight Classification, supra note 21, at 231.}}
\footnote{114. E. Motor Express, Inc. \textit{v. A. Maschmeijer, Jr., Inc.}, 247 F.2d 826, 828 (2nd Cir. 1957); \textit{see also} Close \textit{v. Anderson}, 442 F. Supp. 14, 17 (W.D. Wash. 1977) ("Adequate packaging is the responsibility of the shipper. The packaging must be sufficient to withstand normal and reasonably foreseeable events.").}
\end{footnotes}
shipper are United States v. Savage Truck Line, Inc.\textsuperscript{115} and Franklin Stainless Corporation v. Marlo Transport Corporation.\textsuperscript{116} In Savage, the shipper had loaded six airplane engines encased in cylindrical containers in the defendant motor carrier's truck.\textsuperscript{117} During transportation they came loose, causing the truck to swerve and resulting in an accident and the death of the driver of another vehicle.\textsuperscript{118} There were multiple claims and cross-claims, including claims by the shipper, the United States, against the motor carrier, Savage, for contribution and a claim for damage to its freight.\textsuperscript{119} In Savage, the Fourth Circuit laid down the standard for determining responsibility for improper shipper loading:

When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.\textsuperscript{120}

Since Savage's driver had inspected the load before the trip and knew the engines were not properly secured, it had failed to prove it was free of negligence and the shipper was entitled to recover for the damage to the engines.\textsuperscript{121}

In Franklin Stainless, coils of stainless steel were loaded by the shipper's employees on the defendant motor carrier's trailer.\textsuperscript{122} Its driver told the shipper he had never hauled steel coils before and asked the shipper whether the load was secure.\textsuperscript{123} The shipper assured him it was.\textsuperscript{124} During transportation, an accident occurred due to the improper loading of the coils.\textsuperscript{125} Following Franklin's settlement of the victim's personal injury action, it sued the motor carrier, Marlo, to recover the damages, costs and expenses it paid in that action.\textsuperscript{126} Franklin alleged Marlo was negligent in failing to comply with ICC regulations pertaining to the proper loading and securing of the cargo.\textsuperscript{127} The Court, however, noted that the jury found the trucker reasonably relied on the shipper's assurance that the coils were properly loaded, that no witness testified the

\textsuperscript{115} United States v. Savage Truck Line, Inc. 209 F.2d 442 (4th Cir. 1953).
\textsuperscript{116} Franklin Stainless Corp. v. Marlo Transp. Corp., 748 F.2d 865 (4th Cir. 1984).
\textsuperscript{117} Savage Truck Line, Inc., 209 F.2d at 443.
\textsuperscript{118} Id. at 443-44.
\textsuperscript{119} Id. at 444.
\textsuperscript{120} Id. at 445.
\textsuperscript{121} Id. at 446.
\textsuperscript{122} Franklin Stainless Corp., 748 F.2d at 866.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 866-67.
\textsuperscript{126} Id. at 867.
\textsuperscript{127} Id. at 867-68.
defect was open and obvious, and that Marlo’s driver could reasonably rely on the shipper’s assurances.\textsuperscript{128} It therefore concluded Franklin was not entitled to indemnity against Marlo.\textsuperscript{129}

An important lesson from \textit{Savage} and \textit{Franklin Stainless} is that they essentially turned on whether the motor carriers met their burden of proving they were not negligent. A carrier’s ability to demonstrate that it complied with the Federal Motor Carrier Safety Administration’s (FMCSA) load securement regulations is essential for a motor carrier to successfully meet its burden of proving freedom from negligence in cases involving shifting or unsecured cargo or improper loading as the cause of damage.

The importance of proving freedom from negligence in an “act of the shipper” case involving a latent improper loading defect was illustrated more recently in \textit{Castine Energy Construction, Inc. v. T.T. Dunphy, Inc.}\textsuperscript{130} In \textit{Castine}, the shipper sued a motor carrier for damage to a shipment of certain specially made steel industrial filters or covers, each weighing 2,000 pounds, shipped from Maine to Virginia.\textsuperscript{131} The shipper, Castine, had welded iron crossbars onto the covers to facilitate their loading onto the trailer.\textsuperscript{132} Dunphy’s driver then used chains attached to the crossbars to secure the load.\textsuperscript{133} The covers became loose in transit and spilled onto the highway becoming irreparably damaged.\textsuperscript{134} In defending Castine’s Carmack Amendment lawsuit, Dunphy relied on the “act of the shipper” defense, and—to meet its burden of proving freedom from negligence—it called upon a retired Maine state trooper to testify as an expert witness with respect to Dunphy’s compliance with federal safety and loading regulations.\textsuperscript{135} Following a jury verdict for Dunphy, Castine appealed, contending that the trial court erred by allowing the expert to testify as to how the safety regulations should be interpreted.\textsuperscript{136}

The Supreme Judicial Court of Maine affirmed.\textsuperscript{137} It ruled the trial court did not err in allowing the state trooper’s testimony as to what steps would have been required to properly secure the covers before transporting them.\textsuperscript{138} While recognizing that the primary duty of safe loading of property is upon the motor carrier, the court noted:

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\textsuperscript{128} \textit{Id.} at 869.
\textsuperscript{129} \textit{Id.} at 870.
\textsuperscript{130} \textit{Castine Energy Constr., Inc. v. T.T. Dunphy, Inc.}, 861 A.2d 671, 675, 678 (Me. 2004).
\textsuperscript{131} \textit{Id.} at 673-74.
\textsuperscript{132} \textit{Id.} at 674.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 675-77.
\textsuperscript{136} \textit{Id.} at 673-74.
\textsuperscript{137} \textit{Id.} at 678.
\textsuperscript{138} \textit{Id.} at 677.
When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observations by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.139

Whether the shipper's act or omission is improper packaging, improper loading, misdescription on the bill of lading, inherent defect, or vice or any similar defense the success or failure of the motor carrier's case will depend on the evidence as to the defect or omission at issue (usually requiring expert witness testimony), and its concurrent ability to prove its freedom from negligence. Motor carrier defense counsel are continually challenged to explain and reeducate their clients on this two-pronged burden of defense. Perhaps that explains why motor carrier decisions addressing the exceptions to carrier liability under the Carmack Amendment are not nearly as common as three other principal defenses: preemption, limitation of liability and failure to file a timely claim or lawsuit.

III. PREEMPTION OF STATE AND COMMON LAW CLAIMS

It is common in Carmack Amendment litigation to see complaints filed by shippers, especially shippers of interstate household goods, that include a constellation of state and common law claims such as garden-variety negligence, breach of contract, breach of warranty, fraud, misrepresentation, negligent and intentional infliction of emotional distress, mental anguish, conversion, various business torts, defamation and, of course, the all-time favorite, a claim under state unfair and deceptive trade practices acts (DTPA) seeking punitive damages, plus attorney's fees, tax, and tip. Of course, punitive DTPA claims are alleged because plaintiffs naturally seek as expansive a scope of damages as possible, because they want an attorney's fee award or because they are ignorant of the strict liability characteristics of Carmack Amendment litigation and its defined permissible damages. To neutralize such claims, motor carriers typically remove the lawsuit from state to federal court, and follow removal with either a Rule 12(b) motion to dismiss all non-Carmack claims on grounds of federal preemption, or plead preemption as an affirmative defense in their answer, laying the foundation for a future motion for summary judgment.

An in-depth analysis of Carmack Amendment preemption of state law claims is far beyond the scope of this article. The most comprehensive treatment of this topic can be found in Slouching Toward a Morass: A

139. Id. at 678 (citing United States v. Savage Truck Line, Inc., 209 F.2d 442, 445 (4th Cir. 1953)).
Evolution of Motor Carrier Liability

Case for Preserving Complete Carmack Preemption. Suffice it to say, the overwhelming weight of authority on Carmack Amendment preemption, from Adams Express to Hughes v. United Van Lines, Inc., to Underwriters at Lloyds of London v. North American Van Lines, Inc., to Moffit v. Bekins Van Lines Co., to Cleveland v. Beltman North American Co., Inc., to Rini, to Gordon v. United Van Lines, Inc., and countless federal and state court decisions in between, have conclusively established that in the interests of uniformity in the disposition of claims brought under interstate bills of lading, all state statutory and common law claims arising out of loss or damage to an interstate shipment of goods are preempted by the Carmack Amendment. Moreover, the Supreme Court has held that where federal regulations cover the same subject matter as the relevant state law, those regulations preempt state law claims. Thus, motor carriers facing cargo claims based on alleged violation of the Federal Motor Carrier Safety Administration's (FMCSA) claim handling regulations or other FMCSA regulations have additional available preemption firepower.

Of course nothing is ever simple, and to make things interesting the First Circuit in Rini cracked the door open by noting in dicta that while the purpose of the Carmack Amendment is to establish uniform federal guidelines to remove the uncertainty surrounding a carrier’s liability when damage occurs to an interstate shipment, “liability arising from separate harms—apart from the loss or damage of goods—is not preempted.” This was picked up by the Court in Gordon, and—as a result—creative plaintiffs have been designing complaints with language contrived to appear to allege claims standing apart from the actual loss or damage to the goods or the carrier’s claim handling process. Basically, they seek to circumvent Carmack Amendment preemption by purporting to allege conduct and claims separate and distinct from the transportation, delivery, loss of or damage to the goods, or the claims process itself so as to create a cause of action appearing to be separate from the Car-

150. Rini, 104 F.3d at 506.
151. Gordon, 130 F.3d at 289.
mack Amendment claim. However, most courts see through the camouflage and dismiss such claims. "But for" the interstate transportation of the shipment, the shipper would have no claim. Hence, it is preempted.

Preempted claims include claims for intentional infliction of emotional distress: *Rini*,152 *Smith v. United Parcel Service*,153 *Gordon*;154 claims for breach of the implied covenant of good faith and fair dealing: *Cleveland v. Beltman North American Co*;155 claims for violations of state unfair and deceptive trade practice statutes: *Rini*;156 consumer fraud claims related to a plaintiff's purchase of additional insurance coverage: *Berryman v. Wheaton Van Lines, Inc.*;157 and even lost wages and mental anguish resulting from the destruction of the shipper's goods in *Morris v. Covan World Wide Moving Inc.*158 Generally, if the claim arose from the interstate transportation of the goods, it is preempted.

Directly related to the Carmack Amendment preemption defense is the so-called "savings clause" argument commonly advanced by shippers seeking to avoid preemption of their state law claims. The savings clause, presently codified as to motor carriers at 49 U.S.C. §13103, provides as follows "[e]xcept as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law."159

However, shipper reliance on the savings clause as a means to circumvent Carmack preemption has been rejected by every court from *Adams Express* on down, based on the reasoning that to construe the saving clause as grounds for allowing plaintiffs to avail themselves of state remedies would emasculate the Carmack Amendment itself.160 According to the Court in *Adams Express*, a broad reading of the clause "would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to."161

Closely related to Carmack Amendment preemption of state and common law claims is the important but less frequently litigated preemption defense under the Federal Aviation Administration Authorization

152. *Rini*, 104 F.3d at 506.
156. *Rini*, 104 F.3d at 506.
161. *Id.* at 507.
Act of 1994 ("FAAAAA"), codified as to motor carriers in the ICCTA at 49 U.S.C. §14501(c)(1). That statute provides:

Except as provided . . . a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.\textsuperscript{162}

The origins of §14501(c) preemption trace back to Supreme Court decisions involving the preemptive effects of the Airline Deregulation Act of 1978 ("ADA").\textsuperscript{163} The Supreme Court has construed the language "relating to," as used in §14501(c), as preempting all state enforcement actions "having a connection with or reference to" a carrier's "rates, routes or services" in more than a tenuous, remote, or peripheral manner.\textsuperscript{164} The Supreme Court later defined the phrase "enact or enforce any law" to mean prohibiting the enforcement of state laws, statutes, regulations, or policies beyond the confines of the contractual agreement between the parties which impose obligations external to the conditions to which the parties voluntarily agreed.\textsuperscript{165} The preemptive effect of §14501(c)(1) as to motor carriers was modeled on the virtually identical preemption provision of the ADA.\textsuperscript{166}

Thus, motor carriers defending the smorgasbord of state law causes of action arising from or related to loss or damage to interstate shipments of goods have available a substantial preemption defense package to exclude the clutter of such claims. Early preemption in a lawsuit eliminates the waste of time in discovery on irrelevant claims and forecloses so-called "red herring" issues such as a driver's alleged gross negligence or the carrier's routine destruction of driver's logs (spoliation argument)—claims and issues that have no place in the strict liability regime of the Carmack Amendment. Since Adams Express in 1913, preemption has matured into an extremely valuable motor carrier defense tool that eliminates extraneous claims and damages exclusive of those available under the Carmack Amendment. It does not matter how a shipment got lost or damaged; only the fact of the loss or damage is relevant for a prima facie Carmack Amendment case, and it makes no difference whether the car-

\textsuperscript{162} 49 U.S.C. § 14501(c)(1) (2005). This provision also applies to brokers and freight forwarders.


\textsuperscript{164} Id. at 383-84.


rier or its driver were negligent or grossly negligent. This is not tort law. Therefore, a shipper has no need to interview the motor carrier’s driver or claim personnel as to how a loss or damage occurred in order to prove its case. Preemption thus is a most valuable tool for keeping litigants and judges focused on the relevant issues.

IV. LIMITATION OF MOTOR CARRIER LIABILITY

It can be fairly said that the fiercest battleground in Carmack Amendment litigation is under what circumstances and to what extent a motor carrier is entitled to limit its liability for lost or damaged cargo. Although at common law a carrier was liable for the full amount of the shipper’s loss, courts early on held that “a carrier may, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.”

The validity of carrier/shipper agreements that limit a carrier’s liability was tested and upheld even before enactment of the Carmack Amendment in Hart v. Pennsylvania Railroad:

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

The current incarnation of the Carmack Amendment as to motor carriers preserves the codification of these principles and permits motor carriers to limit their liability for cargo loss or damage:

(A) Shipper waiver. Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods

described in section 13102(10)(A)) under which the liability of carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) Carrier notification. If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.169

While early case law on motor carrier liability limitation identified as key elements the knowledge of the shipper that its rate was based upon a limited value from the terms of the bill of lading and the carrier's published tariffs, and the carrier's demonstration that the limitation was "a fair, open, just and reasonable agreement;" courts nonetheless have struggled to identify clear and uniform standards by which a limitation would be deemed binding.

In *Anton v. Greyhound Van Lines, Inc.* the defendant carrier sought to limit its liability for damage to an interstate household goods shipment to 60¢ per pound per article based on the bill of lading on which the shipper had not inserted a declared valuation for the shipment.170 The bill of lading was not signed by either the plaintiff or the defendant carrier, Greyhound.171 The First Circuit in *Anton,* after reviewing several prior decisions on the subject, concluded that an interstate motor carrier—in order to limit its liability under the Carmack Amendment—must prove that it (1) maintained an approved tariff with the former Interstate Commerce Commission; (2) obtained the shipper's written declaration of his choice of liability; (3) gave the shipper a reasonable opportunity to chose between two or more levels of liability; and (4) issued a receipt or bill of lading prior to moving the shipment.172 Since the evidence at trial indicated Greyhound had failed to issue a receipt or bill of lading, and since there was no indication that there was any choice of different liability levels offered by Greyhound to the shipper, it was held liable for the full amount of the plaintiff's claim.173

The criteria articulated in *Anton* subsequently evolved into the so-called "four point test" a carrier must meet in order to limit its liability

171. *Anton,* 591 F.2d at 106.
172. *Id.* at 107.
173. *Id.* at 108-10.
for interstate cargo loss or damage. The “four point test” has been recognized in many jurisdictions over the years.\textsuperscript{174} The battleground in “four point test” jurisdictions typically turns on whether the motor carrier demonstrates that the shipper had a reasonable opportunity to choose between different levels of carrier liability, meaning “that the shipper had both reasonable notice of the liability limitation and the opportunity to obtain information necessary to making a deliberate and well-informed choice.”\textsuperscript{175}

However, things began to change in 1994 when Congress enacted the Trucking Industry Regulatory Reform Act of 1994 (‘‘TIRRA’’)\textsuperscript{176} which eliminated the tariff filing requirement for released rates orders for non-household goods motor carriers. TIRRA was followed by Congress’ passage of the ICCTA in 1995, which replaced the former 49 U.S.C. §10730 (establishing general tariff requirements which had to be met by a motor carrier seeking to establish limited liability rates) with the present 49 U.S.C. §14706(c) component of the Carmack Amendment.

The notion that Congress’ recodification of the former §10730(b)(2) into the present §14706(c) evidences its intent to no longer require carriers to offer two or more levels of liability was rejected in Emerson Electric Supply Co. v. Estes Express Lines, Corp.\textsuperscript{177} According to the Emerson court, “a carrier wishing to limit its liability is still required to give the shipper a reasonable opportunity to choose between different levels of liability.”\textsuperscript{178} The released value doctrine does not require motor carriers to offer a full value rate.\textsuperscript{179} In some jurisdictions, the fact that the carrier’s bill of lading contains a so-called declared value box will not, standing alone, satisfy the carrier’s obligation to give the shipper a choice between different levels of liability if its corresponding tariff rules do not provide the shipper with an option to declare a higher value with the

\begin{itemize}
  \item \textsuperscript{174} See, e.g., Toledo Ticket Co. v. Roadway Exp., 133 F.3d 439, 442 (6th Cir. 1998); Rohner Gehrig Co., Inc. v. Tri-State Motor Transit, 950 F.2d 1079, 1081 (5th Cir. 1992) (adopting the four point test); Hughes Aircraft Co. v. N. Am. Van Lines, Inc., 970 F.2d 609, 611-12 (9th Cir. 1992); Carmana Designs Ltd. v. N. Am. Van Lines Inc., 943 F.2d 316, 319 (3d Cir. 1991); Norton v. Jim Phillips Horse Transp., Inc., 901 F.2d 821, 827 (10th Cir. 1990); Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1415 (7th Cir. 1987); Mech. Tech., Inc. v. Ryder Truck Lines, Inc., 776 F.2d 1085, 1087 (2nd Cir. 1985).
  \item \textsuperscript{175} Bio-Lab, Inc. v. Pony Express Courier Corp., 911 F.2d 1580, 1582 (11th Cir. 1990).
  \item \textsuperscript{176} Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673.\textsuperscript{177} Emerson Elec. Supply Co. v. Estes Express Lines, Corp., 451 F.3d 179, 187 (3d Cir. 2006). (‘‘At most, the deletion of §10730(b)(2) indicates Congress’s intent to deregulate the motor carrier industry and to abolish the ICC. Moreover, the ICCTA’s legislative history does not reveal a congressional intent to alter the two or more levels of liability requirement.’’).
  \item \textsuperscript{178} \textit{Id.} at 188.
  \item \textsuperscript{179} Kemper Ins. Co. v. Federal Exp. Corp., 252 F.3d 509 (1st Cir. 2001). (Court upheld an air carrier’s tariff that limited shipper’s declaration of value to 500 and ruled that the Carmack Amendment would not mandate a different result.).
\end{itemize}
corresponding level of liability.\textsuperscript{180} As noted in \textit{Emerson}, "[t]o satisfy the two or more levels of liability requirement, a carrier must offer two or more shipping rates with corresponding levels of liability for one type of shipment."\textsuperscript{181}

Although cases such as \textit{Anton},\textsuperscript{182} \textit{Hughes},\textsuperscript{183} \textit{Toledo Ticket},\textsuperscript{184} \textit{Emerson Electric},\textsuperscript{185} and others set a high burden for motor carriers seeking to limit their liability, over the last several years there has been a distinct trend away from the "four point test" test toward a practical standard more in line with the realities of modern commerce. The erosion of the "four point test" can be traced to \textit{Hollingsworth & Vose Co. v. A-P-A Transportation Corp.},\textsuperscript{186} where the First Circuit addressed and revisited its prior decision in \textit{Anton}, in which it originally adopted the test. The Court in \textit{Hollingsworth & Vose} observed that the "fair opportunity" (to choose between a limited and an unlimited liability shipping rate) requirement had "taken on a life of its own" and decided to "candidly . . . disavow the reasoning of \textit{Anton}."\textsuperscript{187} The Court concluded that in order for a carrier's released rate limitation to apply, "[i]t is enough that the tariff made both coverages available, the bill of lading afforded the shipper a reasonable opportunity to choose between them . . . and the shipper was a substantial commercial enterprise capable of understanding the agreements it signed."\textsuperscript{188}

The "four point test" was then further eroded. In \textit{EFS National Bank v. Averitt Express, Inc.} the plaintiff bank sued the defendant motor carrier, Averitt, for the loss of an interstate shipment for which the bank had completed one of Averitt's standard bills of lading.\textsuperscript{189} The bill of lading contained the standard language that the shipment was received subject to the carrier's rates, classifications and rules that were available to the shipper on request.\textsuperscript{190} Averitt's tariff limited its liability to $25.00 per pound in the absence of a value declared on the bill of lading, and EFS failed to declare a value.\textsuperscript{191} Averitt moved for summary judgment

\textsuperscript{180} \textit{Id.} at 189.

\textsuperscript{181} \textit{Id.} (citing \textit{New York, New Haven & Hartford R.R. v. Nothangle}, 346 U.S. 128, 134-35 (1953) ("[O]nly by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained.").

\textsuperscript{182} \textit{Anton v. Greyhound Van Lines, Inc.}, 591 F.2d 103, 105-06 (1st Cir. 1978).

\textsuperscript{183} \textit{Hughes v. United Van Lines, Inc.}, 829 F.2d 1407, 1412 (7th Cir. 1987).

\textsuperscript{184} \textit{Toledo Ticket Co. v. Roadway Exp.}, 133 F.3d 439, 442 (6th Cir. 1998).

\textsuperscript{185} \textit{Emerson Electric}, 451 F.3d at 187.

\textsuperscript{186} \textit{Hollingsworth & Vose Co. v. A-P-A Transp. Corp.}, 158 F.3d 617 (1st Cir. 1998).

\textsuperscript{187} \textit{Id.} at 620.

\textsuperscript{188} \textit{Id.} at 621.


\textsuperscript{190} \textit{Id.} at 996.

\textsuperscript{191} \textit{Id.}
seeking to enforce the $25.00 per pound limitation, and EFS opposed the motion in reliance on Sixth Circuit precedent in Toledo Ticket,192 and Trepel v. Roadway Express, Inc.,193 which strictly followed the "four point test."194 EFS claimed that under Toledo Ticket and Trepel Averitt had failed to give it a fair opportunity to choose between two or more levels of liability and had failed to obtain EFS' written agreement as to its choice of liability.195 However, the Court granted Averitt's motion and decided not to follow Toledo Ticket and Trepel on the basis that the shipments in those cases had moved under a pre-TIRRA version of the Carmack Amendment which:

The court added, "[g]iven the recent changes in the law, the four factors used by the Sixth Circuit in earlier cases interpreting the pre-1996 Carmack Amendment may no longer be completely relevant."197

The EFS National Bank Court did not stop there, noting "[i]t is unclear whether the second and third requirements, that the carrier must give the shipper a fair opportunity to choose between two or more levels of liability and that the carrier must obtain the shipper's written agreement as to his choice of liability, should still apply."198

The United States District Court for the Western District of New York in Schweitzer Aircraft Corp. v. Landstar Ranger, Inc. reached a similar result in a case involving damage to a shipment of a $914,389 helicopter damaged in transit where the motor carrier, Landstar, sought to limit its liability to $3,000 pursuant to its tariff.199 The shipper, Schweitzer, had prepared the bill of lading, leaving blank the space provided to declare a value.200 The bill of lading also contained the standard language that the shipment was received for transportation subject to the carrier's tariffs, which were available but never requested by Schweitzer.201 In granting

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194. See EFS Nat'l Bank, 164 F. Supp. 2d at 999.
195. Id.
196. Id. at 1000.
197. Id. at 1001.
198. Id.
200. Id. at 201.
201. Id.
Landstar's motion for summary judgment, the Court ruled there "was no affirmative obligation on Landstar to produce [its tariff] prior to shipment."202 Citing Mechanical Technology, the Court in Schweitzer observed that the shipper, "having had the opportunity on its own form to secure greater protection . . . cannot complain about the consequences of leaving the applicable spaces blank. . . . This is not a case of an unsophisticated shipper. Schweitzer was not shipping lug nuts."203

Another instructive case demonstrating movement away from the "four point test" is Siren, Inc. v. Estes Express Lines, another post-ICCCTA/post-TIRRA decision, where the plaintiff/shipper, Siren, sought to recover for the full value of a shipment of razors lost in transit between Florida and North Carolina.204 Siren had prepared the bill of lading on which it indicated that the shipment should move under "Class 85."205 Under Estes' tariff, Class 85 meant, inter alia, that its liability would be limited to $11.87 per pound.206 Estes' evidence also showed that Siren received and knew that it received a discount of approximately 60% off the full freight rates when shipping at "Class 85."207 Nonetheless, Siren sued Estes for the full value of the shipment ($46,982).208 The district court directed a verdict in favor of Siren for the full amount, finding that "there was no showing that Plaintiff knew or reasonably should have known that the Class 85 designation carried with it the limitation of liability set forth in Defendant's tariff."209 The Eleventh Circuit reversed.210 It focused on what Siren knew about Estes' tariff limitation and ruled "that even if Siren did not know of the terms of the Estes tariff, Estes had a right to rely on the limitation of liability aspect of the term 'Class 85' used by Siren."211 The court noted that it "does not deem it proper or necessary to protect shippers from themselves."212 Concluding, the court then held "that the rate of freight is indissolubly bound up with the valuation placed on the goods by the shipper. Thus, assuming Siren did not actually know that it was limiting Estes' liability, Siren certainly should have known."213

202. Id. at 202.
203. Id. at 203 (quoting Mech. Tech. Inc. v. Ryder Truck Lines, Inc., 776 F.2d 1085, 1087 (2d Cir. 1985)).
204. Siren, Inc. v. Estes Express Lines, 249 F.3d 1268, 1269 (11th Cir. 2001).
205. Id. at 1269 n.3.
206. Id. at 1269.
207. Id.
208. Id.
209. Id.
210. Id.
211. Id. at 1270.
212. Id. at 1271.
213. Id. at 1273 (alteration in original) (citation omitted).
The trend in Carmack Amendment limitation cases seems to be towards abandoning strict adherence to the "four point test" in favor of a more practical test that recognizes modern commercial realities. Whereas prior to the enactment of TIRRA, the filed rate doctrine effectively imputed to shippers actual notice and knowledge of the terms, conditions, regulations, and limitations contained in the carrier's tariff as a matter of law, it is not true that TIRRA's repeal of the filed rate doctrine relieves shippers of such knowledge. Specifically, with respect to the subject of the limitation of a motor carrier's liability, the TIRRA House Conference Report states:

The intention of this conference agreement is to replicate, as closely as possible, the practical situation which occurred prior to the enactment of the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), which repealed the requirement that tariffs be filed with the ICC for individually determined rates. Prior to the enactment of TIRRA, carriers had the ability to limit liability as a part of the terms contained in the tariff. By signing a bill of lading which incorporated by reference the tariff, the shipper was deemed to have agreed to the tariff and its conditions and terms. However, the carrier was under no obligation to specifically notify the shipper of the conditions or terms of the tariff. It was the responsibility of the shipper to take an affirmative step to determine what was contained in the tariff—usually through the retaining of a tariff watching service. An unintended and unconsidered consequence of TIRRA was that, when the tariff filing requirement was repealed, carriers lost this particular avenue as a way of limiting liability. This provision is intended to return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment.\textsuperscript{214}

This legislative history confirms that in spite of the demise of the filed rate doctrine, a shipper—especially a sophisticated one—still should be held to constructive knowledge of the contents of a motor carrier's tariff, even when the tariff is not filed with a governmental body. Under the ICCTA, a motor carrier of property (other than a motor carrier providing transportation in non-contiguous domestic trade) "shall provide . . . to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based."\textsuperscript{215} Thus, the shipper has the affirmative duty to request the applicable tariff if it is incorporated by reference into the bill of lading under which the cargo moves.\textsuperscript{216}

\textsuperscript{215} 49 U.S.C. § 14706(c)(1)(B) (2005). Nowadays, this is typically done by posting on the carrier's website. After all, who doesn't have a computer?
Further supporting motor carrier enforcement of liability limitations based on their classifications, tariffs, rules and circulars—as opposed to blind adherence to the four point test—is the tendency of courts to follow the parties’ course of dealings and hold sophisticated shippers to the motor carrier's limitation. An instructive case on this point is *Calvin Klein Ltd. v. Trylon Trucking Corp.* There, the plaintiff sued the defendant trucking company for the full value of a lost shipment of clothing allegedly worth $150,000. On prior shipments, the carrier had sent the shipper an invoice, which contained language limiting the carrier's liability to $50 per shipment. On the shipment in question, the defendant’s driver stole the truck and the shipment and the plaintiff sought to recover full value.

In *Calvin Klein*, the Second Circuit ruled that even gross negligence on the part of the defendant motor carrier did not void its limitation of liability and recognized that shippers and carriers may contract to limit the carrier's liability. The amount of the carrier's limitation of liability was deemed to be immaterial because of the parties’ course of dealings, and because the shipper had an opportunity to negotiate the amount of coverage by declaring the value of the shipment, which it declined to do. “Commercial entities can easily negotiate the degree of risk each party will bear and which party will bear the cost of insurance.” Significantly, the Court found that this allocation of risk and liability applies “regardless of the degree of carrier negligence.” The parties’ course of dealings as a basis on which to bind the shipper to the carrier's released rate limitation of liability is well-settled.

Most recently, the Eleventh Circuit took a giant step away from the archaic “four point test” and effectively set a new, more modern and...
practical standard for the application of motor carrier cargo liability limitations. In *Werner Enterprises, Inc. v. Westwind Maritime International, Inc.*\(^{226}\) the Court, relying on the Supreme Court’s decision in *Norfolk Southern Railway Co. v. Kirby*,\(^{227}\) held that where a shipment of goods was brokered to a motor carrier, and neither shipper nor broker complied with the motor carrier’s tariff requirements for declaring full value liability, the shipper was bound by the limitation entered into between the broker and the motor carrier, as articulated in the carrier’s tariff rules, regardless of the fact that the shipper had no actual knowledge of the motor carrier’s limitation and no opportunity to negotiate the limitation. “Kirby’s teaching is not limited to maritime law. . . . [T]he benefits of allowing carriers to rely on limitations of liability negotiated by intermediaries are equally as great here as under maritime law.”\(^{228}\) Moreover, the *Werner* Court observed, “we have consistently been reluctant to protect a sophisticated shipper from itself when it drafts a shipping document.”\(^{229}\)

These decisions, together with the often overlooked TIRRA House Conference Report, signal a clear trend that courts today are more inclined to hold commercial shippers to the limitations set forth in motor carrier tariffs, rules, or classifications; especially where the shipper, its intermediary, broker, or agent prepares or accepts a motor carrier bill of lading or ships goods without declaring a value to the motor carrier. Remember, limitations must be “reasonable under the circumstances surrounding the transportation.”\(^{230}\) Probably the best and most effective way for a motor carrier to demonstrate such “reasonableness” is to prepare and offer into evidence a spreadsheet showing the freight charges as actually billed at the released rate limitation for transporting the cargo versus the freight charges that would have been billed if the shipper had declared the higher valuation it seeks in the claim or lawsuit. Usually, the difference is enormous, and the shipper’s rationale (for not having declared a value for the shipment) is simple and obvious: why would the shipper declare a high value and pay high freight charges if it already has cargo insurance? Why pay twice to protect against a risk? Why then should motor carriers be charged with a risk they are not asked or paid to undertake? That answer is simple too: they shouldn’t.

Another important point to address when considering the enforceability of a motor carrier’s limitation of liability is where the shipper

\(^{226}\) *Werner Enterprises, Inc. v. Westwind Maritime Int'l, Inc.*, 554 F.3d 1319, 1323-24 (11th Cir. 2009).


\(^{228}\) *Werner Enterprises, Inc.*, 554 F.3d at 1324-25.

\(^{229}\) Id. at 1328.

claims the limitation is void because of the theft of the shipment by a
complicit carrier employee or an allegation of conversion or even gross
negligence on the carrier's part. The conversion argument is nothing new
to Carmack Amendment plaintiffs seeking to avoid the carrier's cargo
liability limitation, but the tactic is doomed to failure. "[T]he conversion
doctrine is pertinent [as a defense to a limitation of liability defense] only
when there has been a true conversion, i.e., where the carrier has appro-
priated the property for its own use or gain. The carrier may properly
limit its liability [even] where the conversion is . . . by its own employ-
ees."231 Courts have noted that "nothing short of intentional destruction
or conduct in the nature of theft of the property" will void the limitation
on liability.232 The Deiro court has noted "[o]nly an appropriation of
property by the carrier for its own use will vitiate limits on liability."233

In Kemper Ins. Cos. v. Fed. Express Corp. the plaintiff sued the de-
fendant carrier, FedEx, for the loss of seven packages of jewelry the
plaintiff's insured had tendered to FedEx for transportation under a ship-
ning agreement.234 FedEx pled as an affirmative defense that its liability
was limited to $100 per package unless a higher value was declared on the
air bill.235 No value was declared for any of the shipments.236 The plain-
tiff alleged many claims including claims of willful and wanton miscon-
duct on the part of FedEx's employees based on the fact that it had
knowledge "of rampant employee theft [on prior shipments] and lack of
meaningful effort to prevent future thefts from occurring," and therefore
claimed the "conversion exception" to the released value doctrine should
apply so as to render FedEx liable for the full amount of the claim.237
However, the First Circuit in Kemper affirmed the holding of the district
court, "that even if the [conversion] exception included a 'level of willful
and intentional conduct . . . so egregious as to rise to the level of conver-
sion for a carrier's own use,' Kemper had not alleged sufficient facts to
reach such a level."238

Similar to the conversion claim is the misplaced maritime doctrine of
"material deviation," which is sometimes argued as a device to get
around a motor carrier's bill of lading or tariff limitation. Although one

235. Id.
236. Id. at 510.
237. Id. at 512.
238. Id. The court in Kemper also upheld and enforced the defendant carrier's released rate
limitation under both federal common law applying to air, under First Pa. Bank, N.A. v. Federal
Express Corp., 731 F.2d 1113, 1115-16 (3d Cir. 1984) and under the Carmack Amendment, as to
ground (motor) carriers, under Hollingsworth & Vose Co. Kemper Ins. Co., 158 F.3d at 620.
misguided court incorrectly applied the "material deviation" doctrine to a Carmack Amendment claim, the weight of authority is that the "material deviation" admiralty doctrine "has no application in the context of regulated interstate commerce, which is governed by the overriding federal policy of uniformity." If shippers were allowed to invoke the maritime "material deviation" principle in Carmack Amendment litigation it would emasculate motor carrier limitations because anything—however trivial—gone wrong with a truck shipment would be claimed as the basis for the "deviation." This absurd result clearly was never intended by Congress.

On the topic of motor carrier limitations of liability, litigants and judges need to pause, take a few steps back, and look at the big picture of what the Carmack Amendment was intended to do: make shippers whole without a complex burden of proof; enable carriers to know and reasonably limit their risk under the circumstances at hand; and create uniformity and consistency in the valuation and disposition of interstate cargo claims. Decisions such as Werner Enterprises pull everything together in consonance with those objectives, with due consideration of the realities of allocation of risk in commercial shipping. Shippers know (or certainly should know) the nature and value of the goods they ship; that for the cheap freight rates they pay, they get commensurately low, limited motor carrier cargo liability; and that if they want "full value" cargo liability they must expect to pay commensurately higher freight rates. Motor carriers are not insurance companies, which is why shippers buy cargo insurance in the first place. Shippers and their insurance companies cannot have it both ways.

V. TIMELY AND SUFFICIENT CLAIM – AND SUIT - FILING

For over 100 years (nearly 75 as to motor carriers), the Carmack Amendment has permitted carriers to limit the time for filing claims to as short as nine months from the date of delivery of a shipment and for filing suit to two years and one day from the date on which a claim is denied. This is not a statute of limitations, but rather a condition precedent to recovery that the shipper must meet. It is a permissive minimum statutory requirement which, unless incorporated into the contract of carriage, does not apply. According to the Norpin court, "[i]n essence,

Congress meant for a carrier to have a certain measure of repose. A carrier may set any time limitation it chooses by ‘rule, contract or otherwise,’ so long as it does not fall below the statutory requirements.” To avail themselves of these limitation periods as a condition precedent to a shipper’s recovery, motor carriers have adopted language in the uniform straight bill of lading contract—standard in the industry since bills of lading were first created—specifying that claims must be filed in writing with the motor carrier within nine months from the date of delivery or, in the case of non-delivery, within nine months from the date the shipment should have been delivered; and that lawsuits must be filed within two years and one day from the date on which a shipper’s claim is denied.

Disputes over the timeliness of claims and lawsuits usually involve whether the limitations were part of the transportation contract; whether the documents submitted by the shipper constituted a sufficient, timely claim; and whether the carrier’s declination of the claim was sufficient to trigger the two year and one day suit-filing limitation period.

A. Whether the Limitation was Part of the Transportation Contract

The claim and suit-filing requirements referenced above became industry-standard following Congress’ enactment of the Carmack Amendment. Both rail and, subsequently, motor carriers incorporated the statute’s minimum time limits into their standard bills of lading, which have not changed materially as of today. In most cases motor carriers published the limits in their rules tariffs or classifications. Thus, compliance with the bill of lading requirement that claims be filed in writing with the carrier within nine months after delivery of a shipment was deemed “mandatory under federal law.” This is because carriers’ filed tariffs, in which the claim-filing rules were published, had the force and effect of law. However, after Congress eliminated the tariff filing requirement for motor carriers by enacting TIRRA in 1994 and motor carriers stopped filing tariffs with the former Interstate Commerce Commission, there became a factual question as to whether the time limits actually became part of the transportation contract.

This was an issue in Norpin, where the defendant motor carrier, Conway, had applied its pro sticker to an airfreight forwarder’s bill of lading when it picked up the shipment. However, neither the pro sticker nor

243. Id. at 25.
244. See Uniform Bill of Lading Terms and Conditions, in National Motor Freight Classification, supra note 21, at 231.
246. See id.
the forwarder's bill of lading had any terms or conditions or made any reference to Con-way's bill of lading terms and conditions or the fact that they were published in the National Motor Freight Classification, in which Con-way was a participating carrier.\textsuperscript{248} In deciding whether to charge Norpin with constructive knowledge of the nine-month claim-filing rule in the Classification, the Court considered the intention expressed in the TIRRA House Conference Report, but concluded nonetheless that since there was no reference in the shipping documents directing Norpin to the terms and conditions of the Uniform Straight Bill of Lading or Con-way's classification, the nine-month claim-filing limit was deemed inapplicable and not to have been incorporated by reference into the transportation contract.\textsuperscript{249} According to the court, "[i]f a carrier fails to provide notice of its nine month period for filing a claim, a claimant ought not be barred from recovery for failing to adhere to the time limitation."\textsuperscript{250}

Consequently, any motor carrier seeking to avail itself of the nine month claim-filing and two year and one day suit-filing limits permitted by the Carmack Amendment is wise to publish those limits in its tariff, service guide, rules, etc. (on its website), make them available to the shipping public, use a long form bill of lading where possible, and—where not practical—including a pro-sticker, which—at minimum—informs the shipper that governing rules are available on the carrier's website or are otherwise available on request.


In 1972 the late Interstate Commerce Commission promulgated \textit{Ex Parte No. 263: Rules, Regulations and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims}.\textsuperscript{251} That decision resulted in the ICC's adoption of its "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage," which remain in effect today and apply to motor carriers as codified at 49 C.F.R. §370.1 \textit{et seq.} As handed down to the present FMCSA and as published in countless individual tariffs, classifications, service guides, and rules circulars,\textsuperscript{252} the claim rules provide as follows:

\begin{itemize}
  \item \textsuperscript{248} \textit{Id.} at 23.
  \item \textsuperscript{249} \textit{Id.} at 23-25.
  \item \textsuperscript{250} \textit{Id.} at 25.
  \item \textsuperscript{251} Rules, Regulations, & Practices of Regulated Carriers with Respect to the Processing of Loss & Damage Claims, \textit{Ex Parte No. 263 n1}, 340 I.C.C. 515 (1972).
  \item \textsuperscript{252} \textit{See, e.g.}, \textit{Filing of Claims, in National Motor Freight Classification}, supra note 21, at 727.
\end{itemize}
(a) **Compliance with regulations.** A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier.

(b) **Minimum filing requirements.** A written or electronic communication . . . from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and:

1. Containing facts sufficient to identify the baggage or shipment (or shipments) of property,
2. Asserting liability for alleged loss, damage, injury, or delay, and
3. Making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

(c) **Documents not constituting claims.** Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.253

An endless controversy litigated between shippers and motor carriers under these regulations involves the question of whether shippers comply with the minimum claim-filing requirements in a timely manner: whether the “communication” made by the shipper to the carrier within the nine month claim window sufficiently complied with the condition precedent to recovery prescribed by the claim-filing regulations and whether they apply to all claims or only to “voluntarily paid” claims. Our courts have been divided over whether a “strict compliance” or a “substantial compliance” standard should be applied in making this determination.

### i) Strict Compliance View

One line of cases holds that a shipper/claimant, in order to comply with the nine month claim-filing requirement, must strictly comply with the claim-filing rules by making a written or electronic communication to the carrier, within nine months of date of delivery, (1) containing facts sufficient to identify the shipment, (2) asserting liability for the alleged loss or damage and (3) making claim for the payment of a specified or determinable amount of money. A leading case articulating the strict application of the claim-filing regulations is *Pathway Bellows, Inc. v. Blanchette*, a rail case.254 In *Pathway Bellows*, a shipment of metal expansion

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joints was transported from California to New York, where it arrived on October 22, 1974 in a damaged condition. Pursuant to the shipper's request, the rail agent examined the shipment and prepared an inspection report, which noted the damage. On May 12, 1975, the shipper sent a letter to the railroad stating "we are in the process of filing a claim for freight damage." It was not until July 23, 1975, one day after the expiration of the nine-month claim-filing period, that the railroad received a more detailed letter containing a specific dollar amount of alleged damage. The district court had held that Pathway Bellows' May 12, 1975 letter was deficient as a formal claim but ruled nonetheless that the second letter dated July 22, 1975 and received by the railroad on July 23, 1975 was timely because the word "filed" was not defined in the bill of lading and was somewhat ambiguous.

The Second Circuit reversed, ruling that the shipper's July 22, 1975 claim letter was not "filed" when it was mailed because the railroad did not receive it until the next day, after the nine month claim period had expired. As for the May 12, 1975 letter, the Court rejected Pathway Bellows' argument that the regulations relied on in the district court do not provide the proper standard for assessing the sufficiency of contested claims. The Court in Pathway Bellows declined to follow the holding in Wisconsin Packing Co. v. Indiana Refrigerator Lines, which declared that the claim regulations were intended to apply only to "voluntary" disposition of claims by carriers to ensure that the process of claims settlement would be more expeditious and less subject to discriminatory manipulation. Pathway Bellows rejected the notion that there were dual standards for assessing the sufficiency of claims, depending upon whether the carrier voluntarily decides to settle a claim or contest its liability. The court noted:

We do not believe that the ICC, in promulgating the claim-filing regulations, intended a radical departure from the claim investigation policy underlying the written claim requirement. ... Neither do we believe that the ICC, by specifying minimum claim-filing requirements, intended to afford carriers an unfair opportunity to escape liability. The minimum filing requirements appear to call for no more

255. Id. at 901.
256. Id.
257. Id.
258. Id.
259. Id. at 901-02.
260. Id. at 904-05.
261. Id. at 903.
262. Wis. Packing Co. v. Ind. Refrigerator Lines, 618 F.2d 441 (7th Cir. 1980).
263. Pathway Bellows, 630 F.2d at 903-04.
264. Id.
information than one ordinarily would expect a claim for damages to con-
tain, and compliance with these requirements is neither onerous nor unre-
sonable. To the extent that carriers may escape liability, such "windfalls"
may be properly traced, not to the existence of the regulations, but to ship-
ners' unexcused failure to comply with a reasonable condition contained in
bills of lading. . . .

. . . Although we agree with the Wisconsin Packing court that the ICC's
principal aim in promulgating these regulations was to encourage parties to
settle claims instead of resorting to costly time-consuming litigation . . . we
point out that there is a vast difference between prescribing the form a prop-
erly constituted claim must take and that of determining the substantive
merits of that claim.265

Since Pathway Bellows' letter of May 12, 1975 was inadequate in form to
consistute a written claim, and since its July 22, 1975 letter was not timely
filed when mailed, the Second Circuit reversed, concluding, "[a]lthough it
may appear Draconian to require that Pathway Bellows lose a $40,000
recovery because its claim letter was received one day late, Pathway Bel-
lows has identified no special circumstances that would entitle it to be
relieved of the admittedly severe consequences of its own procrastina-
tion."266 Numerous jurisdictions have followed the strict compliance
standard articulated by Pathway Bellows.267

The decision in Bobst Champlain, Inc. v. IML-Freight, Inc. is instruc-
tive as to the sufficiency of a shipper's claim letter.268 In Bobst, following
the motor carrier's delivery of a machine in damaged condition, the only
written document sent by the shipper to the motor carrier within the nine
month claim period stated, 

"[p]lease be advised that the above referenced
machine which arrived in Port Newark on or about December 26, 1977
was found to be damaged. The estimated amount of damage is approxi-
mately $100,000.00."

The court concluded the letter was defective be-

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265. Id. at 903-04.
266. Id. at 905.
    (shipper's claim must strictly comply with Carmack Amendment claim-filing requirements);
    Nedlloyd Lines, B.V. Corp. v. Harris Transp. Co., 922 F.2d 905, 908 (1st Cir. 1991) ("[B]y deny-
ing liability, the shipper could avoid the ICC procedure for responding to an adequate claim and
    force the shipper to file suit. Thus, limiting the applicability of the regulations to voluntarily-
    settled claims would permit precisely the type of discrimination among claimants that the regula-
tions were intended to address."); Intech, Inc. v. Consol. Freightways, Inc., 836 F.2d 672 (1st Cir.
    1987) (shipper's claim filed in 13th month deemed untimely in spite of motor carrier's continu-
    ous assurances that container would be delivered); S & H Hardware & Supply Co. v. Yellow
    Transp., Inc., 432 F.3d 550 (3d Cir. 2005) (shipper failed to comply with claim-filing requirements
    on shipments of goods worth $1.6 million even where carrier's investigators found that one or
    more of the carrier's drivers was complicit in the theft); Gen. Elec. Co. v. Brown Transp. Co., 597
    F. Supp. 1258 (D. Va. 1984) (shipper's claim inadequate because it knew the amount of damages
    but failed to include the information).
269. Id. at 666.
cause it failed to make claim for the payment of a specified or determinable amount of money as required by the claim-filing regulations.270 Referring to the shipper's claim letter, the court noted, "[c]learly Bobst does not in this letter make claim for 'a specified amount.' What does 'determinable' mean in this context? I conclude that it means an amount determinable, as a matter of mathematics, from a perusal of the documents submitted in support of the notice of claim."271

In Delphax Systems, Inc. v. Mayflower Transit, Inc. the defendant motor carrier, Mayflower, delivered a shipment on July 5, 1995 in damaged condition, with a damage notation on the bill of lading.272 The bill of lading included the standard nine-month claim-filing requirement.273 On August 22, 1995 Delphax sent Mayflower a letter stating the machine was received in damaged condition, that it was preparing a detailed estimate relating to the damage and that, "[t]he current rough estimate is that the damage will be in the $40,000 to $50,000 range."274 On November 3, 1995 Delphax sent Mayflower a second letter asking for verification from Mayflower's delivery driver detailing the circumstances surrounding the pick-up and his observations of the damage.275 The Court in Delphax, considering the claim-filing requirements at 49 C.F.R. §370.3(b), concluded that Delphax's two letters to Mayflower neither asserted liability on Mayflower's part nor made claim for payment of a specified or determinable amount of money, contrary to the requirements of Mayflower's bill of lading, published tariff, and the claim regulations.276 The Court further rejected Delphax's estoppel argument, in which it claimed Mayflower should have been estopped from asserting the claim-filing defense, and ruled that correspondence from Mayflower's claim adjuster—who had initially indicated Mayflower would accept Delphax's late claim for review—did not occur until after the claim period had already expired.277

Moreover courts have held that actual knowledge of a claim does not meet or substitute for the written notice requirement, even where a shipper sent a letter but failed to specify an amount of damages.278

270. Id. at 668.
271. Id. at 669.
273. Id. at 62.
274. Id.
275. Id.
276. Id. at 64.
277. Id. at 65.
Another line of cases applies a more liberal “substantial” compliance standard for determining whether a shipper has complied with the claim-filing regulations. The leading substantial compliance case is the Seventh Circuit’s decision in *Wisconsin Packing*..

In that case, which involved a shipment of frozen meat gone bad, the only document given by the shipper to the defendant motor carrier was a notice stating that the shipment had been refused due to high temperatures in the product. The Court in *Wisconsin Packing*, citing the Supreme Court’s decision in *Georgia, Florida and Alabama Railway Co. v. Blish Milling Co.* for the proposition that a bill of lading requiring written claims within a particular period of time “was intended simply ‘to secure reasonable notice’ and ‘to facilitate prompt investigation,’” held that if the written notice sufficiently apprised the carrier of the claim, it was sufficient under the regulations.

The *Wisconsin Packing* Court ruled that the plaintiff’s claim letter gave the defendant motor carrier “reasonable notice,” and relied on the fact that “it [was] also apparent that the carrier not only was aware of the need to investigate, but actually conducted a thorough inquiry.” The Court went on to hold that the ICC’s claim-filing regulations do “not even apply to a contested case such as this.... Even if the regulation were to apply, plaintiff could demonstrate its compliance.” Thus, *Wisconsin Packing* gave rise to the notion that if a claim is contested, the claim-filing regulations do not apply.

In *Insurance Company of North America v. G.I. Trucking Company*, the Court agreed with the rationale in *Nedlloyd Lines* and *Pathway Bellows* that the regulations apply to contested as well as uncontested claims, but instead focused on the sufficiency of the claimant’s written claim letter itself, which stated, “[t]his letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (Estimate).” The Court in *G.I. Trucking* expressly rejected the notion, articulated in *Nedlloyd* and *Pathway Bellows*, that a claim must specify an amount of damages to be considered legally sufficient and ruled instead that written claims are to be liberally construed.
citing its prior decisions in *Culver v. Boat Transit, Inc.* and *Taisho Marine & Fire Insurance Co. v. Vessel Gladiolus,* concluded there was satisfactory written notice of damage and a clearly communicated intent to hold the motor carrier liable. It was influenced by the fact that the record indicated G.I. performed some investigation of the claim. According to the court, "[u]nder Taisho and Culver, nothing more is required to satisfy the written claim requirement."

In *Siemens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company* the defendant railroad delivered a transformer on January 28, 2000 in damaged condition. On March 1, 2000 the shipper sent the railroad a letter stating that it intended to file a claim for damages, but could not "state a cost for repairs but [would] send a report when available. [The shipper] estimated repairs at $25,000." Siemens subsequently submitted a letter dated April 5, 2000 to the railroad stating it was "estimating a total cost of $700,000.00-$800,000.00 and that is the amount of our claim." The district court granted the railroad's motion for summary judgment on the grounds that Siemens had failed to file a timely claim within nine months of the delivery because a strict interpretation of Siemens' letters did not satisfy the regulations’ requirement that they make claim for a specified or determinable amount of damages. On appeal, the Eleventh Circuit reversed. While the *Siemens* Court agreed with the First, Second, Fifth, Sixth, and Ninth Circuits that the claim-filing requirements apply to both contested as well as voluntarily resolved claims, it disagreed with the district court on the sufficiency of Siemens’ claim letter to the railroad. The *Siemens* Court distinguished its facts from those in *Salzstein* and *Nedlloyd,* where the claim letters did not include an amount of damages or assert that the carrier was liable.

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289. *Culver v. Boat Transit, Inc.,* 782 F. 2d 1467 (9th Cir. 1986).
291. *G.I. Trucking,* 1 F.3d at 907.
292. *Id.*
293. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 1253.
298. *Id.* at 1245.
299. *Id.* at 1250-54.
300. *Id.* at 1252-53 (citing *Salzstein v. Bekins Van Lines Inc.,* 993 F.2d 1187, 1189, 1190-91 (5th Cir. 1993); *Nedlloyd Lines, B.V. Corp. v. Harris Transp. Co.,* 922 F.2d 905, 908 (1st Cir. 1991)).
C. EXCEPTIONS TO CLAIM-FILING REQUIREMENTS

Even strict compliance jurisdictions have recognized narrow exceptions to the claim-filing requirements. Pathway Bellows cracked the door open through which tardy plaintiffs may save their cases by suggesting, in a footnote, that the failure to file a timely claim might be excused if the shipper was unable, despite the exercise of reasonable diligence, to ascertain the extent of its loss within the nine month claim-filing period. Or, where there is affirmative conduct on the part of the carrier that misled the shipper into believing there was no need to file a timely claim, the carrier could be estopped from raising inadequacy of the notice of claim as a defense.

The leading estoppel case is Perini-North River Associates v. Chesapeake & Ohio Railway Company. In Perini, a rail case, the plaintiff's crane was damaged during transportation and was discovered at the consignee's yard on August 29, 1972. Subsequently, Perini reported the damage to the railroad, who then assigned a damage clerk to examine the crane damage. The clerk filed various inspection reports with the railroad and told Perini it need not file a claim since one had already been filed when the crane was reloaded after the accident. Also, no claim forms were sent to Perini, which was a departure from the railroad's usual claim practice. There was also evidence that Perini's claim had previously been assigned a file number. In any event, Perini did not actually complete and return the claim form until June 27, 1973, slightly more than ten months after the delivery. The railroad then disallowed the claim because it had been filed out of time.

On these facts, the Third Circuit held that the railroad's indication that the filing requirement had been waived, combined with its departure from its normal practice of forwarding claim forms to the shipper, had misled the shipper as to the necessity of filing a formal claim. Thus, the railroad was estopped from raising the shipper's failure to file a timely notice of claim as a defense. Significantly, the Court in Perini noted:

[w]e do not question the accepted rule that actual knowledge on the part of

301. Pathway Bellows, Inc. v. Blanchette, 630 F.2d 900, 905 n.10 (2d Cir. 1980).
302. See id.
304. Id. at 270-71.
305. Id. at 271.
306. Id.
307. Id.
308. Id.
309. Id.
310. Id.
311. Id. at 274.
312. Id.
the carrier cannot substitute for the written notice required by a bill of lading. The estoppel inquiry is not closed, however, simply by virtue of that principle.

... We do not suggest that it is the carrier's duty to remind a consignee of its pending claim.313

However, in light of the facts and circumstances of the shipper/carrier relationship and the conduct of the railroad's claim agent, the carrier was estopped from enforcing the claim-filing regulation.314 Nonetheless, even if a defendant carrier's conduct contributed to a shipper's failure to file a timely claim, the court still must determine a reasonable period for a plaintiff to discover its loss, determine the extent of its damages, and file a timely claim.315

Relief from the nine-month claim-filing requirement must be predicated entirely upon principles of estoppel, based on the carrier's affirmative conduct, not on whether a carrier had knowledge of the loss or damage. In R.T.A. Corp. v. Consolidated Rail Corp. the Court refused to excuse the shipper's failure to file a timely notice of claim where the shipper had sent a letter to the carrier stating "due to your negligence, a loaded trailer was received with damage to the trailer itself, as well as the cargo inside. Kindly notify your insurance carrier," but never included a claim amount within the nine month claim period.316 The Court concluded the shipper's letter did not satisfy the minimum claim-filing requirements and rejected the plaintiff's estoppel argument, based on Perini, that the remarks of the defendant's employees in disallowing its claim led it to infer that it was unnecessary to file a written claim.317 The court held "[i]f damages are sought it is for the claimant to say exactly what it seeks, rather for the carrier, against its self-interest, to say what the claimant deserves."318 A carrier's actual knowledge of damage to a shipment does not excuse compliance with claim-filing regulations.

As a general rule, courts have refused to apply the doctrine of estoppel where the carrier either did not reply at all to an inadequate notice of

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313. *Id.* at 273-74.
314. *Id.* at 274.
317. *Id.* at 210-11.
318. *Id.* at 210; see LTA Group, Inc. v. J.B. Hunt Transp., Inc., 101 F. Supp. 2d 93, 99 (N.D.N.Y. 2000) ("Rather than look to what the carrier knew, or should have known, about the facts surrounding the claim, courts instead hold that 'the notice that [the shipper] provided in writing to [the carrier] is controlling.'" (quoting Consol. Rail Corp. v. Primary Indus. Corp., 868 F. Supp. 566, 572 n.5 (S.D.N.Y. 1994)).
Evolution of Motor Carrier Liability

A defendant's failure to pay, decline, or make a firm compromise settlement offer of a shipper's claim in accordance with the FMCSA's regulations also does not constitute a basis for estoppel.

The plaintiff's failure to file a timely written claim as a condition precedent to recovery is a common issue in motor carrier Carmack Amendment litigation. The outcome typically boils down to questions of: what did the shipper know about his claim; when did he know it; when and how did he communicate it to the motor carrier; are the claim-filing requirements articulated in the bill of lading itself or in the motor carrier's tariff; and is the claimant a sophisticated shipper? All these are critical to a court's determination of whether the plaintiff in a Carmack Amendment lawsuit timely complied with the condition precedent to recover on its claim under the claim rules or whether the claim is time-barred.

D. Failure to File a Timely Lawsuit

The Uniform Straight Bill of Lading terms and conditions also require shipper seeking to pursue a Carmack Amendment lawsuit against a motor carrier to file suit within two years and one day from the date on which the carrier denied the shipper's claim. Again, this is a minimum time limit, permitted by Carmack to be included in the transportation contract. If it is not in the transportation agreement (bill of lading), then courts likely will apply the four year default provision for civil actions arising under an Act of Congress.

This two year and one day suit limit for motor carriers is the same as for railroad Carmack Amendment claims and, again, courts will apply the same legal analysis for both. The controversy surrounding this contractual deadline usually involves whether and when the motor carrier sufficiently "denied" the shipper's claim so as to trigger the clock on the limitation period. The two year and one day limitation period in motor carrier classifications and tariffs does not conflict with the Carmack Amendment. "Rather, it is expressly contemplated and sanctioned by


320. See One Step Up, Ltd. v. J.B. Hunt Transp. Serv. No. 05 Civ. 7197, 2006 U.S. Dist. LEXIS 85439, at *18-*22 (S.D.N.Y. Nov. 22, 2006). See also Landess v. N. Am. Van Lines, Inc., 977 F. Supp. 1274, 1281-83 (E.D. Tex. 1977) (motor carrier's sending a settlement check to plaintiff, which was rejected by plaintiff, was not an affirmative act by defendant that led plaintiff to believe that filing a claim was not necessary so as to estop carrier from strictly enforcing the claim filing regulation).


the Carmack Amendment.”

When faced with the carrier's defense that the shipper's lawsuit was not timely filed, the dispute usually focuses on whether the carrier's declination letter was sufficiently clear, final, and unequivocal as to constitute a proper disallowance. “[O]nce an effective . . . disallowance has been made, subsequent correspondence between the parties does not halt the running of the limitations period.” In *Combustion Engineering*, the defendant carrier's claim declination letter to the shipper stated the shipper's “claim as presented is disallowed.” Thereafter, the carrier and the shipper engaged in extensive correspondence, in some of which the railroad advised the shipper that its claim was still active. Although the district court had granted the carrier summary judgment, relying on the original claim declination letter, the Second Circuit reversed because it found the railroad's letter, stating that the claim “as presented was disallowed,” “plainly failed unequivocally and finally to reject any part of Combustion's claim for its damaged cargo. . . . From the 'as presented' language used, it is evident that the subsequent presentation of adequate documentation would enable Conrail to process the claim in a routine fashion.”

Although it is a factual issue as to whether a particular declination letter is sufficiently “clear, final and unequivocal,” many cases have held the motor carrier's declination letter to have been sufficient as a matter of law to trigger the two year and one day time limit and bar a shipper's untimely lawsuit. In *Security Insurance Company of Hartford v. Old Dominion Freight Line, Inc.* on the other hand, a declination letter to shipper stating that the motor carrier would transfer the file to the originating carrier for resolution was held to be susceptible of multiple interpretations and insufficient to start the two year and one day time

323. Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697, 703-04 (11th Cir. 1986) (“we are not prepared to strike down all tariff provisions of which a shipper has no actual notice. Such a result would quickly force carriers to enlarge the bills of lading issued to shippers into mammoth documents containing paragraph upon paragraph of unreadable fine print.”).


325. *Id.* at 534.

326. *Id.* at 535.

327. *Id.* at 537.

328. *See Great N. Ins. Co. v. McCollister's Moving & Storage, Inc.*, 190 F. Supp. 2d 91, 94 (D. Mass. 2001) (declination letter stated “Based on [the above] facts we must deny your claim . . .” and a second letter stating the carrier's apology for having scrapped the plaintiff's machine); Burtman Iron Works, Inc. v. Con-Way Transp. Serv., Inc., 97 F. Supp. 2d 122, 126 (D. Mass. 2000) (declination letter stated “[i]n view of clear delivery record and in the absence of documentation showing carrier liability, we have no alternative other than to deny payment of your claim,” and a second letter stated, “[t]o date, we have received no rebuttal to our declination and no evidence overcoming our clear delivery record. . . . [W]e have no alternative other than to maintain our declination and deny payment.”).
Motor carrier claim personnel, perhaps for customer relations reasons or because they simply dislike giving their customers the bad news, too often seem disposed towards couching their declination letters with "feel good" phraseology such as, "[y]our claim as presented is disallowed;" "[y]our claim in its present form is disallowed;" "[a]t this time we are unable to process your claim for payment;" "[i]f you have any new information, please contact me;" and similar language that can be construed by shippers as leaving the door open for future processing of their claim. Courts are more likely to rule such letters of declination are not "clear, final and unequivocal" and do not start the running of the two year and one day suit limitation period. Motor carriers must face the fact that the declination message must be clearly sent. If you're going to deny the claim, then deny it. There is no middle ground if you, the motor carrier, want the limitation period to commence. Therefore, the best way to send a declination message and start the two year suit period ticking is to close the letter with, "[f]or the above reasons, your claim is denied." Blunt and to the point. This should remove any doubt as to the message being sent.

Carmack Amendment litigation, as it is involved with contracts of adhesion (bills of lading), rules, tariffs, classifications, service guides, and circulars—which are foreign to many shippers, insurance companies, lawyers, and judges—will inherently involve disputes and litigation over the sufficiency of claims, the timeliness of lawsuits, and whether any exceptions apply to excuse the shipper's failure to act. Though the disputes are fact-based, the outcome will depend greatly on the jurisdiction in which the case is litigated and the detail, clarity, and substance of the communication at issue.

VI. "E-COMMERCE" ISSUES

I doubt that either Senator Carmack or Congress had any inkling in 1906 as to how dramatically the world of commerce and communication would change with the advent of computer technology, the Internet, e-mails, and the convenience, speed, detail, and flood of information we take for granted today. These technological advances leave shippers and motor carriers with no excuses for either being unaware of a carrier's limitation of liability, its claim- and suit-filing rules, or for failing to know a carrier's cargo liability options. Virtually every shipper and motor carrier employee today has on his/her desk a computer terminal connected to the Internet. For shippers this means they have no excuse for being

unaware of the liability limits and claim rules in a carrier’s tariff, service
guide, circular, or classification and the options available to declare and pay
for higher valuation. Similarly, motor carriers today have no excuse
for failing to publish all these rules on their websites, thereby making
them readily available to the shipping public.

In one of the first known reported “E-Commerce” decisions (involv-
ing air freight liability), Treiber & Straub, Inc. v. United Parcel Service,
Inc., the shipper, Treiber, a jewelry store, shipped a package containing
a ring via defendant UPS’s “Next Day Air” service and purchased $50,000
“in insurance, the maximum permitted” for the shipment.330 The ring
was actually worth more than double the $50,000 limit.331 After UPS lost
the package in transit, Treiber sued UPS to collect the $50,000, since it
had purchased that amount of “insurance.”332 UPS denied liability on
the basis that a disclaimer in its Terms and Conditions warned that when
a customer ships an item of “unusual value,” defined as an item worth
more than $50,000, there is no liability at all.333 After the district court
granted UPS’s motion for summary judgment, Treiber appealed and the
Seventh Circuit affirmed.334

The Seventh Circuit, applying federal common law as to air carriers,
held that UPS had provided adequate notice of its rules on its website
that customers were not permitted to ship items of “unusual value.”335
Moreover, in order to book the shipment on UPS’ website, the plaintiff:

had to agree not once but twice [by clicking to agree to particular terms on
the website], to abide by the Terms and Conditions set forth in order to ship
the package [which was] enough to ensure that Treiber had clear and reason-
able notice of the rules. . . .
UPS [did] not have the burden of proving that Treiber had actual knowledge
of the pertinent restrictions.336

In a subsequent, factually similar case, Feldman v. United Parcel Ser-
vice, Inc., also involving the application of federal common law to an air
freight shipment as opposed to the Carmack Amendment, the Court
ruled that although UPS’s tariff did limit its liability, it had not given the
plaintiff adequate notice of the provisions of its tariff because when the
shipper clicked on the hyperlink in UPS’s website to accept the terms of

331. Id.
332. Id.
333. Id.
334. Id.
335. Id. at 382.
336. Id. at 385. It is interesting that this decision, by the Seventh Circuit, imposes a harsh,
strict application of the carrier’s tariff rules as published on its website, in contrast to the liberal
compliance enforcement of motor carrier claim filing rules and regulations in Wisconsin Packing
Co. v. Ind. Refrigerator Lines, 618 F.2d 441 (7th Cir. 1980), also authored by the Seventh Circuit.
the UPS tariff, the tariff itself was not hyperlinked.337 In order to see the actual “Terms of Service,” the customer had to go to UPS’s website or obtain a copy from UPS, and once he did “he would discover, in the twenty-eight pages of the Tariff, an Item 460, which states that ‘any package having an actual value of more than $50,000’ may not be shipped.”338 Thus, taking into consideration all of the “surrounding circumstances,” the court concluded there were enough factual ambiguities as to reasonable notice to deny UPS’s motion for summary judgment.339 Although Treiber & Straub and Feldman were not Carmack Amendment lawsuits, there is no reason to expect the outcome would be different in a Carmack case involving website-based tariff rules and booking arrangements since Carmack represents a codification of federal common law.

The lesson from these two E-Commerce cases, albeit in a federal common law context nonetheless, is that motor carriers should publish their cargo limitation and loss and damage claim rules on their websites in readily accessible places and in straightforward, plain language if they expect to avail themselves of 21st Century technology to limit their cargo claim exposure. Shippers should research the carriers they use, request and obtain all relevant cargo claim rules and, if in doubt, inquire.

VII. SHIPPER/CARRIER CONTRACTS; WAIVER OF CARMACK AMENDMENT REMEDIES

Long before Congress’ passage of the ICCTA, the former Interstate Commerce Act identified two different types of for-hire motor carriers: “common” and “contract.”340 The Carmack Amendment applied only to common carriers. The ICCTA eliminated the “common” versus “contract” distinction and now defines only the term “motor carrier” as “a person providing motor vehicle transportation for compensation.”341 However, “Congress’ creation of one type of motor carrier did not also create only one type of carriage.”342 According to the M. Fortunoff court, the difference is:

common carriage services, that is, those services offered to the general public at fixed rates without negotiated bilateral contracts, continue to be different from contract carriage services, which are those services performed on an ongoing basis for a shipper pursuant to a contract individually negotiated

338. Id. at *45.
339. Id. at *55.
342. M. Fortunoff of Westbury Corp., 432 F.3d at 139.
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at arm's length.\textsuperscript{343}

The ICCTA expressly provides that a motor carrier providing transportation or service subject to the Act may enter into a contract with a shipper (other than for the transportation of household goods) "to provide specified services under specified rates and conditions. If the carrier and shipper, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies."\textsuperscript{344} The waiver of Carmack Amendment rights, duties, and liabilities under §14101(b) must be expressed and in writing.\textsuperscript{345}

As a result of this freedom to contract under the ICCTA, motor carriers and shippers now routinely enter into contracts intended to identify transportation services unique to a particular shipper. For many shippers and carriers this freedom to contract is a very convenient, beneficial business tool that facilitates commerce at various levels.

However, both shippers and motor carriers are cautioned to pay particular attention to whether their §14101(b) contract waives the provisions of the Carmack Amendment. The consequences of waiver can be significant. If a shipper/caller contract does not expressly waive the provisions of Title 49, including the Carmack Amendment, then the full force and effect of that statute continue to apply: the shipper retains the benefit of Carmack's strict liability features, its limited, relatively easy burden of proof and the motor carrier’s two-pronged, often difficult burden of defense; while the motor carrier retains its limitations on liability, claim and suit-filing time limitations, other rules applicable to its services as published in its tariff, classification, circular, or service guide (on its website); and—especially—the preemptive power of the Carmack Amendment over state law claims for relief.

Conversely, if the §14101(b) contract expressly waives the Carmack Amendment, the parties will be left to the terms of the contract and applicable state law for determining their rights, duties, and liabilities in the event of cargo loss or damage. An express waiver of the Carmack Amendment can cut either way depending on the issue, the facts, and the law of the forum state. Shippers could benefit from an express waiver under §14101(b) by then being able to allege various claims against the motor carrier that would otherwise be preempted, including breach of

\textsuperscript{343} Id.
contract, conversion, misrepresentation, fraud, unfair and deceptive trade practices claims, claims of bad faith, waiver, estoppel, laches, and many other state and common law remedies and defenses commonly seen in traditional breach of contract actions.

This parade of horribles, from the motor carrier’s perspective, was recently illustrated in *Great American Insurance Company of New York v. T.A. Operating Corporation.* In *Great American*, the plaintiff subrogating insurance company sued the defendant motor carrier, Prime, and a truck stop for the loss of Great American’s insured’s (Novartis’) $30 million shipment of pharmaceuticals stolen from the truck stop. Novartis had a contract with Prime which limited Prime’s liability to $100,000 but it also contained a clause waiving all remedies under the Carmack Amendment pursuant to 49 U.S.C. §14101(b). In a convoluted, poorly reasoned decision, the Court in *Great American*, after noting the §14101(b) waiver and the “released valuation” doctrine under the Carmack Amendment, nonetheless denied Prime’s motion for summary judgment and allowed the plaintiff the opportunity to prove a “separate, risk-related promise (special to the particular shipment at issue)” to avoid Prime’s limitation under the misplaced, wrongly applied maritime doctrine of “material deviation.” While it is difficult to tell from the decision how much (or how little) the *Great American* Court was affected by the §14101(b) waiver, one point is clear from the decision: it was not a good outcome for the defendant motor carrier.

There is no doubt that express waiver of Carmack Amendment rights, remedies, and liabilities can benefit shippers and motor carriers in the right circumstances, but extreme caution must be exercised by both parties before waiving any Carmack remedies or defenses in a §14101(b) contract. Yes, the parties could, through very careful draftsmanship and attention to every detail, craft an agreement that covers everything without the necessity for Carmack Amendment rights, remedies, duties, liabilities, and defenses. But be careful what you wish for. If Carmack is waived, you will be subject to state contract law including all the claims and relief Carmack does not tolerate.

**VIII. CONCLUSION**

Although the Carmack Amendment, as it pertains to motor carriers, has not changed substantially in the last 75 years, judicial interpretation and application of Carmack principles are constantly tested and affected

347. *Id.* at *3*.
348. *Id.* at *6-*7.
349. *Id.* at *12-*14.
by creative litigants and modern technology. Major litigation battles continue to be fought over burdens of proof and defense, recoverable damages, preemption, limitations of liability, time-bar issues, and other tariff-based motor carrier defenses. Shipper responsibility for the acts of their intermediaries, shipper/carrier contracts, §14101(b) waivers, website-based motor carrier rules, and the ease of information access and communications via the Internet will be more frequently litigated as we head into the 21st Century. With all this available technology and information, courts in the future should be more inclined to recognize the sophistication of the parties to the transportation contract.

The days of the filed rate doctrine may be long gone, but the days of information technology and website-based tariffs and rules are here and now. In each case, courts will look to determine what the agreement between the parties was. Was the motor carrier's limitation reasonable under the circumstances? What did the shipper know or what should it have known, etc.? By identifying the critical issues described above and dealing with as many of them as possible before transportation, shippers and motor carriers can minimize risk and subsequent problems. But until we have Star Trek-style transporters that move goods from point A to point B by dissolving and reassembling their molecules—which doesn’t appear likely in the near term—trucks will continue to transport and deliver goods. Hence, everyone in the supply chain should be aware of how the Carmack Amendment affects cargo claims and liabilities in the real world of truck transportation today.
The Coming Sea Change in the Handling of Ocean Cargo Claims for Loss, Damage or Delay

Dennis Minichello*

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I. INTRODUCTION

The admiralty and maritime law in the United States has long been characterized by its dogged pursuit of uniformity; its interconnection with the maritime laws of many of the major trading countries in the world; and its adherence to tradition and hoary historical precedents (some would stay stubbornly so)—changing only in the most cautiously incremental fashion over an extended period of time. These characteristics of U.S. admiralty and maritime law have, generally, provided consistency and stability in application of the law, and have generally outweighed the negative affects of rigidity.

The characteristic features of U.S. admiralty and maritime law are on full display with regard to the law regulating the loss and damage of goods transported by vessels between countries on the oceans. The so-called “Hague Rules” have since 1924 been the internationally recognized rules governing liability with respect to loss and damage claims arising out of the international shipment of goods.¹ In the United States the Hague Rules were the basis for the Carriage of Goods by Sea Act, commonly referred to as “COGSA,” enacted in 1936.² The COGSA adhered to the Hague Rules and was, in general, aligned with the laws relating to the carriage of goods enacted in most of the important trading countries in the world. The Hague Rules provided a source of uniformity, which resulted in a certain consistency for the international trade of goods transported by ocean.

While the Hague Rules and the COGSA were a breakthrough in the development of international law for the carriage of goods by sea, the experience with the actual application of those laws over time revealed certain deficiencies and the need for some revision. Consequently, the

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Hague Rules were slightly modified by the so-called Visby Rules. Many nations adopted these Rules, which came into force in 1977. In pursuit of further change, the United Nations in 1978 adopted the Hamburg Rules which introduced major changes into the law governing the international shipment of goods by sea. The changes called for by the Hamburg Rules were controversial and not widely adopted. The exact details of all of the changes found in the Visby Amendment and the Hamburg Rules are not the subject of this paper as neither of those regimes were adopted by the United States, which has continued to rely on the COGSA since 1936.

Needless to say, what started as a uniform approach to the international shipment of goods by sea has changed into a non-uniform approach in several significant areas, as trading countries have each sailed their own route in deciding which rules they are going to follow. This is apparent by the division of the world into Hague states (53), Hague-Visby states (54), Hamburg states (36), and states without any known cargo liability laws (7). As time passed, the lack of uniformity proved profound, cumbersome and increasingly difficult to justify, especially as trade between countries of the world increased exponentially.

Since the adoption of the Hague Rules, there have been substantial changes in the types of vessels, the handling of cargo, the technology, and the procedures involved in the transportation of cargo by sea. For the tradition-based admiralty and maritime law, the changes rapidly outpaced the ability of the laws to keep up, and be applied in a realistically meaningful way. In the United States, the courts stepped in and tried to interpret and stretch the COGSA to the new world which was developing as a result of all of the rapid change. However, while the courts acted with the best of intentions, the difficulties in trying to interpret and apply a law crafted during the first decades of the twentieth century with conditions that existed at the end of the twentieth century resulted in numerous conflicts. It became painfully obvious that a new legal regime needed to be developed; one with a keen eye towards modern business practice.

The task of modernizing and harmonizing the law regarding the international transport of goods was taken up by the United Nations Com-

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5. For a good discussion of these rules, see THOMAS J. SCHORENAUM, ADMIRALTY AND MARITIME LAW (2d ed. West 1994).


7. In 1996, the Maritime Law Association of the United States proposed amendments to the COGSA, which stalled in Congress as it became apparent that the United Nations was prepared to address the issue.
mission on International Trade Law ("UNCITRAL"). In October 2003, UNCITRAL proposed a draft of a new convention, which provided for substantial changes to the Hague/Visby/COGSA regime in a number of very important respects. The United States through both the Department of State and the Maritime Law Association were active participants in the UNCITRAL process. On December 11, 2008, the United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea as developed by UNCITRAL. On September 23, 2009, sixteen nations signed


10. The United Nations issued the following press release regarding the Convention:

The United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea on 11 December 2008. The General Assembly authorized the opening for signature of the Convention at a signing ceremony to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommended that the rules embodied in the Convention be known as “The Rotterdam Rules.”

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea aims to create a contemporary and uniform law providing for modern door-to-door container transport including an international sea leg, but not limited to port-to-port carriage of goods. There are many innovative features contained in the Convention, including provisions allowing for electronic transport records, and other features to fill the perceived gaps in existing transport regimes. Extensive negotiation by the Member States and observers of the United Nations Commission on International Trade Law (UNCITRAL) has resulted in overwhelming support for a significant increase to the limits on carrier liability for cargo loss or damage that apply in most countries. This is expected to be of substantial benefit for shippers, particularly those in developing and least-developed countries, which are consumers of transportation services. It is expected that harmonization and modernization of the legal regime in this area, which in many countries dates back to the 1920s or earlier, will lead to an overall reduction in transaction costs, increased predictability when problems are encountered, and greater commercial confidence when doing business internationally.

Since 2002, the Working Group on Transport Law of UNCITRAL worked in close cooperation with interested international inter-governmental and non-governmental organizations to prepare a legislative text on issues relating to the international carriage of goods. The draft Convention was prepared over thirteen sessions of the Working Group from April 2002 to January 2008, and was approved by UNCITRAL in New York on 3 July 2008, following which it was sent to the General Assembly for adoption at its current 63rd session.

See General Assembly Adopts Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, United Nations Information Service, Dec. 12, 2008, http://www.unis.unvienna.org/unis/pressrels/2008/unis1125.html ("The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. Its mandate is to remove legal obstacles to international trade by progressively modernizing and harmonizing trade law. It prepares legal texts in a number of key areas such as international commercial dispute settlement, electronic commerce, insolvency, international payments, sale of goods, transport law, procurement and infrastructure development. UNCITRAL also provides technical assistance to law reform activities, including assisting Mem-
the Convention at a ceremony in Rotterdam, the Netherlands.\textsuperscript{11} The rules embedded in the Convention will be thereafter known as the "Rotterdam Rules." Ratification by twenty nations will place the Convention into force.\textsuperscript{12} Given the history of the development of this new Convention; the active participation by the United States; and the wide variety of special interests and organizations involved, commentators are cautiously optimistic that the Convention will enter into force as provided in Chapter 18 of the Convention.

Writing about a Convention, which has not yet been ratified, can be an exercise in futility. However, the forces necessary to lead to ratification and adoption of the new Convention appear to be aligning in the direction of ratification. This means that all those who spend their working lives involved in transportation issues (including lawyers) need to be aware of the changes which might be coming so that they can determine what impact such changes may have for them in the future. While the Convention limits its application to the international carriage of goods wholly or partly by sea, there will be implications for all those parties that interface with such carriage. Therefore, the implications of the new Convention may be more significant than its modest title would suggest. This author suggests that knowledge of the Rotterdam Rules at this stage of its early life would seem beneficial to the readers of this journal. Therefore, with cautious optimism this author dips his writing oars into the waters, and navigates with only the splendor of the ratification star as his guide.

II. A Very Brief Overview of the COGSA

Having been in existence for over 70 years, the COGSA is both a familiar and comprehensively litigated (sometimes \textit{ad nauseum}) statute with volumes of case law dealing with every aspect of its provisions. It is neither the purpose nor the intent of this paper to exhaustively review each and every such issue. However, it would be useful to engage in a short review of the salient provisions of the COGSA as an introduction to the Rotterdam Rules, and a more extended discussion of the salient provisions of that Convention and how they compare with equivalent provisions of the COGSA.

Generally speaking, the COGSA may be described as setting up a
liability regime very similar to the law of bailment, but different in key aspects. An ocean carrier (defined as "the owner or the charterer who enters into a contract of carriage with a shipper")\textsuperscript{13} has responsibilities and liabilities, rights and immunities, as well as an available limitation of liability for negligence. The statute is relatively short (16 sections) as compared to the Rotterdam Rules (96 articles divided into 18 chapters). The statute applies to every bill of lading or similar document of title related to a carriage of goods by sea to or from ports of the United States in foreign trade. Thus, the COGSA does not apply to purely domestic water born carriage of goods, which is the subject of the Harter Act.\textsuperscript{14} The COGSA only defines the terms "carrier," "contract of carriage," "goods," "ship," and "carriage of goods."\textsuperscript{15} The COGSA makes it clear that all contracts for the carriage of goods by sea are subject to the responsibilities and liabilities, and entitled to the rights and immunities provided in the statute.\textsuperscript{16} The responsibilities and liabilities of the carrier and ship include the responsibilities and concomitant liabilities to make the ship seaworthy: to properly man, equip, and supply the ship; to make the holds, refrigerating and cooling chambers, and other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation; to properly and carefully load, handle, stow, carry and discharge the cargo; and to issue a bill of lading, providing specific information including the number of packages or pieces, or the quantity or weight of the cargo and the apparent order and condition of the goods.\textsuperscript{17} The bill of lading is considered \textit{prima facie} evidence of the receipt by the carrier of the goods as described in the bill of lading.\textsuperscript{18} Most importantly for loss and damage claims, the receiver of the cargo must note any loss or damage on the bill of lading upon delivery, or, if the loss and damage is not apparent, within three days of the delivery.\textsuperscript{19} The date of the delivery is important because suit for a loss or damage to goods must be brought within one year after delivery of the goods, or the date when the goods should have been delivered.\textsuperscript{20} Any clause in a bill of lading relieving the carrier or the ship from liability for loss or damage contrary to the liabilities provided for under the statute are void and of no effect.\textsuperscript{21}

14. Id. § 30701. ("Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.").
15. Id. § 30701 (1).
16. Id. § 30701 (2).
17. Id. § 30701 (3).
18. Id. § 30701 (3)(4).
19. Id. § 30701 (3)(6).
20. Id.
21. Id. § 30701 (3)(8).
Under the COGSA, a carrier is not liable for any loss or damage caused by the unseaworthiness of the vessel unless that unseaworthiness is the result of the owner's want of due diligence to make sure that the ship is properly manned, equipped, and supplied.\textsuperscript{22} The carrier and the ship are also not responsible for loss or damage due to so-called "uncontrollable causes of loss" including fires; so-called perils of the sea; acts of God; acts of war; acts of public enemies; arrests or restraints of princes, rulers, or people; services under legal process; quarantine restrictions; acts or omissions of the shipper; labor-related issues, riots and civil commotions; life-saving attempts at sea; wastage in the cargo due to the nature of the cargo; insufficiency of packing; insufficiency or inadequacy of marks; latent defects not discoverable by due diligence; or any other cause arising without the actual fault or privity of the carrier.\textsuperscript{23} With regard to the last requirement, the carrier has the burden of proof to show that neither the fault nor neglect of its agents or servants contributed to the loss or damage.\textsuperscript{24} Unlike other common carriers, an ocean carrier has no vicarious liability for the negligence of the master, mariner, pilot, or servants in the navigation or management of the vessel.

Similarly, the shipper is not responsible for loss or damage sustained by the carrier or the ship that is without its act, fault, or neglect.\textsuperscript{25} Most importantly, the carrier's liability shall not exceed $500 per package, or in the case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in currency, unless the nature and value of the goods have been declared before the shipment and inserted in the bill of lading.\textsuperscript{26} The term "package" is not defined and probably has been the most litigated aspect of the statute especially since the development of containerization, and one of the reasons for the impetus to update the legal regime for the international transportation of goods by water.\textsuperscript{27}

Finally, and of most importance to other modes of domestic transportation which have come to interface directly with the ocean mode as a result of the development of intermodalism, the COGSA does not preclude extending its terms by contract for the period of time prior to loading or after discharge.\textsuperscript{28} Thus, the genesis of the so-called Himalaya Clause\textsuperscript{29} and the application of the COGSA limitation to the transporta-

\textsuperscript{22} Id. § 30701 (4)(1).
\textsuperscript{23} Id. § 30701 (4)(2).
\textsuperscript{24} Id.
\textsuperscript{25} Id. § 30701 (4)(3).
\textsuperscript{26} Id. § 30701 (4)(5).
\textsuperscript{27} The general rule is that a "package" is the largest individual unit of packaged cargo made up, by or for the shipper, which is delivered to the carrier. See Omark Indus., Inc. v. Assoc. Container Transp. (Australia), Ltd., 420 F. Supp. 139, 142 (D. Or. 1976).
\textsuperscript{28} 46 U.S.C. § 30701 (7).
\textsuperscript{29} Adler v. Dickson, [1955] 1 Q.B. 158, 159 (C.A.).
tion of cargos on the domestic leg of a through shipment.\textsuperscript{30}

The COGSA, was in its way and in its time, designed to balance the respective liabilities, responsibilities, and limitations of a carrier and a shipper. It recognized both the concept of bailment in the context of common carriage, while at the same time acknowledging the particular challenges faced by an ocean carrier transporting cargo in the often difficult and hostile environment of the seas. It was not the most comprehensively written statute, nor was it all inclusive, requiring constant review and interpretation by numerous courts from its beginning until today. Thus, while the statute did purport to honor the uniformity sought by the Hague Convention, over time that uniformity was strained and sometimes non-existent as the COGSA was applied in the real world. These problems were exacerbated by the change in the business of shipping and its technology. From that experience was born the Rotterdam Rules.

III. THE ROTTERDAM RULES: ANALYSIS AND COMPARISON WITH THE COGSA

The Rotterdam Rules reflect both the legacy of the Hague/Visby/Hamburg Rules, incorporating some of the core concepts found in those rules while also adding many other provisions such as intermodalism, electronic document communication, and other developments in the international transportation of cargo by sea. Consequently, the scope of the Rotterdam Rules is much greater than the scope of the prior conventions, which is reflected in a much lengthier set of rules—divided between 96 articles and 18 chapters. The preamble to the Convention acknowledges the contribution of the previous conventions to the uniformity of the law governing the carriage of goods by sea, and reaffirms the value of a harmonized and unified set of rules governing international trade in the promotion of "universal economic cooperation among all States on a basis of equality, equity and common interests."\textsuperscript{31} Noting that, at the present time, shippers and carriers do not have the benefit of a binding universal regime, the Convention provides for a set of rules, which—if ratified—will serve that purpose. The time honored quest for uniformity lives on!\textsuperscript{32}

The following is a chapter-by-chapter summary and analysis (not ex-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{31} Rotterdam Rules, supra note 11.
\item \textsuperscript{32} Id. ("Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally.").
\end{itemize}
\end{footnotesize}
haustive) of the salient provisions of the Rotterdam Rules with comparisons, as appropriate, to the COGSA.

A. CHAPTER 1 – GENERAL PROVISIONS

The Rotterdam Rules ("the Rules") reflect both an adherence to some of the legal principles of its predecessors as well as radical change. The first major difference between the Rules and the COGSA can be found in this first chapter, which defines 30 terms used in the Convention—as compared to the five terms defined in the COGSA. In addition to the increase in defined terms, two of the common terms, "carrier" and "contract of carriage," have been altered. In the COGSA, "carrier" is defined as following: "[t]he term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper." In the Rules, "'Carrier' means a person that enters into a contract of carriage with a shipper." Thusly, the Rotterdam Rules simplify the definition of a carrier. To include, as the COGSA does, an owner or charterer within the definition is redundant. By defining "carrier" as a person who "enters into a contract of carriage with a shipper," the drafters have crafted a straightforward and inclusive provision.

Under the COGSA, the term "contract of carriage" is defined as:

[Applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.]

This most cumbersome and somewhat convoluted definition has been replaced in the Rotterdam Rules with the following:

"Contract of carriage" means a contract in which a carrier, against a payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by

34. 46 U.S.C. § 30701 (1)(a).
35. Rotterdam Rules, supra note 11, art. 1(5).
other modes of transport in addition to the sea carriage.\textsuperscript{37}

There are two noteworthy aspects of this definition. First, in addition to a more straightforward definition of the term, the Rotterdam Rules also implicitly acknowledge the Himalaya Clause concept and intermodalism, by providing that a contract of carriage for carriage by sea may also include carriage by other modes of transportation. Second, the new definition does not mention the phrase "bill of lading" as is found in the COGSA definition. Indeed, "bill of lading" is not referenced at all in the Rotterdam Rules. The Rules substitute the concept of a "transport document" (and its variations "negotiable transport document" and "non-negotiable transport document"), as well as the concept of the "electronic transport record," in place of the bill of lading.\textsuperscript{38} Jettisoning the bill of lading phrase—common to all modes of transportation—may be the most radical departure from the previous conventions. However, the new terminology reflects the modern day realities of ocean transportation, and is more consistent with the overall structure of the Rotterdam Rules.

Some of the other newly defined terms in the Rotterdam Rules merit further comment at this juncture. The definition of "volume contract"\textsuperscript{39} is an acknowledgment of the use of shipping contracts pursuant to U.S. law, which are separately negotiated documents between shippers and carriers.

The definitions of "liner transportation" and "non-liner transportation"\textsuperscript{40} draw the distinction between ships that operate on regular schedules, and those that do not.

The concept of a "performing party" is introduced into the lexicon of the Rotterdam Rules essentially to denote a designee of a carrier who performs "any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods;" but does not include any person retained or under the control of the shipper or a consignee.\textsuperscript{41}

A "maritime performing party"\textsuperscript{42} is a performing party who undertakes the carrier's obligation essentially at the ports of loading and discharge of a ship. An inland carrier may be a maritime performing party if it performs its services exclusively within a port area.\textsuperscript{43}

The definition of a "documentary shipper" is an acknowledgment of

\textsuperscript{37} Rotterdam Rules, supra note 11, art. 1(1).
\textsuperscript{38} Id. art. 1(14)-(16), (18).
\textsuperscript{39} Id. art. 1(2).
\textsuperscript{40} Id. art. 1(3), (4).
\textsuperscript{41} Id. art. 1(6).
\textsuperscript{42} Id. art. 1(7).
\textsuperscript{43} Id.
the current usage of documents to reflect the transportation of goods.\textsuperscript{44}

The terms "transport document," "negotiable transport document," and "non-negotiable transport document" mentioned above have been substituted for the concept of a bill of lading with clear meanings within the context of the Rotterdam Rules.\textsuperscript{45}

The addition of the terms "electronic communication," "electronic transport record," and "negotiable electronic transport record" are a nod to the use of electronic communications in the handling and negotiation of written contracts of carriage.\textsuperscript{46} It is clear from the definitions that the drafters of the Convention acknowledge the common usage of such wording in international trade, and the legal effect given to that terminology.

The definition of the word "container" is obviously inclusive of any conveyance, which is used to consolidate and transport goods intending to include not only those conveyances currently in use, but any which may be developed in the future.\textsuperscript{47}

While it may seem somewhat redundant to define some of the terms contained in the definitional section of the Rotterdam Rules, a reading of the entire Convention reveals the value of doing so, as the definitions portend what the Rules hope to accomplish and avoid.

The concept of uniformity is again brought to the fore in this chapter by Article 2, which emphasizes the "international character" of the Convention, and "the need to promote uniformity in its application" for the benefit and "good faith in international trade."\textsuperscript{48} Finally, in yet another nod to the holy doctrine of uniformity and—most importantly—for practitioners of admiralty and maritime law in the United States, Article 4 of Chapter 1 provides for the supremacy of the terms of the Rotterdam Rules over common law contract and tort claims in any judicial or arbitral proceeding, so long as the loss or damage relates to goods covered by a contract of carriage as defined under the Convention.\textsuperscript{49} The terms of the Convention, including defenses and limits of liability, apply to the carrier, a maritime performing party, the master, crew, and any other person that performs services onboard the ship, including employees of the carrier or maritime performing party. A similar protection is provided to a shipper, documentary shipper, and their subcontractors, agents, or employees.\textsuperscript{50} This provision is of particular importance in the U.S. federal system subject to the "Savings to Suitors" clause.

\textsuperscript{44} Id. art. 1(9).
\textsuperscript{45} See supra text accompanying note 38.
\textsuperscript{46} Rotterdam Rules, supra note 11, art. 1(17)-(19).
\textsuperscript{47} Id. art. 1(26).
\textsuperscript{48} Id. art. 2.
\textsuperscript{49} Id. art. 4.
\textsuperscript{50} Id. art. 4(1).
B. CHAPTER 2 – SCOPE OF APPLICATION

As seen above, the COGSA has been somewhat limited in its scope to the carriage of goods by sea to and from ports of the United States in foreign trade—with the caveat that there has been no prohibition against a carrier or shipper agreeing to extend the COGSA to the custody, care, and handling of the goods prior to loading or subsequent to discharge from the ship. The Rotterdam Rules go considerably further as they apply to not only inward and outward carriage, but also to carriage to and from inland points in contracting states, regardless of whether either port is in a contracting state.\textsuperscript{51} The Rotterdam Rules apply universally without regard to the nationality of the carrier, performing parties, the shipper, the consignee, or other parties.\textsuperscript{52}

While the Rotterdam Rules apply to contracts of carriage as defined, the Rotterdam Rules do not apply to certain contracts in liner transportation, and certain contracts of carriage in non-liner transportation even though such contracts could otherwise fall within the definition of contracts of carriage. Included within the exclusion for contracts in liner transportation are charter parties and other contracts for use of the ship or any of the space therein (such as slot charters).\textsuperscript{53} The Convention does not apply to contracts of carriage in non-liner transportation (such as a voyage charter) except where there was no charter party, or other contract between the parties and a transport document or an electronic transport record is issued.\textsuperscript{54} While excluding certain contracts, the Rotterdam Rules would still apply between the carrier and a consignee, a controlling party, or another bill of lading holder that is not an original party to the charter party, or another contract of carriage as excluded by the Rotterdam Rules.\textsuperscript{55}

The COGSA is also not applicable to charter parties.\textsuperscript{56} However, if a bill of lading is issued when a ship is being operated pursuant to a charter party, then the charter party shall conform to the terms of the COGSA.\textsuperscript{57}

C. CHAPTER 3 – ELECTRONIC TRANSPORT RECORDS

This chapter represents an acknowledgment of the advances made in the communication of transportation documents by electronic means,
which is now commonly accepted in the maritime commercial world. This is not a subject covered under the COGSA. Chapter 3 authorizes the use of electronic records, and a method by which paper negotiable transport documents may be replaced by negotiable electronic transport records.\textsuperscript{58} The Rules are designed to affirm the validity and integrity of the electronic transport record and the equivalence of the two records, so long as the shipper and carrier both consent.\textsuperscript{59} The specific procedures for the use of such records are left to the parties, subject only to their reference in the "contract particulars" which shall be "readily ascertainable."\textsuperscript{60}

D. Chapter 4 - Obligations of the Carrier

The obligations of the carrier (or performing party) found in the Rotterdam Rules generally comport with the same obligations found in the COGSA, but with more clarity and specificity. Chapter 4 begins with a general statement that the carrier has an obligation to carry the goods to the place of destination, and deliver them to the consignee in accordance with the terms of the contract of carriage and subject to the Convention.\textsuperscript{61} This explication of the general duty of the carrier is then followed by a delineation of the period of time during which the carrier is responsible for the goods, which can be the subject of agreement between the contracting parties subject to certain limitations, but essentially begins with the receipt of the goods for carriage, and extends to when the goods are delivered.\textsuperscript{62}

Such specificity was lacking in the COGSA. During its period of responsibility, the carrier must "properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods," which actions may be, subject to written agreement, "performed by the shipper, the documentary shipper or the consignee."\textsuperscript{63} The COGSA also obliges the carrier to do the same.\textsuperscript{64} Like the COGSA, the Rotterdam Rules obligate a carrier to certain conduct during the period of its responsibility. Specifically, the carrier must "properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods" (but, a shipper and carrier may contract for the shipper to perform any or all of those duties).\textsuperscript{65} "Before, at the beginning of, and during the voyage by

\textsuperscript{58} Rotterdam Rules, \textit{supra} note 11, art. 8-9.
\textsuperscript{59} See \textit{id.} art. 8(a).
\textsuperscript{60} \textit{Id.} art. 9(2).
\textsuperscript{61} \textit{Id.} art. 11.
\textsuperscript{62} \textit{Id.} art. 12.
\textsuperscript{63} \textit{Id.} art. 13.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
sea," a carrier must exercise due diligence to:

(a) Make and keep the ship seaworthy;
(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.66

The Rotterdam Rules are more explicit than the COGSA in the right of the carrier to deal with goods that may become a danger to the vessel, or to sacrifice the goods at sea when such a sacrifice is necessary to preserve human life, the vessel or the vessel’s other cargo.67

E. CHAPTER 5 – LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

This chapter will look somewhat familiar in part to anyone used to referencing the COGSA, or to anyone comparing the two sets of rules side by side. However, the structure of the two rules differs in important ways.

The enumeration of the liabilities of the carrier in the COGSA are found in Section 4 of that Act titled “Rights and Immunities of Carrier and Ship.”68 The first part of that section deals with “unseaworthiness,” and provides that neither the carrier nor the ship will be liable for loss or damage resulting from unseaworthiness, unless caused by want of due diligence to make the vessel seaworthy, and “to secure that the ship is properly manned, equipped and supplied.”69 The carrier has the obligation of proving that it exercised due diligence once unseaworthiness has been established.70

Section 4(2), titled “Uncontrollable causes of Loss,” states that neither the carrier nor the vessel shall be responsible for loss or damage

66. Id. art. 14. “The test of seaworthiness is whether the vessel is reasonably fit to carry the goods which she has undertaken to transport.” The Silvia, 171 U.S. 462, 464 (1898). “As unseaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it has held out as fit to carry, or it is not seaworthy in that respect.” Martin v. Steamship Southwark, 191 U.S. 1, 9 (1903). “The Amended Jason clause has been interpreted in conjunction with the Carriage of Goods by Sea Act to permit a carrier to recover in general average, even if the vessel was unseaworthy, provided the carrier exercised due diligence to make the vessel seaworthy at the commencement of the voyage.” Todd Shipyards Corp. v. United States, 391 F. Supp. 588, 591 (S.D.N.Y. 1975).
69. Id. § 30701 (4)(1).
70. Id.
arising or resulting from a list of enumerated causes very similar to what is found in the Rotterdam Rules.\textsuperscript{71} Perhaps most notable of the enumerated causes of loss are causes related to the "act, neglect or default of the master, mariner, pilot or the servants of the carrier and the navigation or in the management of the ship" (the so-called errors in navigation and management defense),\textsuperscript{72} and the catch all clause which states:

\begin{quote}
[a]ny other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault of privity of the carrier nor the fault or neglect of the agents or servants of the carrier, contributed to the loss or damage.\textsuperscript{73}
\end{quote}

Implied within both Section 3 and Section 4 of the COGSA is a shifting burden of proof.

The Rotterdam Rules provide a more explicit shifting burden of proof with regard to liability, as compared to the burden of proof developed by the courts from the COGSA.\textsuperscript{74} The Rules declare that a carrier is liable for loss or damage if the claimant proves that said loss or damage took place during the period of the carrier's responsibility.\textsuperscript{75} However, a carrier will not be liable if it can prove that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault, or the fault of any person identified as such in the Rules.\textsuperscript{76} Alternatively, the carrier can be relieved of all or part of its liability if it proves that the loss, damage, or delay was the result of one of the enumerated events or circum-

\textsuperscript{71} Compare id. § 30701 (4)(1), with Rotterdam Rules, \textit{supra} note 11, art. 17(3).
\textsuperscript{72} 46 U.S.C. § 30701 (4)(2)(a).
\textsuperscript{73} Id. § 30701 (4)(2)(q).
\textsuperscript{74} As one court has noted, "the burden of proof under COGSA shifts more frequently than the wind on a stormy sea." Banana Services, Inc. v. M/V Fleetwave, 911 F.2d 519, 521 (11th Cir. 1990). The Ninth Circuit has described COGSA's burden shifting procedures as follows:

1. The plaintiff cargo interests have the burden of proving a 'prima facie against the carrier by showing that the cargo was delivered in good condition to the carrier, but was discharged in a damaged condition.'
2. 'The burden of proof then shifts to the vessel owner to establish that the loss came under a statutory exception to COGSA.'
3. 'The burden then returns to the shipper to show, at a minimum, concurrent causes of loss in the fault and negligence of the carrier, unless it is the type of negligence excluded under COGSA.'
4. 'The carrier then has the burden of allocating the loss between (1) the loss caused by his fault and negligence and (2) the loss covered under the exceptions ... The burden of proof, however, alters when a carrier seeks exoneration under [§ 1304 (2) exception whereby] the carrier acquires the additional burden of showing freedom from negligence.'

Complaint of Damodar Bulk Carriers, Ltd., 903 F.2d 675, 683 (9th Cir. 1990) (citations omitted); see also Sunkist Growers, Inc. v. Adelaide Shipping Lanes, 603 F.2d 1327, 1341(9th Cir. 1979).

\textsuperscript{75} Rotterdam Rules, \textit{supra} note 11, art. 17(1).
\textsuperscript{76} Id. art. 17(2).
stances. The Rotterdam Rules then shift the burden of proof again by noting that—notwithstanding the enumerated events or circumstances which would excuse the carrier of liability—the carrier will be liable if the claimant can prove that the fault of the carrier contributed to that event or circumstance on which the carrier relies; or if the claimant proves that an event or circumstance not listed contributed to the loss, damage, or delay; and the carrier cannot prove that this event or circumstance is not attributable to its fault or the fault of other persons referenced in the Rules. The carrier is also liable if the loss, damage, or delay was probably caused by or contributed to by the unseaworthiness of the ship, the improper crewing, equipping and supplying of the ship, or the fact that the holds or other parts of the ship in which the goods are carried or any container supplied by the carrier in or upon which the goods are carried were not fit and safe for reception, carriage and preservation of the goods; and the carrier is unable to prove that none of those events or circumstances caused the loss, damage, or delay; or that it exercised due diligence in accordance with Article 14 of the Rotterdam Rules. If at the end of the entire analysis, the carrier is relieved of part of its liability, it is only relieved "for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article." The carrier also has vicarious liability.

A maritime performing party is also subject to the obligations and liabilities of the Rotterdam Rules, and is entitled to the same defenses and limits of liability as are available to the carrier if it meets certain conditions. A maritime performing party is not liable for greater limits of liability agreed to by the carrier unless it agrees to accept such obligations. A maritime performing party does have vicarious liability.

The Rotterdam Rules provide for joint and several liability among the carrier and any maritime performing parties, but said liability is limited to the amounts provided in the Rules.

Another important provision relates to the notice that is required in the event of loss, damage, or delay. The notice provision of the Rotterdam Rules is not substantially different than what currently applies under the COGSA. There is a presumption of good delivery by the carrier,
unless notice of loss of or damage to the goods is provided to the carrier before or at the time of delivery or, if not apparent, within seven working days after delivery (three days under COGSA). In the case of delay, the time period is twenty-one days (COGSA lacks this provision). The failure to provide notice does not affect the right to claim compensation for loss or damage, nor does it change the allocation of the burden of proof set out in Article 17. The obligations to participate in a joint survey of lost or damaged goods and provide information—a practice common to the maritime industry (also found in the COGSA)—are affirmed.

Whether the shifting burden of proof provides too much complexity in the actual application of the liability rules, or whether the previous approach developed by the courts will be a sufficient template upon which to handle the issue, will be determined as cases are brought before the courts. The prosecution of a claim and the defense against a claim may not prove as cumbersome as the Rules might suggest.

"Delay" is an important concept addressed in the Rules, but not expressly covered by COGSA with few cases on the subject. Articles 17, 19, 20 and 23 of Chapter 5, refer to "loss, damage or delay," but, interestingly, the damage calculation provisions of Article 22 refer only to "loss of or damage." Delay is defined in Article 21 in relation to an agreement among the parties for a time of delivery, suggesting that there can be no delay claim absent an agreed delivery time. Article 60 sets out or applies damages for delay, referencing back to Article 22. There is also an express limit on damages "for economic loss due to delay," which is "two and one-half times the freight" on the goods delayed.

F. Chapter 6 – Additional Provisions Relating to Particular Stages of Carriage

The concept of "deviation" has long been a particularly harsh issue for carriers. Basically, the doctrine of unreasonable deviation provides that where a carrier subjects the cargo to unreasonable and unjustifiable risks not contemplated by the parties who contracted carriage, the carrier forfeits its contractual limitations of liability. This has usually been applied in cases involving geographical deviations or unauthorized on deck

86. Id. art. 23(1); 46 U.S.C. § 30701 (3)(6).
87. Rotterdam Rules, supra note 11, art. 23(4).
88. Id. art. 23(2).
89. Id. art. 23(6); 46 U.S.C. § 30701 (3)(6).
90. Rotterdam Rules, supra note 11, art. 22.
91. Id. art. 21.
92. Id. art. 60.
93. Id.
The Rotterdam Rules rely on existing law to determine what constitutes a deviation, but the Rules also make clear that the deviation itself does not deprive a carrier of any defense or limitation available unless reckless, willful, and wanton conduct was involved.\(^9\) Another contentious issue has to do with the stowage of cargo onboard the decks of vessels, a practice now common with the advent of containerization. The Rotterdam Rules specifically spell out when cargo may be carried on deck, and specifically address the use of containers as well as the “customs, usages or practices of the trade in question.”\(^9\)

Finally, the Rotterdam Rules make clear that they do not take precedence over other international conventions, which apply to the loss of or damage to goods during the carrier’s period of responsibility, but solely before their loading onto the ship or solely after the discharge from the ship.\(^9\)

G. Chapter 7 – Obligations of the Shipper to the Carrier

The COGSA is primarily carrier-directed when it comes to allocating liability for loss, damage, or delay. The COGSA says virtually nothing about any obligation the shipper may have to the carrier, with the exception of providing accurate information about the shipment itself.\(^9\) In a departure from that approach, the Rotterdam Rules specify clear obligations that the shipper has to the carrier and the consequences of a breach of those obligations. The Rotterdam Rules provide that the shipper is to deliver the goods in such condition that they can withstand the rigors of

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94. Bunge Edible Oil Corp. v. M/Vs’ Torm Rask & Fort Steele, 949 F.2d 786, 788 (5th Cir. 1992); Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27, 31 (2d Cir. 1986). The Seventh Circuit has held that the application of the doctrine of unreasonable deviation does not avoid the application of the package limitation. Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt, 313 F.2d 872, 875 (7th Cir. 1963). However, other circuits have refused to follow the Seventh Circuit. Nemeth v. Gen. S.S. Corp., 694 F.2d 609, 612 (9th Cir. 1982); Spartus Corp. v. S.S. Yafo, 590 F.2d 1310, 1317 (5th Cir. 1979); DuPont de Nemours Int’l v. S.S. Mormacvega, 493 F.2d 97, 103 (2d Cir. 1974). Damage sustained as a result of the deviation makes the carrier an insurer of the goods without statutory exceptions and limitations. See, e.g., Northwestern Nat’l Ins. Co. v. Galin, No. 85 Civ. 1832 (CSH), 1987 WL 25050, at *1 (S.D.N.Y. Nov. 13, 1987); Ataei v. M/V Barber Tonsberg, 639 F. Supp. 993, 1004 (S.D.N.Y. 1986).

95. Rotterdam Rules, supra note 11, art. 24. It is not entirely clear what “applicable law” refers to in this article, although it is reasonable to conclude that it is a reference to the existing case law under the COGSA. Even the word “deviation” is left undefined. A deviation is not necessarily improper and it is clear from the case law that only unreasonable deviations would constitute a breach of a carrier’s obligations. Therefore, where a carrier subjects the cargo to unreasonable and unjustifiable risks not contemplated by the parties to the contract of carriage, such actions would constitute an unreasonable deviation.

96. Id. art. 25(1)(c).

97. Id. art. 26.

The shipper must cooperate with the carrier in providing information and instructions with regard to the shipment of the cargo. A shipper must provide all information, instructions, and documents for the handling and transport of the cargo. Dangerous goods requiring special handling shall be disclosed and appropriately marked. In this regard, the Rules do not change the obligation under U.S. law, the Hague-Visby Rules, or the Hamburg Rules.

Most importantly, and absent from the COGSA, the Rotterdam Rules provide that a shipper can be liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage is caused by a breach of the shipper's obligations under the Rules. This liability would include liability for the acts or omissions of anyone that the shipper has entrusted with the performance of its obligations except the carrier or a performing party acting on behalf of the carrier.

One possible consequence of obligating the shipper to the carrier is a shifting of the burden of proof from the carrier to the shipper in relation to damage for goods in shipper-packed containers. Under COGSA, it is the carrier's burden to prove that goods were insufficiently packaged to withstand the normal handling during transportation in order to establish a defense to a cargo damage claim. Under Article 27 of the Rotterdam Rules, a shipper has an affirmative duty to deliver the goods in a condition able to withstand normal handling. With regard to a shipper-packed container, the cargo must be carefully stowed, latched, and secured such as not to cause harm to persons or property. The result of such a provision might be to shift the burden of proof to the shipper to prove that cargo was sufficiently packaged when a claim is made for cargo damage. This provision may also grant a cause of action to a maritime performing party when an improperly packaged container causes injury to persons or other property.

H. Chapter 8 - Transport Documents and Electronic Transport Records

One of the most novel features of the Rotterdam Rules as compared to the COGSA is this chapter dealing with transport documents and the
electronic transmission of those documents in connection with the international transportation of cargo by sea.\textsuperscript{108} There are no similar provisions in the COGSA. Indeed, while the COGSA refers to a bill of lading as the shipping document, there is no mention of a bill of lading in the Rotterdam Rules. In its place, the Rules refer to a "transport document,"\textsuperscript{109} "negotiable transport document,"\textsuperscript{110} "non-negotiable transport document,"\textsuperscript{111} "electronic transport record,"\textsuperscript{112} "negotiable electronic transport record,"\textsuperscript{113} and "non-negotiable electronic transport record."\textsuperscript{114} This is a significant change in the nomenclature of ocean shipping. The Rotterdam Rules, in essence, acknowledge the use of electronic communication in the transmission of transport documents, and make electronic transport documents the equivalent of the paper form.

The Rotterdam Rules recognize three types of paper documents and two types of electronic alternatives. There is a difference drawn between a non-negotiable transport document and a negotiable transport document. For each of those documents there is an electronic equivalent.

In this chapter and throughout the convention, the Rules acknowledge the custom, practice, and usage of the trade with regard to the use of a negotiable document or record.\textsuperscript{115} While a shipper is entitled to receive a transport document or a record of his choice, he may agree not to use one or rely on the custom practice and usage of the trade.\textsuperscript{116} Electronic transport records are the most interesting. They are treated in the same way as their paper counterparts, but must be used with the consent of the carrier and the shipper.\textsuperscript{117} There must be an agreement in place that provides for the procedures associated with the issuance and transfer of the record and other particulars.\textsuperscript{118} Those procedures must be referenced in the contract of carriage and be readily available to the parties to the contract. There are no statutory procedural requirements, so this is one area where the courts may have to determine whether the procedures, which are referenced in the contract of carriage, provide a satisfactory substitute for a paper equivalent.

The transport document or the electronic transport record must contain,\textit{ inter alia}, the following information (to be provided by the shipper):

\begin{itemize}
  \item \textsuperscript{108} Id. art. 35-42.
  \item \textsuperscript{109} Id. art. 1(14).
  \item \textsuperscript{110} Id. art. 1(15).
  \item \textsuperscript{111} Id. art. 1(16).
  \item \textsuperscript{112} Id. art. 1(18).
  \item \textsuperscript{113} Id. art. 1(19).
  \item \textsuperscript{114} Id. art. 1(20).
  \item \textsuperscript{115} Id. art. 35.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id. art. 8.
  \item \textsuperscript{118} Id. art. 9.
\end{itemize}
• the description of the goods;
• "[t]he leading marks necessary for the identification of the goods;"
• "[t]he number of packages or pieces, or the quantity of the goods;"
• the apparent good order and condition of the goods at the time they are received for carriage;
• "[t]he name and address of the carrier;"
• the date of reception or loading of the goods or of the issue of the document of record, a number of originals of any negotiable transport document if more than one original was issued;
• the name and address of the consignee; and
• the name of the ship as specified in the contract and the relevant transport of points (place of receipt, delivery). 119

Transport documents must be signed by the carrier or, if the record is electronic, an electronic signature is required. 120 Documents issued in accordance with the Rules will provide prima facie evidence in favor of the shipper, and, where the document or record is negotiable, conclusive evidence in favor of a third party transfer action in good faith. 121 A consignee of a non-negotiable document has further protections. 122 Where a shipment is transferred "freight prepaid," a carrier will not be able to assert against a holder or consignee of the transport document a claim that the freight has not been paid. 123 The Rules also benefit the carrier as the carrier will be able to qualify contract particulars if it knows that the contract particulars are false or has reasonable grounds for suspicion. 124 This is especially valuable with regard to goods that are delivered to a carrier in a sealed container. 125 The Rules will assist in determining the evidentiary effect of the document when it comes to loss or damage claims.

The detail of the chapter relating to transport documents and electronic transport records is, as mentioned above, a new innovation with regard to the COGSA. The COGSA, insofar as bills of lading are concerned, specifies the contents of the bill. 126 The bill of lading is prima facie evidence of the receipt by the carrier of the goods as described in the bill of lading. 127 There is reference to a so-called "shipped" bill of lading in relation to documents of title. 128

119. Id. art. 36.
120. Id. art. 38.
121. Id. art. 41(a).
122. Id. art. 41(c).
123. Id. art. 42.
124. Id. art. 40.
125. Id. art. 40(4).
127. Id. § 30701 (3)(4).
128. Id. § 30701 (3)(7).
The Rotterdam Rules obligate a consignee to accept delivery of the goods at the time and location agreed in the contract of carriage; or if there is no such agreement, at a time and location where delivery could reasonably be expected with regards to the terms of the contract and the customs, usages, and practices of the trade, and the circumstances of the carriage. The consignee must acknowledge receipt of the goods from the carrier, and the carrier may refuse delivery if the consignee refuses to acknowledge that receipt.

The Rules then provide for different treatment if a delivery occurs when there has not been any negotiable transport document or the negotiable electronic transport record is issued; when delivery is made pursuant to a non-negotiable transport document that requires surrender; and delivery when a negotiable transport document or negotiable electronic transport record is issued. The procedures to be followed and the rights and obligations of the carrier delivering the goods and the consignee accepting delivery vary depending on the nature of the delivery. The Rules are very specific for each type of delivery, presumably, so that the respective parties have a clear understanding of how delivery should be effectuated and what needs to be done if problems arise.

The Rules also recognize that not all goods end up "delivered" as provided in the Rules. "Goods remaining undelivered" (as that phrase is delineated by the Rules) may be subject to certain so-called self help remedies. Here:

the carrier may, at the risk of expense of the person entitled to the goods, take such action in respect to the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;
(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect to the goods, including by moving them; and
(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

Before such actions are taken, the carrier must give reasonable notice to the person stated in the contract and, if known to the carrier, the
consignee, the controlling party, or the shipper. The proceeds for the sale of such goods are to be delivered to the person entitled to the goods subject to costs incurred by the carrier, including costs in connection with carriage of the goods.

Finally, and perhaps most importantly, the carrier will not be liable for the loss of or damage to the goods when they remain undelivered, unless the claimant can prove that such loss or damage resulted from the failure by the carrier to act reasonably under the circumstances to preserve the goods, and that the carrier knew or ought to have known that the loss or damage to the goods would result from taking reasonable actions. As an alternative to any of those actions, the carrier may retain the goods to secure payment of any sums due.

J. CHAPTER 10 – RIGHTS OF THE CONTROLLING PARTY

This chapter, unknown in content in the COGSA, specifies who is entitled to exercise the right of control over the goods during their transportation. The carrier has control during its period of responsibility as required by the Rules. The Rules deal primarily with the shipper and the right of control in relation to cargos transported in accordance with non-negotiable transport documents, negotiable transport documents, or negotiable electronic transport records. A carrier is bound to execute instructions issued by the person who has the right of control; with the right of the carrier to indemnity from the shipper for loss or damage related to the carrier’s executing any instructions received pursuant to the Rules. Conversely, the failure to comply with the instructions will subject the carrier to liability for loss of or damage to the goods, or for delay in delivery subject to the liability limitations in the Rules.

K. CHAPTER 11 – TRANSFER OF RIGHTS

This chapter continues with issues related to the use of negotiable

136. Id. art. 48(3).
137. Id. art. 48(4).
138. Id. art. 48(5).
139. Id. art. 49.
140. Id. art 50(1). While the right of control is not provided in the COGSA, the right of control has been largely governed by the 1916 Pomerene Act, sometimes called “The United States Bill of Lading Act.” 49 U.S.C. §§ 80101-80116 (1994). The Pomerene Act does not of its own terms apply to shipments from a foreign country to the United States, but, courts have applied a “General Maritime Law” based upon the Pomerene Act and Article 7 of the U.C.C. David Crystal, Inc. v. Cunard S.S. Co., 223 F. Supp. 273, 284-86 (S.D.N.Y. 1963), aff’d, 339 F.2d 295 (2d Cir. 1964).
141. See Rotterdam Rules, supra note 11, art. 51.
142. Id. art. 52.
143. Id.
transport documents and the right of the holder to transfer the rights incorporated in such documents to another person. This largely procedural chapter defines the rights and liabilities of a holder.

L. CHAPTER 12 - LIMITS OF LIABILITY

Perhaps the most litigated issue found in cases interpreting the COGSA has been the limit of liability. Under the COGSA, the liability for loss or damage in connection with the transportation of goods is $500 per package or for goods not shipped in packages, $500 per customary freight unit; unless the nature and value of the goods has been declared by the shipper before shipment and inserted in the bill of lading, and the shipper and carrier are permitted to contract for greater liability. Most of the litigation involving the COGSA package limitation has had to do with determinations regarding what constitutes a “package” for the purposes of applying the limitation. The COGSA did not define “package,” and, thus, it has been left to the courts to define the intent of the statute as to whether a specific cargo constituted a single package or multiple packages. The cases attempting to apply the $500 limitation to the “customary freight unit,” another term left undefined in the COGSA, have also struggled with determining the intent of the parties to the shipment and applying the limitation. Generally speaking, a “customary freight unit” is the actual freight unit used by the parties to calculate freight for the shipment at issue.

For the carrier to be entitled to invoke the $500 per package or customary freight unit limitation, the Supreme Court has required a reciprocal benefit of a choice of freight rate tied to the release valuation of

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144. See id. art. 57-58.
145. Id. art. 58.
147. Cases interpreting the word “package” are too numerous to cite in total here. See, e.g., Mitsui & Co. v. Am. Exp. Lines, Inc., 636 F.2d 807 (2d Cir. 1981) (bundles as packages); Trane Disc Inc. v. M/V Barber Nara, 1984 A.M.C. 1984 (D. Md. 1983); see also Hartford Fire Ins. Co. v. Pac. Far East Line, Inc., 491 F.2d 960 (9th Cir. 1974). But see, Tokio Marine & Fire Ins. Co. v. Nippon Express, U.S.A. (Ill.), Inc., 155 F. Supp. 2d 1167 (C.D. Cal. 2000) (discussing goods on pallets as packages); Allied Int’l Am. Eagle Trading Corp. v. S.S. Yang Ming, 672 F.2d 1055 (2d Cir. 1982) (discussing goods on pallets as packages); Royal Ins. Co. v. Sea-land Serv., Inc., 50 F.3d 723 (9th Cir. 1993) (yachts on cradles as packages). Generally speaking, the rule has evolved that the court will attempt to determine the intent of the parties from the bill of lading especially where the number of packages is stated in the bill of lading even for containerized or palletized cargo. E.g., Leather’s Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); see also Mitsui & Co., 636 F.2d 807 (discussing containers as packages); Smythgreyhound v. M/V Eurygenes, 666 F.2d 746 (2d Cir. 1981) (discussing containers as packages).
The Coming Sea Change

Constructive notice of the package limitation results from the incorporation of the COGSA in the bill of lading.\footnote{149}{Union Pac. R.R. Co. v. Burke, 255 U.S. 317, 321 (1921); see also Pan Am. World Airways v. Cal. Stevedore & Ballast Co., 559 F.2d 1173, 1176 (9th Cir. 1977).}

The Rotterdam Rules provide for a limit of liability of 875 Special Drawing Rights (“SDR”) as defined by the International Monetary Fund, converted into the national currency of the state on the date of judgment or award or the date agreed upon by the parties.\footnote{150}{Fireman’s Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 996 (11th Cir. 2001).} The limitation is to be applied “per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher.”\footnote{151}{See Rotterdam Rules, supra note 11, art. 59(1), 59(3).} Like in the COGSA, the parties can agree to a higher amount of limitation of liability.

The Rules, like the COGSA, do not define the word “package” but attempt to alleviate the problems associated with the use of that term by reference to both the manner in which the packages are physically shipped and reference to the contract particulars. Thus, when goods are loaded in a container on a pallet or on a similar article of transport used to consolidate goods, the number of packages or shipping units actually specified in the contract of carriage will be deemed either “packages” or “shipping units.”\footnote{152}{Id. art. 59(1).} If there is no such delineation in the contract of carriage, then the entire container, pallet, or vehicle will be deemed one shipping unit.\footnote{153}{Id. art. 59(2).} The Rotterdam Rules then look to the contract of carriage and the details about how the goods have been enumerated in order to determine the intent of the parties for purposes of the application of the limit of liability which, essentially, has been what courts have done with COGSA cases.

Loss of or damage due to delay are treated somewhat differently than claims for physical loss or damage. Loss of or damage to goods due to delay will be calculated by reference to the value of the goods at the place and time of delivery.\footnote{154}{Id.} That value will be based on either the commodity exchange price, the market price, or by reference to the normal value of the goods of the same kind and quality at the place of delivery.\footnote{155}{Id. art. 60.} Further, compensation for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed.\footnote{156}{Id.} The total amount payable for any loss may not
exceed the amount established by applying the 875 SDR per package figure if there was a total loss of the goods concerned.  

Finally, the limitation of liability may be avoided if the carrier engages in an intentional breach of its obligations under the Rules, or acts "recklessly and with knowledge that such loss would probably result."  

M. CHAPTER 13 - TIME FOR SUIT

No suit for loss or damage "may be instituted after the expiration of a period of two years" from the date of delivery, but "[t]he day on which the period commences is not included in the period." This contrasts with the one year period provided in the COGSA. In the case of short delivery or non-delivery, the period of time is calculated beginning with the last day in which the goods should have been delivered. Extensions of time for suit by a carrier are permitted by a "declaration to the claimant." Extensions are not provided for in the COGSA, but courts have permitted them.

When a carrier or other person is sued for loss or damage to cargo, that carrier or person may institute an action for indemnity. The time for instituting that suit is the latter of the time allowed by the applicable law in the jurisdiction where the proceedings are instituted or ninety days from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the underlying action, whichever is earlier. This is a new time period unknown in the COGSA. In the case of an action for indemnity, the two year period of time for suit does not apply.

N. CHAPTER 14 - JURISDICTION

This chapter was particularly important to members of the U.S. delegation who participated in the UNCITRAL negotiations for the Convention. In the wake of the Sky Reefer decision of the U.S. Supreme Court, choice of forum clauses in ocean bills of lading, providing for judicial forums other than the United States, are routinely inserted by

158. Id. art. 59-60.
159. Id. art. 61.
160. Id. art. 62(1)-62(2).
161. Id. art. 62(2).
163. Rotterdam Rules, supra note 11, art. 62(2).
164. Id. art. 63.
166. Rotterdam Rules, supra note 11, art. 64.
167. Id.
carriers and have been enforced by U.S. courts—effectively making it difficult for cargo interests to pursue their claims against carriers in the United States.170

The Rotterdam Rules provide that a plaintiff may institute suit against a carrier in a competent court within the jurisdiction of one of the following places: (1) "[t]he domicile of the carrier;" (2) "[t]he place of receipt agreed in the contract of carriage;" (3) "[t]he place of delivery agreed in the contract of carriage;" (4) "[t]he port where the goods are initially loaded on a ship or the port where the goods are finally discharged from the ship;" or (5) in a competent court designated by an agreement between the shipper and carrier.171 The right of the shipper and carrier to agree to an exclusive court is limited to a volume contract.172 A person who is asserting a claim against a carrier, but who is not a party to such a volume contract, is only bound by the exclusive choice of court agreement if: (1) "[t]he court is in one of the places designated in [Chapter 14];" (2) "[t]hat agreement is contained in the transport document or electronic transport record;" (3) "[t]hat person is given timely and adequate notice of the court where the action shall be brought and that jurisdiction of the court is exclusive;" and (4) "[t]he law of the court seized recognizes that the person may be bound by the exclusive choice of court agreement."173 It is believed that the perceived adverse results of the Sky Reefer decision are remedied by this jurisdiction provision.174

Similarly, a claim may be instituted against a maritime performing party in the domicile of the maritime performing party; the court where the goods are received by the maritime performing party; "the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performed its activities with respect to the goods."175 In the event a carrier and a maritime performing party are both joined in a single action arising out of a single occurrence, the action may only be instituted in a court designated pursuant to the Rules, unless there is an exclusive choice of court agreement that complies with


171. Rotterdam Rules, supra note 11, art. 66.

172. Id. art. 67.

173. Id.


175. Rotterdam Rules, supra note 11, art. 68.
An interesting provision of this chapter is the fact that both shall be binding on contracting states only if those contracting states declare in accordance with the Convention that they will be bound by them. The reason for this so-called opt in provision has to do with the law of the European Union as well as the fact that most of the nations who participated in the UNCITRAL negotiations did not want any jurisdiction or arbitration provisions in the Convention. If a contracting state does opt into the jurisdictional provisions of the Convention, then any decisions made by a court having jurisdiction under the Convention are to be recognized and enforced by another contracting state in accordance with the law of that contracting state, which would also include the right to refuse recognition and enforcement if so provided by that state’s law.

O. Chapter 15 – Arbitration

The COGSA does not contain any prescription or prohibition with regard to the availability of arbitration or the right of parties to conclude arbitration agreements in a contract of carriage. In apparent recognition of the use of arbitration as a means of resolving disputes relating to the loss and damage of ocean cargo, the Rotterdam Rules instead provide that arbitration may be used if the parties agree. The Rules place very few restrictions on the use of arbitration agreements. The arbitration proceeding may take place at any place designated for that purpose in the arbitration agreement. If no place is designated, then the arbitration proceeding may take place in the domicile of the carrier, the place of receipt agreed in the contract of carriage, the place of delivery agreed in the contract of carriage, the port where the goods are loaded on a ship, or the port where the goods are discharged from the ship.

There are also certain provisions regarding the use of arbitration agreements contained in volume contracts, and for contracts of carriage and non-liner transportation. Similar to the opt out provision in Chapter 14, the provisions of this chapter only bind contracting states that declare that they will be bound by the provisions of this chapter.

P. Chapter 16 – Validity of Contractual Terms

Chapter 16 essentially provides for the non-voidability of the terms

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176. Id. art. 71.
177. Id. art. 74.
178. Id. art. 73.
179. Id. art. 75.
180. Id. art. 75(2).
181. Id. art. 78.
182. Id.
of the Convention. Any contract of carriage which excludes or limits the obligations or liabilities of the carrier or maritime performing party are void.\footnote{Id. art. 79.} The COGSA has a similar provision.\footnote{46 U.S.C. § 30701 (3)(8).} The Rotterdam Rules also void any assignment of a benefit of insurance of goods in favor of the carrier or other persons referred in the Convention.\footnote{Rotterdam Rules, \textit{supra} note 11, art. 79(1)(c).} Again, the COGSA has a similar prohibition.\footnote{46 U.S.C. § 30701 (3)(8).}

In addition, any term in a contract of carriage which directly or indirectly excludes, "limits or increases the obligations under this Convention of a shipper, consignee, controlling party, holder or documentary shipper," or increases the liability of those entities for breach of any of its obligations under the Convention is void.\footnote{Rotterdam Rules, \textit{supra} note 11, art. 79(2).}

Notwithstanding these provisions, there are special rules for so-called "volume contracts." Greater leeway is given to shippers and carriers to negotiate terms and conditions of such contracts, which "may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention."\footnote{Id. art. 80.} The concept of "derogation" is introduced reflecting a departure from the Rules of the Convention that otherwise would apply to a contract of carriage.\footnote{Rotterdam Rules, \textit{supra} note 11, art. 80(2).} The Rules contemplate that a derogation will be individually negotiated and prominently stated in the contract of carriage that it is not incorporated by reference from another document or included in a contract of adhesion not subject to negotiation. The Rules also include that the shipper is given an opportunity and notice to conclude a contract of carriage on terms and conditions that comply with the Convention and without any derogation.\footnote{Id. art. 80.} If the volume contract satisfies the requirements of the Rules, then the terms of the volume contract will apply to other persons than the shipper, if those persons "[receive] information that prominently states that the volume

\begin{itemize}
  \item \footnote{Id. art. 79.} The COGSA has a similar provision.\footnote{46 U.S.C. § 30701 (3)(8).} The Rotterdam Rules also void any assignment of a benefit of insurance of goods in favor of the carrier or other persons referred in the Convention.\footnote{Rotterdam Rules, \textit{supra} note 11, art. 79(1)(c).} Again, the COGSA has a similar prohibition.\footnote{46 U.S.C. § 30701 (3)(8).}
  \item \footnote{Rotterdam Rules, \textit{supra} note 11, art. 79(2).}
  \item \footnote{Id. art. 80.} The concept of volume contracts is not unfamiliar to American shipping practitioners because service contracts as regulated by 46 U.S.C. § 40502 (2006) were authorized under the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1988. Such service contracts allowed for rates and other terms of service that might differ from a carrier's published tariffs and deal with such terms as conditions as volume, rates, service, equipment, liability and security, all of which may vary from COGSA's provisions. Under the Rules, a volume contract must cover more than one shipment, include a volume commitment and a specified duration.
  \item \footnote{Rotterdam Rules, \textit{supra} note 11, art. 80(2).} A derogation from the Rules' provisions do not include: the duty of the ocean carrier before and during a voyage by sea to exercise due diligence to make and keep the ship seaworthy and properly crewed, equipped, and supplied (Article 14); the shipper's obligation to provide certain information, instruction and documents (Article 29); special rules for carrying dangerous cargo (Article 32); and liability for any damage arising from a breach of Article 61.
  \item \footnote{Id. art. 80.} The concept of volume contracts is not unfamiliar to American shipping practitioners because service contracts as regulated by 46 U.S.C. § 40502 (2006) were authorized under the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1988. Such service contracts allowed for rates and other terms of service that might differ from a carrier's published tariffs and deal with such terms as conditions as volume, rates, service, equipment, liability and security, all of which may vary from COGSA's provisions. Under the Rules, a volume contract must cover more than one shipment, include a volume commitment and a specified duration.
  \item \footnote{Id. art. 80.} The concept of volume contracts is not unfamiliar to American shipping practitioners because service contracts as regulated by 46 U.S.C. § 40502 (2006) were authorized under the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1988. Such service contracts allowed for rates and other terms of service that might differ from a carrier's published tariffs and deal with such terms as conditions as volume, rates, service, equipment, liability and security, all of which may vary from COGSA's provisions. Under the Rules, a volume contract must cover more than one shipment, include a volume commitment and a specified duration.
\end{itemize}
contract derogates from this Convention and gave its express consent to
be bound by such derogation; and . . . [s]uch content is not solely set forth
in a carrier's public schedule of prices and services, transport documents
or electronic transport record."193 In the event of a dispute, the party that
is claiming the benefit of "the derogation bears the burden of proof that
the conditions for derogation have been fulfilled."192

Live animals and other goods, which require special treatment, come
in for special treatment under the Rotterdam Rules, notwithstanding the
general prohibitions with regard to the lessening or increasing of obliga-
tions or liabilities found in this chapter.193 The Rules permit that a con-
tract of carriage for those types of cargo may exclude or limit the
obligations or the liability in both the carrier and the maritime perform-
ing party, unless the claimant can prove that the loss, damage, or delay
resulted from the intent to cause such loss, damage or delay, or was done
as a result of a reckless act, and with knowledge that such loss, damage,
or delay did probably result.194 However, the Rules make clear that con-
tracts of carriage for such cargo must not be related to ordinary commer-
cial shipments made in the ordinary course of trade.195 This provision
makes it clear that these special rules are not to be used as a smoke
screen to avoid the applicability of the Convention for the normal and
ordinary course of trade.

Q. Chapter 17 – Matters Not Governed by this Convention

The Rotterdam Rules clearly apply to the international transporta-
tion of cargo by sea. In what appears to be an abundance of caution, the
scope of the Rules is further defined by this chapter, which delineates
those matters not intended to be governed by the Convention. Those
matters include: (1) international conventions governing the carriage of
goods by other modes of transport (air, road, rail, and inland water-
ways);196 (2) the limitation of liability of vessel owners;197 (3) general av-
erage adjustments by national law;198 (4) contracts of carriage for
passengers and their luggage;199 or (5) damage caused by a nuclear
incident.200

191. Id. art. 80(5).
192. Id. art. 80(6).
193. Id. art. 81.
194. Id. art. 81(a).
195. Id. art. 81(b).
196. Id. art. 82.
197. Id. art. 83.
198. Id. art. 84.
199. Id. art. 85.
200. Id. art. 86.
R. Chapter 18 – Final Clauses

This chapter deals mostly with procedural issues having to do with the ratification of the Convention by the contracting states and the effect of such ratification. The most important provision of this chapter for purposes of this paper is Article 94 relating to the entry into force of the Convention.\textsuperscript{201} The Convention will become effective on the first day of the month following the expiration of one year after the twentieth contracting party has ratified the Convention.\textsuperscript{202} Each contracting state will then apply the Convention to all contracts of carriage concluded on or after the date of entry into force.

IV. Summary and Conclusions

As should be obvious to the reader of this article, the COGSA and the Rotterdam Rules share a common heritage. There are also many differences which need to be considered and understood. The new Convention establishes a level of contractual freedom in the guise of volume contracts, which can be tailored providing for greater or lesser rights or obligations. The period of responsibility for the cargo changes from a "tackle to tackle" principle to a "door to door" principle beginning at the place of receipt, and ending when the cargo is delivered to its final destination—a recognition of the use of intermodal carriers for the transportation of cargo. Carriers and shippers are provided a high level of flexibility in determining in their contracts of carriage the period of responsibility. The concept of a performing party and a maritime performing party is introduced, a feature which differs substantially from the COGSA. The application of the new Convention extends to such defined entities providing substantive liability rules for those parties as well as granting them the defenses available to the carrier.

The new Convention extends the carriers obligations to exercise due diligence not only prior to and at the beginning of the sea voyage, but during the entire voyage in addition to the customary obligations found in the COGSA. The burden of proof in the event of a claim for loss or damage is delineated in great detail. The limitation of liability has been changed and will be measured using Special Drawing Rights. The shipper's obligations are also spelled out unlike in the COGSA.

Rules regarding transport documents or electronic transport documents are also delineated, recognizing the practices of modern international shipping. The statute of limitations has been increased from one to two years and the notice provisions are changed. The Rotterdam Rules provide, for the first time, rules relating to the right of control, and trans-

\textsuperscript{201} Id. art. 94.
\textsuperscript{202} Id.
fer of rights in relation to the contracts of carriage as reflected in transport documents or their electronic equivalent. Electronic documents are authorized, and rules for usage are provided. The errors in navigation and management of the vessel clause has been deleted as has the so-called catch-all exemption of the COGSA relating to the exemption from liability for any cause without the actual fault or privity of the carrier. The Rotterdam Rules recognize and provide for the use of arbitration. One can continue, but the point is made that while the heritage is the same, the Rotterdam Rules are new and different.

It remains to be seen how well the Rotterdam Rules, if finally ratified by a sufficient number of countries, will impact the international transportation of cargo by sea. While the Rotterdam Rules in many respects constitute a radical departure from the COGSA, it would not be inconceivable for courts to look to the case law developed under the COGSA in those instances where the two regimes share similar provisions or concepts. Undoubtedly, situations will develop which, notwithstanding the extensive amount of work which went into the drafting of the Convention, were not contemplated or considered and will require creative legal analysis and judicial resolution. And, as in all things related to admiralty and maritime law, tradition will be respected and uniformity will be pursued.
Complete Preemption Under the Railway Labor Act: Protecting Congressionally Created Grievance Arbitration Procedures

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Federal courts in the United States are courts of limited jurisdiction. Article III, Section 2 of the U.S. Constitution gives the judicial branch the power to decide cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority." In addition to this grant of jurisdiction, Congress has expressly authorized defendants to remove cases from state court to federal court in "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, trea-
ties or laws of the United States.”

The scope of this removal authority as it intersects with the doctrine of federal preemption has been the subject of much debate. Unfortunately, no “bright-line rule” exists for determining what cases “arise under” the Constitution, treaties or laws of the United States. The absence of a bright line rule has led to significant litigation. Removal cases require courts to apply the U.S. Supreme Court’s “well-pleaded complaint rule” and to determine if one of the exceptions to that rule—statutory preemption, field preemption, or complete preemption—provides a ground for federal court jurisdiction. The lack of a bright line rule has become particularly problematic for courts faced with determining whether cases that raise state law claims that involve the interpretation or application of labor agreements governed by the Railway Labor Act (“RLA”) are removable under principles of complete preemption.

Part I of this article sets forth the basic principles of removal jurisprudence and the origin of the conflicts arising under the well-pleaded complaint rule and its exceptions. Part II examines the history of the preemption doctrine and the scope of ordinary preemption versus complete preemption, including the U.S. Supreme Court’s recent analyses of complete preemption in Beneficial National Bank v. Anderson and Aetna Health Inc. v. Davila.

Part III discusses the historical application of the complete preemption doctrine in RLA cases, including the currently

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5. See Moss, supra note 4, at 1604.
8. 539 U.S. 1, 6-8 (2003).
10. The analytical application portions of this article focus solely on complete preemption involving cases impacting the interpretation or application of the terms of an RLA-governed collective bargaining agreement subject to the mandatory grievance and arbitration provisions of the RLA. The article does not deal with the line of complete preemption cases involving state claims that impliedly or expressly allege a violation of the RLA. Such claims are governed by Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), which expanded the preemption doctrine established in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239 (1959), to the RLA.
prevailing view that the RLA does not provide grounds for complete pre-
emption reflected in the Eleventh Circuit's decision in Geddes v. Ameri-
can Airlines, Inc.;\textsuperscript{11} the Third Circuit's decision in Railway Labor
Executives Ass'n v. Pittsburgh & Lake Erie Railroad;\textsuperscript{12} the Sixth Circuit's
decision in Roddy v. Grand Trunk Western Railroad;\textsuperscript{13} and the Second
Circuit's decision in Sullivan v. American Airlines.\textsuperscript{14} Part IV argues that
the Supreme Court's reasoning in Beneficial National Bank effectively
overruled Geddes and its progeny and that state law causes of action im-
pling collective bargaining agreement disputes under the RLA are
completely preempted. Finally, Part V provides additional considerations
weighing in favor of applying complete preemption to the RLA.

I. INTRODUCTION

When a plaintiff files a lawsuit in state court, one of the first things a
defendant normally does is evaluate whether or not the case can be re-
moved to federal court. For a case to be removed, the case must be one
that could have been filed initially in the federal court; that is, the federal
court would have had subject matter jurisdiction over the case had it been
filed in the federal court at the outset.\textsuperscript{15} To determine if a case falls
within the federal court's original jurisdiction, courts generally look no
further than the face of the complaint.

A. THE WELL-PLEADED COMPLAINT RULE: THE
ORIGIN OF THE CONTROVERSY

In 1908, the U.S. Supreme Court limited federal court jurisdiction
and the removal procedure to cases in which the basis for federal jurisdic-
tion appears on the face of the plaintiff's "well-pleaded complaint."\textsuperscript{16}
Under the well-pleaded complaint rule, a plaintiff is ordinarily the master

\begin{itemize}
  \item[11.] Geddes, 321 F.3d. at 1357.
  \item[12.] Pittsburgh & Lake Erie, 858 F.2d. at 943.
  \item[13.] Roddy, 395 F.3d at 326.
  \item[14.] 424 F.3d 267, 277 (2d Cir. 2005).
  \item[15.] Under the removal statute, 28 U.S.C. § 1441, \textit{et seq.}, a case that has been filed in state
court may be removed to federal court by filing a notice of removal in federal court, if the case
originally could have been brought in federal court under either diversity jurisdiction or federal
question jurisdiction. The notice of removal must be filed within thirty days following the ser-
vice of a facially removable complaint or within thirty days following any event that gives rise to
federal jurisdiction, such as the voluntary dismissal of non-diverse parties or an amended com-
plaint stating a federal claim, but in no event may a notice of removal based on diversity of
citizenship be properly filed more than one year following the filing of an initial complaint. 28
U.S.C. § 1446(b). With the exception of class actions, all defendants who have been served at
the time of the notice of removal must consent to the removal. Plaintiffs generally must object
to the removal by filing a motion to remand within thirty days of the notice of removal. 28
U.S.C. § 1447(c).
  \item[16.] Mottley, 211 U.S. at 153.
\end{itemize}
of his or her claim and has the power to determine whether a state or federal court should preside over the case. A defendant may remove a plaintiff's case from state court to federal court only if the face of the plaintiff's complaint establishes grounds for invoking the original jurisdiction of a federal court by satisfying the diversity requirement or by stating a federal question:

[Whether] a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

"For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law."

As with any general rule, however, the well-pleaded complaint doctrine is not without exception. The primary exception to the well-pleaded complaint rule is the artful pleading exception. That exception arises when a plaintiff attempts to draft a complaint to avoid naming a federal statute and thereby to avoid creating an express federal question over which a federal court would obviously have original jurisdiction. If the plaintiff fails to name a federal statute but the complaint is in actuality based on a federal statute, the federal court will have jurisdiction.

In other words, even if state law is the sole apparent source of a plaintiff's claims as determined from the face of a state court complaint, the "case might still 'arise under' the laws of the United States if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."

Consequently, "it is an independent corollary of the well-pleaded

19. Id. at 10 (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)).
20. Id. at 10-11 (citing Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974); Pan Am. Petroleum Corp. v. Super. Court, 366 U.S. 656, 663 (1961); and Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112 (1936)). See also Beneficial Nat'l Bank, 539 U.S. at 6 ("As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.").
complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint.” A plaintiff cannot avoid federal jurisdiction by crafting factual allegations purporting to support purely state-law causes of action when, in reality, the complaint is based on federal law.

When state causes of action have been removed to federal court, and the defendant thereafter seeks to dismiss the suit on ordinary preemption grounds, the convergence of the well-pleaded complaint rule, the artful-pleading exception, and complete preemption doctrines frequently presents a challenge to a judge dealing with a motion to remand the case to state court. When Congress has expressly decreed that federal courts shall have exclusive jurisdiction over a certain subject, and that state’s suit involves such subject, even if it contains only state-law claims, may be removed to federal district court, the result is clear. The complaint will be dismissed.

The result is much murkier, however, when Congress has not expressly provided for exclusive federal jurisdiction. In such cases, federal courts are left to guess about whether Congress so pervasively intended to preclude state court jurisdiction that it enacted a federal statute that “provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.” Such is the case with complaints that implicate the interpretation or application of a collective bargaining agreement governed by the RLA.

These cases are further complicated when the defendant seeks to have the federal court dismiss the complaint based on principles of “ordinary preemption.”

23. Id. at 22 (citing Avco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinist & Aerospace Workers, 376 F.2d 337, 339-40 (6th Cir. 1967)). See also Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987), superseded by statute, 29 U.S.C. § 1056 (2006) (“One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.”).


B. COMPLETE PREEMPTION VERSUS ORDINARY PREEMPTION:
THE SIMILARITIES FUEL THE CONTROVERSY

The complete preemption doctrine was first recognized by the Supreme Court in 1968 when the Court considered the preemptive effect of § 301 of the Labor Management Relations Act ("LMRA"). Since that time, other substantive areas of federal law have been slowly, and sometimes reluctantly, added to the mix. Lower courts have often struggled with application of the concept of complete preemption primarily due to its similarity to its closely related cousin: the doctrine of ordinary preemption.

Ordinary preemption is typically asserted as an affirmative defense to the merits of a state claim and may be invoked in either state or federal

LEXIS 1515, at *3-5 (9th Cir. Jan. 18, 2007); Carlson, 445 F.3d at 1049. As the Second Circuit noted: "The complete-preemption doctrine must be distinguished from ordinary preemption, also known as defensive preemption. . . . Many federal statutes - far more than support complete preemption - will support a defendant's argument that because federal law preempts state law, the defendant cannot be held liable under state law." Sullivan, 424 F.3d at 272-73 (internal citations omitted).


30. See Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974) (holding state claim regarding the right to possession of Indian tribal lands necessarily "arises under" several federal laws and treaties); Metro. Life. Ins. Co., 481 U.S. at 65-67 (holding state contract and tort claims completely preempted by the Employee Retirement Income Security Act of 1974); Beneficial Nat'l Bank, 539 U.S. at 11 (holding state law usury claims against national banks completely preempted by the National Bank Act). See also Hall v. N. Am. Van Lines, Inc., 476 F.3d 683, 688-89 (9th Cir. 2007) (holding 1906 Carmack Amendment to the Interstate Commerce Act of 1886 completely preempts state law claims for breach of an interstate shipping contract and for common law fraud and conversion); Miles v. Okun, 430 F.3d 1083, 1091 (9th Cir. 2005) (complete preemption of state tort claims by bankruptcy law); PCI Transp. Inc. v. Ft. Worth & W. R.R., 418 F.3d 535, 545 (5th Cir. 2005) (complete preemption under the Interstate Commerce Commission Termination Act of 1995); Hoskins v. Bekins Van Lines, 343 F.3d 769, 778 (5th Cir. 2003) (holding complete preemption under the Carmack Amendment to the Interstate Commerce Act); Briarpatch Ltd., LP v. Phoenix Pictures, Inc., 573 F.3d 296, 305 (2d Cir. 2004) (holding complete preemption under the Copyright Act); Lundeen v. Canadian Pac. Ry., 447 F.3d 606, 615 (8th Cir. 2006), vacated, 532 F.3d 683 (8th Cir. 2008), reh'g denied 532 F.3d 683 (8th Cir. 2008), superseded by statute, 49 U.S.C. § 20106(b) (2006) (holding complete preemption under the Federal Railroad Safety Act).

court as a ground for dismissing the plaintiff’s complaint. Under the well-pleaded complaint rule, however, an affirmative defense interposed by a defendant is not enough to give a federal court original jurisdiction, even in situations in which the defense shows it is “very likely, [that] in the course of the litigation, a question under the Constitution would arise . . . .”33 Put another way, “a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.”34

Ordinary preemption thus only provides grounds for dismissal in whatever court the lawsuit was initially filed. It does not provide a basis for removal jurisdiction.

In contrast, complete preemption is jurisdictional in nature and is not pleaded as an affirmative defense to a claim under state law. Complete preemption provides a procedural basis to remove a state court case to federal court even though no federal claim is pleaded or would be present if the complaint were well-pleaded. Complete preemption emanates from those areas of federal substantive law for which Congress or the courts have decreed that a federal law completely supplants state law, such that federal jurisdiction is created merely by pleading a state claim that implicates subject-matter of the federal statute.

32. “[O]rdinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court.” Blab T.V., 182 F.3d at 855. Ordinary or defensive preemption takes three common forms: express preemption, field preemption and conflict preemption. Express preemption occurs when Congress explicitly states that state law is preempted, such as § 514 of ERISA. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 106-08 (1983), abrogated by Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). Field preemption arises when Congress occupies the entire field, leaving no room for the operation of state law, such as the Natural Gas Act. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1985). See also Wis. Cent. Ltd. v. Shannon, 539 F.3d 751, 765 (7th Cir. 2008), aff’d 516 F. Supp. 2d 917 (N.D. Ill. 2007) (Adamson Act governing hours of service on railroads bars the states from regulating railroad overtime wages under field preemption analysis). Conflict preemption occurs when it is impossible for a party to comply with both federal and state law or where “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 373 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).


34. Gully v. First Nat’l Bank in Meridian, 299 U.S. 109, 116 (1936). See also Franchise Tax Bd., 463 U.S. at 14 (“[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of [ordinary] preemption, even if the defense is anticipated in the plaintiff’s complaint, and even if both parties admit that the defense is the only question truly at issue in the case.”).

35. The Second Circuit has opined that a more accurate term for complete preemption would be “jurisdictional preemption.” Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272 n.5 (2d Cir. 2005).
C. COMPLETE PREEMPTION UNDER THE RLA: A QUESTION AT THE FOREFRONT OF THE CONTROVERSY

Cases involving rail or air carrier collective bargaining agreement disputes subject to the RLA are one area in which the confusion between complete preemption and ordinary preemption reigns supreme. Under the RLA, disputes arising from the application or interpretation of collective bargaining agreements are termed “minor disputes” and fall within the exclusive jurisdiction of Congressionally created boards of adjustment. When a plaintiff files an action against a RLA carrier, and resolution of the case would require a court to interpret or apply the terms of a collective bargaining agreement, ordinary preemption dictates that neither a federal court nor a state court has jurisdiction to hear the case because of the preemptive effect of the exclusive and plenary jurisdiction of the boards of adjustment.

When a plaintiff sues a rail or air carrier in state court and pleads only state law causes of action that arguably require the application or interpretation of a collective bargaining agreement, the first question that typically arises is not whether the case should be dismissed under traditional principles of “ordinary” preemption. Clearly, if a case presents a “minor” dispute under the RLA, the case should be dismissed for resolution through the RLA’s mandatory arbitration provisions. In the large majority of such cases, rather than litigating the preemption issue in state court by a motion to dismiss, the defendant carrier attempts to remove the case to federal court on the grounds that the case is governed by the


RLA and, consequently, is completely preempted by federal law.\(^{40}\) Following removal, the question that arises in federal court, usually on a motion to remand to state court, is whether the federal court has jurisdiction in the first instance to determine if the particular dispute implicated by the state claim is a "minor" dispute under the RLA.\(^{41}\) If the RLA completely preempts state law, that answer is "yes," and the removing defendant has properly invoked the original jurisdiction of the federal court to decide the underlying preemption question.\(^{42}\)

Federal courts, however, are split on the question of whether the RLA gives rise to complete preemption.\(^{43}\) Based on the U.S. Supreme Court's 2003 decision in Beneficial National Bank v. Anderson,\(^{44}\) the history of the RLA, and notions of judicial fairness, this article argues the complete preemption doctrine should apply to cases involving RLA collective bargaining agreement disputes.

II. WHAT IS PREEMPTION?

Preemption is a judicially created doctrine "holding that certain matters are of such a national, as opposed to local, character that federal laws pre-empt or take precedence over state laws."\(^{45}\) Federal preemption arises "where federal law so occupies the field that state courts are pre-

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41. See Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1345 (7th Cir. 1986) ("Indeed, asking whether federal law provides a defense or occupies the field may just be another way of asking whether the issue of federal preemption shall be decided by a state or a federal court, and perhaps that question should be asked directly, without taking the essentially question-begging step of asking whether the federal statute occupies the field. If the federal statute is deemed merely to create a defense, the state court decides whether it is a good defense; if it is deemed to occupy the field, the federal court decides whether the plaintiff has a cause of action.").


44. 539 U.S. 1, 8-11 (2003).

45. BLACK'S LAW DICTIONARY 1060 (5th ed. 1979).
vented from asserting jurisdiction." 46 In short, preemption is "a court-created doctrine that gives Congress the ability to replace state laws in a particular area when this area falls within Congress’s authority under Article I" of the U.S. Constitution. 47

A. ORDINARY PREEMPTION VERSUS COMPLETE PREEMPTION—A CLOSER LOOK

If a case involves "ordinary" preemption, federal law provides the defendant with a substantive affirmative defense to the plaintiff's state law claims. The Supreme Court has summarized the doctrine of ordinary preemption as follows:

It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress’ intent to supersede state law altogether may be found from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 48

In essence, in cases involving ordinary preemption, the defense can argue the state court should dismiss the state law claims for failure to state a claim upon which relief could be granted because the only available remedy stems from a federal statute not invoked by the plaintiff. 49

Ordinary preemption merely provides a defense that can be raised by the defendant; it does not, under the well-pleaded complaint rule, pro-

46. Id. at 551.
vide a basis for removal jurisdiction.\textsuperscript{50}

Complete preemption, in contrast, is not an affirmative defense. Instead, complete preemption is a jurisdictional principle the defendant can use to remove purportedly state law claims to federal court on the grounds the case "arises under" federal law.\textsuperscript{51} After removal, a federal court can then determine whether (1) the case should be dismissed based on the principles of ordinary preemption, (2) leave should be granted for the plaintiff to re-plead his or her claims invoking the appropriate federal law or seeking the appropriate federal remedy, or (3) the case should be remanded to state court for lack of federal jurisdiction.\textsuperscript{52}

As a practical matter, the real distinction between principles of "ordinary" preemption and "complete" preemption is not the ultimate question of whether the plaintiff can state a claim under state law in the face of a potentially conflicting federal statute. Instead, the true distinction turns on which court—federal or state—has the opportunity to decide whether the plaintiff has stated a viable state law claim:\textsuperscript{53}

\begin{itemize}
\item \textbf{[A]} federal law may substantively displace state law under ordinary preemption but lack the extraordinary force to create federal removal jurisdiction under the doctrine of complete preemption. If no other grounds for federal jurisdiction exist in such cases, then it falls to the state courts to assess the merits of the ordinary preemption defense.\textsuperscript{54}
\end{itemize}

If a federal statute completely preempts state law, a federal court has jurisdiction to determine whether the case should be dismissed under principles of ordinary preemption.\textsuperscript{55} If the federal statute does not com-

\begin{itemize}
\item \textsuperscript{52} Under the RLA, of course, the appropriate federal remedy is arbitration thus requiring a district court to dismiss the suit entirely or, in the alternative, refer the case to arbitration and retain jurisdiction for award enforcement purposes. \textit{See, e.g.}, Miller v. Am. Airlines, Inc., 525 F.3d 520, 524-25 (7th Cir. 2008) (affirming grant of summary judgment for employer after district court referred case to arbitration as a "minor dispute").
\item \textsuperscript{53} As discussed in more detail below, the deciding court is often outcome-determinative. \textit{See also} Burt Neuborne, \textit{The Myth of Parity}, 90 HARV. L. REV. 1105 (1977) (arguing that the choice of forum between state and federal court is often outcome-determinative).
\item \textsuperscript{54} Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1353 (11th Cir. 2003).
\item \textsuperscript{55} See Levine v. United Healthcare Corp., 402 F.3d 156, 159-67 (3d Cir. 2005) (holding...
pletely preempt the state claim, the claim’s viability remains in the hands of the state court.56

B. EVOLUTION OF THE COMPLETE PREEMPTION DOCTRINE IN THE U.S. SUPREME COURT

“Determining whether a state law claim is completely preempted turns on Congressional intent.”57 In the thirty-seven years since the U.S. Supreme Court’s first “complete preemption” case,58 the question of what Congressional intent warrants complete preemption remains unsettled. With each new complete preemption case in the absence of Congress’ “express” complete preemption,59 the Supreme Court’s standard continues to evolve.

1. Congressional Intent to Completely Preempt an Area of Law: Avco Corp. v. Machinists Aero Lodge No. 735 – In Avco, Avco Corporation and Aero Lodge No. 735 were parties to a collective bargaining agreement covering the production and maintenance workers at Avco’s Nashville plant.60 The collective bargaining agreement contained a “no strike” clause, prohibiting bargaining unit employees from striking during the life of the contract. Despite the no-strike pledge, union workers nevertheless engaged in a series of work disruptions and, eventually, a plant-wide strike.

Avco Corp. filed an action in the Chancery Court for Davidson County, Tennessee,61 against Aero Lodge to enjoin the union’s strike and enforce the terms of the collective bargaining agreement. The Tennessee state court issued an ex parte injunction against the union and the union subsequently removed the action to the Middle District of Tennessee.62 The district court ruled that “all claims founded upon collective bargaining agreements in industries affecting interstate commerce arise under federal law” and, therefore, fell within the original jurisdiction of the fed-

state law subrogation claims completely preempted by ERISA giving federal court jurisdiction and affirmed district court’s dismissal of case based on principles of ordinary preemption).

56. See Lontz v. Tharp, 413 F.3d 435, 442-44 (4th Cir. 2005) (holding wrongful discharge claim was not completely preempted by National Labor Relations Act, but expressing no view on whether claims were preempted on the merits by federal labor law because ordinary preemption is a question for the state court to resolve).


59. See supra text accompanying note 30.


61. Id.

The district court then granted the union’s motion to dissolve the state court injunction; a decision that was affirmed on appeal by the Sixth Circuit.

The U.S. Supreme Court granted the petition for certiorari to decide whether a claim under a collective bargaining agreement is a claim “arising under the ‘laws of the United States’ within the meaning of the removal statute.” The Supreme Court held that such claims fall within the original jurisdiction of the federal courts and are, therefore, removable under 28 U.S.C. § 1441.

Although the Avco petitioner only pleaded a claim for relief under state law and only sought a state law remedy, the court found the claim arose under § 301 of the LMRA. Relying on the 1957 decision in Textile Workers Union v. Lincoln Mills of Alabama, the Supreme Court held that claims involving collective bargaining agreements (in private industries other than rail and air) are controlled by federal substantive law; the remedies available arise solely under federal law; and state law cannot create “an independent source of private rights” in this area. As such, claims under a LMRA collective bargaining agreement arise under the laws of the United States and are removable.

While the reasoning underlying Avco is less than clear from the language of the original opinion, the Court later explained the Avco holding in Franchise Tax Board v. Construction Laborers Vacation Trust:

The necessary ground [for the Avco] decision was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action “for violation of contracts between an employer and a labor organization.” Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. Avco stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope

64. Avco Corp. v. Machinists Aero Lodge No. 735, Int’l Ass’n of Machinists & Aerospace Workers, 376 F.2d 337, 339-43 (6th Cir. 1967).
66. Id. at 560-62.
67. Avco Corp., 376 F.2d at 339-41.
68. Id. at 343.
70. 353 U.S. 448 (1957).
71. Avco Corp., 390 U.S. at 559-60.
of the federal cause of action necessarily "arises under" federal law.\textsuperscript{74}

2. Congressional Intent to Create a Federal Cause of Action: Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California – In Franchise Tax Board, a California tax board filed suit in the Superior Court of Los Angeles County to enforce tax levies issued against funds held in trust by the Construction Laborers Vacation Trust for taxpayers who were delinquent in their state income tax payments.\textsuperscript{75} The trust removed the case to the United States District Court for the Central District of California on the grounds that the case was preempted by the Employee Retirement Income Security Act ("ERISA"),\textsuperscript{76} and the tax board moved to remand.\textsuperscript{77} The district court denied remand holding that the state tax levy was not preempted by ERISA.\textsuperscript{78} The Ninth Circuit reversed.\textsuperscript{79}

Recognizing the importance of the issue between the parties, namely whether ERISA "permits state tax authorities to collect unpaid state income taxes by levying on funds held in trust for the taxpayers under an ERISA-covered vacation benefit plan,"\textsuperscript{80} the Court determined that the federal district court lacked jurisdiction in the first instance to decide the ERISA-related issue and thus held that the case was improvidently removed from state court.\textsuperscript{81}

In its analysis of the propriety of removal, the Court first noted that the original complaint included two causes of action: the first was a claim under California's tax code to enforce a tax levy and the second claim sought a declaration of the parties' respective rights under California's Declaratory Judgment Act.\textsuperscript{82} The Court further noted that:

\[\text{The "law that creates the cause of action" is state law, and original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is "really" one of federal law.}\textsuperscript{83}

In determining whether the two causes of action were questions of
federal law dressed as state law claims, the Court examined whether ei-
ther claim required "resolution of a substantial question of federal law . . . ."84 With respect to the appellant's claim to enforce the state tax levy, the Court held the well-pleaded complaint rule precluded federal jurisdiction because "California law establishes a set of conditions, with-
out reference to federal law, under which a tax levy may be en-
forced . . . ."85 Consequently, "federal law becomes relevant only by way of a defense to an obligation created entirely by state law . . . ."86 A defense, even the defense of preemption, is not grounds for removal.87

The tax board's second claim—"[t]hat the court declare defendants legally obligated to honor all future levies by the Board upon" the trust88—was more problematic for the Court because, even though the tax board had anticipated the defendants' ERISA-preemption defense, the question of ERISA preemption was nonetheless a "necessary ele-
ment" of the appellant's state law-based declaratory judgment claim.89 In
the declaratory judgment claim, "the only question[s] in dispute" was the
rights and duties of the trust fund's trustees under ERISA.90 Consequ-
ently, the face of the complaint evidenced that the plaintiff could not
obtain the relief it sought "without a construction of ERISA and/or an
adjudication of its pre-emptive effect and constitutionality—all questions of federal law."91

The Court noted that ERISA grants trustees of ERISA plans the
right to petition a federal court for injunctive relief when the trustees' "rights and duties under ERISA are at issue."92 Thus, if the trustees had
brought suit for declaratory judgment to determine if they were allowed to pay the tax levy under ERISA, the suit clearly would have arisen under federal law.93 Nevertheless, because the "express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties" rather than "suit[s] against such parties,"94 the "[s]tate's suit for a declaration of the validity of state law is sufficiently removed" from the question of fed-
eral law that original jurisdiction is not appropriate in federal court.95

The trustees argued "that ERISA, like § 301, was meant to create a

84. Id.
85. Id.
86. Id. at 13.
87. Id. at 13-14.
88. Id. at 14.
89. Id.
90. Id.
91. Id.
92. Id. at 19-20.
93. Id.
94. Id. at 21.
95. Id. at 21-22.
body of federal common law, and that 'any state court action which would require the interpretation or application of ERISA to a plan document 'arises under' the laws of the United States.'\textsuperscript{96} The Supreme Court rejected the trustees' argument. Noting that ERISA contains "a series of express causes of action" for specific parties involved in ERISA-covered plans (namely, participants, beneficiaries and fiduciaries), the Court found that the state causes of action filed by the Franchise Tax Board did not come within any of ERISA's specific causes of action.\textsuperscript{97} The state's suit was not brought by a participant, beneficiary or fiduciary and, therefore, did not "arise under" ERISA.\textsuperscript{98}

Moreover, the Court reasoned that, unlike § 301 of the LMRA, § 514(b)(2)(A) of ERISA\textsuperscript{99} clearly states that ERISA is not designed to preempt every state cause of action relating to ERISA-covered plans.\textsuperscript{100} The Court also noted that § 301 created a federal remedy for the Avco plaintiff, while ERISA did not supply the Franchise Tax Board with a "federal cause of action to replace" the pre-empted state claims.\textsuperscript{101} Consequently, because ERISA did not create a federal cause of action for the claims at issue, the Court held that the state's suit did not "arise under" federal law for purposes of removal.\textsuperscript{102}

Thus, the Franchise Tax Board decision required the lower courts to evaluate whether Congress intended to create a federal cause of action for the particular claims at issue as the predicate for complete preemption. Arguably, Franchise Tax Board also required lower courts to evaluate whether the federal statute at issue created a federal remedy for the plaintiff's alleged injury.

3. Congressional Intent to Permit Removal: Metropolitan Life Insurance Co. v. Taylor – In 1987, the U.S. Supreme Court revisited the question of complete preemption under ERISA.\textsuperscript{103} In Metropolitan Life, Arthur Taylor was a salaried engineering analyst for General Motors

\begin{itemize}
\item \textsuperscript{96} Id. at 24 (quoting Br. for Appellees 20-21).
\item \textsuperscript{97} Id. at 24-25.
\item \textsuperscript{98} Id. at 26-27.
\item \textsuperscript{100} Franchise Tax Bd., 463 U.S. at 25. "[N]othing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities." Id. at 26 (quoting 29 U.S.C. § 1144 (2009) (codified with some differences in language at 29 U.S.C. § 1144(b)(2)(A))). "Unlike the contract rights at issue in Avco, the State's right to enforce its tax levies is not of central concern to the federal statute." Franchise Tax Bd., 463 U.S. at 25-26.
\item \textsuperscript{101} Id. at 26. "[E]ven though the Court of Appeals may well be correct that ERISA precludes enforcement of the State's levy in the circumstances of this case, an action to enforce the levy is not itself preempted by ERISA." Id.
\item \textsuperscript{102} Franchise Tax Bd., 463 U.S. at 27-28.
Complete Preemption Under the RLA

Corporation ("GM"). During the course of his employment, Taylor took a leave of absence for severe emotional problems. Initially, Metropolitan Life Insurance Co. ("Met Life") paid Taylor disability benefits under a GM employee benefit plan, but required Taylor to submit to periodic psychiatric examinations to determine continued eligibility for benefits. After Met Life's designated psychiatrist determined Taylor could return to work, Met Life ceased paying benefits. Taylor then sought the continuation of disability benefits based on a physical impairment, but benefits were again denied following a medical examination in which an orthopedist determined no medical problem precluded Taylor's return to work. Nevertheless, Taylor refused to return to work and he eventually was terminated by GM as a "voluntary quit."

Taylor sued GM and Met Life in Wayne County, Michigan, Circuit Court alleging Met Life breached its insurance contract by refusing to award Taylor disability benefits. Taylor sought "compensatory damages for money contractually owed Plaintiff, compensation for mental anguish caused by breach of this contract, as well as immediate reimplementation of all benefits and insurance coverages Plaintiff is entitled to." GM, with the concurrence of Met Life, removed the case to the Eastern District of Michigan alleging federal question jurisdiction stemming from the claim for benefits from an ERISA plan. The district court found the case properly removable and granted summary judgment to GM and Met Life on the merits. The Sixth Circuit reversed, holding that the district court lacked removal jurisdiction because the face of Taylor's complaint stated only state law causes of action to which ERISA preemption was merely a defense.

The U.S. Supreme Court granted certiorari and reversed. The issue before the Court was "whether or not the Avco principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by [ERISA] § 502(a)(1)(B) as an action arising under federal law." The Court held that Taylor's suit, which on its face

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were preempted by ERISA under principles of "ordinary" preemption and also decided on the same day as Metro. Life Ins. Co.).

105. Id. at 60-61.
107. Id. at 563.
111. Id. at 61-62.
112. Id. at 62 (citing Taylor v. Gen. Motors Corp., 763 F.2d 216 (6th Cir. 1985)).
113. Id. at 62.
114. Id. at 64.
stated only state law claims for breach of contract, was different from the state tax collection suit at issue in *Franchise Tax Board*. Unlike the issues in *Franchise Tax Board* for which no ERISA corollary existed, Taylor's suit was a suit by a beneficiary to recover benefits from an ERISA plan and, therefore, a suit directly within the provisions of ERISA § 502(a)(1)(B), "which provides an exclusive federal cause of action for resolution of such disputes." The Court noted "the policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."

Relying on the similarities in the jurisdiction language in § 301 of the LMRA and ERISA § 502 and the legislative history of ERISA, the Court found a "clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for purposes of federal court jurisdiction in like manner as § 301 of the LMRA." Rejecting various arguments raised by Taylor, the Supreme Court opined that "the touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress." Specifically, in ERISA Congress "clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court."

Thus, in *Metropolitan Life*, the Supreme Court shifted from the *Franchise Tax Board*’s focus on intent to create a federal cause of action to a Congressional manifestation of the intent to make causes of action "removable."

4. **Congressional Intent to Provide a Federal Remedy is not Required for Removal: Caterpillar Inc. v. Williams** – Two months after the Taylor decision, the U.S. Supreme Court released its decision in *Caterpillar*. The plaintiffs in *Caterpillar* were employees initially hired into the collective bargaining unit of Caterpillar Tractor Company ("Caterpillar"). Each of the plaintiffs moved into managerial positions outside the scope of the collective bargaining agreement. During their tenure as managers, the tractor company allegedly promised them lifetime employment and

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115. *Id.* at 62-63.

116. *Id.* at 64-65 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) ("ordinary" preemption case in which the Court ruled ERISA preempted state law tort claims)). See also *Valles v. Ivy Hill Corp.*, 410 F.3d 1071 (9th Cir. 2005).


118. *Id.* (emphasis added).

119. *Id.* (emphasis added). The Court’s reasoning is interesting because it seemingly ignores the argument that the state court will dismiss an exclusively federal claim on ordinary preemption grounds.

transfers to other Caterpillar facilities if the company ever closed its doors. After these promises were made, each of the plaintiffs was demoted back into the bargaining unit. When the facility closed, the plaintiffs were all discharged pursuant to the terms of the applicable collective bargaining agreement.\textsuperscript{121}

The plaintiffs sued in California state court alleging "breach of an employment contract, breach of a covenant of good faith and fair dealing, intentional infliction of emotional distress, and fraudulent misrepresentation" under California state law.\textsuperscript{122} Caterpillar removed the suit to the Northern District of California arguing the plaintiffs’ breach of contract claims were completely preempted by § 301 of the LMRA.\textsuperscript{123} The district court ruled removal was proper and dismissed the case when the plaintiffs refused to amend their complaint to state a claim under § 301.\textsuperscript{124} The Ninth Circuit reversed, holding that the plaintiffs’ claims were not based on any alleged breach of a collective bargaining agreement and resolution of the individual employment contract claims did not require interpretation of a collective bargaining agreement.\textsuperscript{125} Therefore, the plaintiffs’ breach of individual contract claims did not fall within the scope of § 301.\textsuperscript{126} The U.S. Supreme Court granted certiorari and affirmed the decision of the Ninth Circuit.\textsuperscript{127}

The issue before the Court was whether a complaint alleging only state common-law breach of individual employment contract claims was completely preempted by § 301 of the LMRA if the claims are asserted by employees who also possess rights under a collective bargaining agreement.\textsuperscript{128} The Court held:

\begin{quote}
[T]he presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.\textsuperscript{129}
\end{quote}

\textsuperscript{121} Id. at 389.
\textsuperscript{122} Williams v. Caterpillar Tractor Co., 786 F.2d 928, 930 (9th Cir. 1986), aff’d sub nom. Caterpillar Inc. v. Williams, 482 U.S. 386 (1987).
\textsuperscript{123} Caterpillar contended “that removal was proper because any individual employment contracts made with respondents ‘were, as a matter of federal substantive labor law, merged into and superseded by the . . . collective bargaining agreements.’” Caterpillar Inc., 482 U.S. at 390 (quoting Pet. for Removal, App. A-36).
\textsuperscript{124} Id.
\textsuperscript{125} Williams, 786 F.2d at 935-36.
\textsuperscript{126} Id.
\textsuperscript{127} Caterpillar Inc., 482 U.S. at 391.
\textsuperscript{128} Id. at 388.
\textsuperscript{129} Id. at 398-99.
Consequently, if a plaintiff alleges entitlement to a right created by a collective bargaining agreement, "the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option." \[130\] Where, however, the plaintiff chooses not to enforce a right under a collective bargaining agreement and, instead, seeks enforcement of rights existing outside a collective bargaining agreement, removal is improper.\[131\] Thus, under the reasoning of Franchise Tax Board, the plaintiffs' individual employment contract claims were not removable because the state cause of action did not fall within the scope of the federal cause of action under § 301.\[132\]

The Caterpillar decision did clarify one point of law left open by Franchise Tax Board: the Court expressly rejected any requirement that the federal cause of action on which removal is based provide the plaintiff with a remedy.\[133\] The Court noted that "[t]he nature of the relief available after jurisdiction attaches is . . . a distinct question from whether the court has jurisdiction over the parties and the subject matter."\[134\]

Because the Caterpillar Court drew on both Franchise Tax Board and Metropolitan Life, but failed to discuss fully the standards enunciated in those decisions, lower courts were left to their own devices in deciding whether to search for a congressional intent to create a federal cause of action under Franchise Tax Board or a congressional intent to permit removal under Metropolitan Life. The result was a distinct split in the circuits, particularly in cases seeking complete preemption under the RLA.\[135\]

5. Congressional Intent to Create an Exclusively Federal Cause of Action: Beneficial National Bank \[v.\] Anderson — In Beneficial National Bank, Marie Anderson and 25 other customers sued Beneficial National Bank ("Beneficial") in the Circuit Court of Barbour County, Alabama, alleging that the bank's interest rates were usurious under "the common law usury doctrine" and an Alabama usury statute.\[136\] No federal claims were made in the state law complaint and only state law remedies were

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130. Id. at 399.
131. Id.
132. Id. at 393-95, 399.
133. Id. at 391 n.4. Cf. Aetna Health Inc. \[v.\] Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J. concurring) (advocating revisiting the breadth of ERISA preemption because "'virtually all state law remedies are preempted but very few federal substitutes are provided'" (quoting DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 456 (3d Cir. 2003))).
134. Caterpillar Inc., 482 U.S. at 391 n.4 (quoting Avco Corp. \[v.\] Aero Lodge No. 735, Int'l Ass'n of Machinists \& Aerospace Workers, 390 U.S. 557, 561 (1968)).
135. See Sullivan \[v.\] Am. Airlines, 424 F.3d 267, 278 n.9 (2d Cir. 2005) (collecting cases).
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sought by the plaintiffs. Nevertheless, Beneficial and the other defendants removed the case to the Middle District of Alabama “based upon the presence of a federal question through complete pre-emption under the National Bank Act.” Beneficial argued that the National Bank Act is the exclusive provision governing the rate of interest that a national bank may lawfully charge, that the rates charged to respondents complied with that provision, that [the Act] provides the exclusive remedies available against a national bank charging excessive interest,” and, therefore, removal under 28 U.S.C. § 1441 was appropriate.

The Middle District of Alabama agreed with Beneficial and denied Anderson’s motion to remand the case to state court. The Eleventh Circuit reversed, holding that the “well-pleaded complaint” rule prohibited removal “unless the complaint expressly alleges a federal claim and the “complete preemption doctrine” did not apply because there was “no clear congressional intent to permit removal” in the National Bank Act.

The U.S. Supreme Court granted certiorari to resolve the conflict between the Eleventh Circuit’s decision and the Eighth Circuit’s decision in Krispin v. May Dept. Stores Co. which found complete preemption under the National Bank Act. The question before the Court was “whether an action filed in a state court to recover damages from a national bank for allegedly charging excessive interest in violation of both ‘the common law usury doctrine’ and an Alabama usury statute may be removed to a federal court because it actually arises under federal law.” Answering the question in the affirmative, the U.S. Supreme Court held that the National Bank Act did completely preempt state law usury claims because federal law definitively defines what constitutes usury by a national bank and created a federal cause of action that was exclusive; thereby precluding any state-law claim of usury against a national bank.

138. The plaintiffs also sued H&R Block, Inc. and Beneficial Tax Masters, Inc., the tax preparation services that arranged for the loans to the plaintiffs. Anderson, 132 F. Supp. 2d at 949.
139. Id. at 949-950.
142. Beneficial Nat’l Bank, 539 U.S. at 4-5.
143. Id. at 5.
145. Anderson, 287 F.3d at 1048.
147. Id. at 3-4.
tional bank. As a result, the National Bank Act provides an exclusive federal remedy for usury such that any cause of action for usury brought against national banks "only arises under federal law."149

In reaching the conclusion that the preemption doctrine applies to state law actions against national banks, the Court carefully examined the interplay between the "well-pleaded complaint" rule and removal of claims "arising under" federal law. The Court noted that under the "well-pleaded complaint" rule: "absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." Exceptions to the well-pleaded complaint rule arise when Congress expressly pre-empts state law claims in a federal statute or "when a federal statute wholly displaces the state-law cause of action through complete pre-emption."153

"When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that [statute], even if pleaded in terms of state law, is in reality based on federal law." In analyzing whether the National Bank Act completely preempted state law usury claims, the Court noted that the two statutes the Court previously had held completely preempted state law (the LMRA and ERISA), "provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action."155

To determine if a federal law, such as the National Bank Act, provides "the exclusive cause of action," the Court directed lower courts to focus "on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." Recognizing the "special nature of federally chartered banks" and the need for "[u]niform rules limiting the liability of national banks," the Court found that the provisions of the National

148. Id. at 11.
149. Id.
150. Id. at 6.
154. Id. at 8.
155. Id. (citing 29 U.S.C. § 1132 (2009) (setting forth procedures and remedies for civil claims under ERISA) and 29 U.S.C. § 185 (describing procedures and remedies for suits under the LMRA)).
156. Id. at 9.
157. Id. at 9 n.5.
Bank Act "supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law." Thus, because the National Bank Act provided the "exclusive cause of action for such claims," they were removable as arising under federal law.

6. Integrated System of Procedures for Enforcement: Aetna Health Inc. v. Davila – In 2004, the United States Supreme Court again visited the question of complete preemption under ERISA. The Court focused on ERISA's "integrated system of procedures for enforcement," finding that system to be "a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans." The Court found "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."

III. Application of the Complete Preemption Doctrine in Cases Involving the Railway Labor Act

A. Brief History of the RLA

The history of railroads at the end of the nineteenth century is filled with labor strife. The Great Strikes of 1877 and the Pullman Strike of 1894 are among some of the country's best known and most violent examples of labor-relations at its worst. Between 1881 and 1905, there were 509 rail strikes that idled 218,393 workers. Because the primary means of moving people and goods from one place to another was the rails, each work stoppage had a direct impact on the economic stability of the

159. *Id.* at 11.
160. *Id.*
163. *Id.*
164. *Id.* at 208-09. If, however, there are rights independent of the ERISA plan, a state claim will not be preempted. Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health and Welfare Trust Fund, 538 F.3d 594, 601 (7th Cir. 2008) (rejecting complete preemption under ERISA in negligent misrepresentation suit brought by medical provider against health plan).
165. The overview of the basic requirements of the RLA is based upon the 1926 Act and subsequent amendments. This article does not attempt to delineate which of the current RLA provisions are original to the 1926 Act and which arose in subsequent amendments. See Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 372 U.S. 682, 685-89 (1963) (outlining some of the changes made to the RLA in subsequent amendments).
Consequently, the U.S. Congress passed a series of laws designed, at least in part, to relieve the labor-relations pressures in the railroad industry. The Congressional efforts culminated in the passage of the Railway Labor Act in 1926, which "followed a half-century of worker agitation, social turmoil and congressional experimentation." The Act was the first legislation—federal or state—to guarantee workers the right to organize, bargain collectively through employee-chosen representatives, and freedom from employer interference. "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." The Act has as its basic premise that “[t]he nation cannot tolerate a work stoppage that threatens to deprive any section of the country of essential transportation services." To this end, Section 1 of the Act sets forth five basic purposes:

1. To avoid any interruption to commerce;
2. To ensure an unhindered right of employees to join a labor union;
3. To provide complete independence of organization by both parties to carry out the purposes of the RLA;
4. To assist in the prompt and orderly settlement of disputes covering rates of pay, work rules, or working conditions; and
5. To assist in the prompt and orderly settlement of disputes growing out of grievances or out of the interpretation or application of existing contracts covering the rates of pay, work rules or working conditions.

The current language of Section 2 propounds the duties of both the carrier and employees under the Act, extolling both sides to "exert every reasonable effort to make and maintain agreements... to avoid any interruption to commerce or to the operation of any carrier growing

167. Id. "During the Pullman strike of 1894, the Chicago Daily Tribune warned that a paralysis of the railroads would return the nation to 'very wretched and primitive conditions' and 'cut down to zero the earning power of the whole people.'" (quoting How the Strike Could be Quickly Settled, CHI. DAILY TRIB., July 6, 1894, at 6)).
171. Wilner, Part II, supra note 168, at 131 (noting, however, that "[r]ailroad strikes no longer threaten intolerable economic dislocations.").
out of any dispute between the carrier and the employees thereof.\footnote{175} Sections 3\footnote{176} and 4\footnote{177} then create two mechanisms designed to assist carriers and employees in fulfilling their statutory duties to settle disputes without interrupting commerce: the National Railroad Adjustment Board and the National Mediation Board.

In \textit{Burley},\footnote{178} the U.S. Supreme Court adopted the vocabulary used by rail management and labor to distinguish between the two types of disputes governed by Section 2 of the RLA: major and minor disputes. A major dispute arises under Sections 2 Seventh and 6 of the RLA and concerns the formation of collective bargaining agreements or attempts to amend or modify provisions of those agreements.\footnote{179} In contrast, minor disputes are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation"\footnote{180} and arise from Sections 2 Sixth and 3 First, "which set forth conference and compulsory arbitration procedures for a dispute arising or growing ‘out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.’"\footnote{181} In short, "major disputes seek to create contractual rights, minor disputes to enforce them."\footnote{182}

Settlement of major disputes requires the parties "to undergo a lengthy process of bargaining and mediation."\footnote{183} If the parties cannot reach an agreement through the normal collective bargaining process, the dispute may then be mediated under the auspices of the National Mediation Board. If the mediator determines the parties are "hopelessly deadlocked," the National Mediation Board will declare impasse and proffer binding arbitration, which either party may reject. If arbitration is rejected, the parties begin a 30-day "cooling off" period during which neither side may utilize self-help. If no agreement is reached during the cooling-off period, the National Mediation Board can notify the President of the United States of a possible threat to commerce and the President may appoint a Presidential Emergency Board ("PEB") to review the stalemate and make recommendations for resolving the stalemate. If the President fails to appoint a PEB or a party rejects the recommendations

\footnotesize{\begin{itemize}
\item 175. 45 U.S.C. § 152 at First (2009).
\item 181. \textit{Consol. Rail Corp.}, 491 U.S. at 303.
\item 182. \textit{Id.} (citing \textit{Burley}, 325 U.S. at 723-724).
\item 183. \textit{Id.} at 302.
\end{itemize}}
of the PEB, the union is free to strike and the carrier may implement the provisions of its Section 6 notices and other proposals discussed during bargaining. However, the U.S. Congress has the power under the Commerce Clause to the Constitution to intervene and either resolve the dispute through legislation or create additional dispute resolution procedures.\textsuperscript{184} Until the parties have exhausted the major dispute procedures, they must maintain the status quo and changes to rates of pay, rules, or working conditions may not be made.\textsuperscript{185} Federal district courts have subject matter jurisdiction to enjoin violations of the status quo pending completion of the required bargaining and mediation.\textsuperscript{186}

In contrast, settlement of minor disputes is governed by the Act's conference and compulsory arbitration procedures.\textsuperscript{187} In the railroad industry, minor disputes not settled by the parties "on property" are subject to compulsory, binding arbitration before the National Railroad Adjustment Board\textsuperscript{188} or before a "system board of adjustment" or "public law board" voluntarily established by the employer and union.\textsuperscript{189} PLB's are mandatory after the grievance has been pending for a year. In the airline industry, minor disputes are resolved by adjustment boards created by the individual airlines and representative unions, akin to the "system board of adjustments" in the railroad industry.\textsuperscript{190}

In both industries courts do not have subject matter jurisdiction to decide cases involving minor disputes.\textsuperscript{191} Judicial review of the arbitration decisions made by adjustment boards is limited.\textsuperscript{192} Courts have au-

\textsuperscript{184} See Transport Workers Union of Am. Local 567, Major Dispute Resolution Process, http://twu567.org/uploadpages/brglnrla.htm (outlining bargaining process and providing convenient flow chart explanation of major dispute resolution under the RLA).

\textsuperscript{185} Consol. Rail Corp., 491 U.S. at 302-303.


\textsuperscript{188} Lloyd K. Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567, 567 (1937) ("The National Railroad Adjustment Board... is... the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts.").


\textsuperscript{190} Int'l Ass'n of Machinists & Aerospace Workers v. US Airways, Inc., 358 F.3d 255, 260 (3rd Cir. 2004).


\textsuperscript{192} See Consol. Rail Corp., 491 U.S. at 304 (citing Union Pac. R.R. v. Sheehan, 439 U.S. 89, 93 (1978); Bradley, 2004 U.S. App. LEXIS at 502 (calling review of arbitration decisions under the RLA "among the narrowest known to law") (quoting Pokuta v. Trans World Airlines, Inc., 191 F.3d 834, 839 (7th Cir. 1999) (quoting Union Pac. R.R., 439 U.S. at 91))); Cont'l Airlines, Inc. v. Int'l Bd. of Teamsters, 391 F.3d 613, 617 (5th Cir. 2004);
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authority to enjoin strikes arising out of minor disputes, but this authority is designed to assure compliance with the Act’s mandatory arbitration procedures. Thus the statute is designed to keep most railroad and airline labor disputes out of the court system entirely.

The U.S. Supreme Court has recognized that, to some extent, “the distinction between major and minor disputes is a matter of pleading. The party who initiates a dispute takes the first step towards categorizing the dispute when it chooses whether to assert an existing contractual right to take or to resist the action in question.”

A long line of court decisions have held that the grievance arbitration procedure is the exclusive procedure for resolving minor disputes and that recourse is mandatory. The RLA establishes a detailed, mandatory dispute resolution process that virtually eliminates the rights of the parties to seek relief in court and dictates what relief is available to the parties.

One could logically conclude that this comprehensive, federally-created process would be seen as evidence of Congressional intent completely to displace state court actions, thereby creating an action that arises solely under federal law. One could also logically conclude that it should be exclusively the province of the federal courts to determine the character of a dispute between the employer, and the employees and their representatives. In many instances a dispute is prompted by a disagreement over the interpretation or application of a collective bargaining

Nachtsheim v. Cont’l Airlines- Int’l Ass’n of Mechanists and Aerospace Workers, 2004 U.S. App. LEXIS 20612, at 4-5 (3rd Cir. 2004); Robinson v. Union Pac. R.R., 245 F.3d 1188, 1193 (10th Cir. 2001) (“even if we were inclined to disagree with the [adjustment] Board’s interpretation of the applicable provisions of the collective bargaining agreement,” the scope of review of the award does not permit the court to make this interpretation).

193. Trainmen, 353 U.S. at 39-40; Bhd. of Maint. Way Employees v. CSX Transp., Inc., 2005 U.S. App. LEXIS 13217 (11th Cir. 2005); Airline Prof’ls Ass’n, Teamster Local Union 1224 v. ABX Air, Inc., 400 F.3d 411, 415 (6th Cir. 2005); CSX Transp., Inc. v. United Transp. Union, 395 F.3d 365, 368-369 (6th Cir. 2005); Nat’l R.R. Passenger Corp. v. Transp. Workers Union of Am., 373 F.3d 121, 125 (D.C. Cir. 2004); Burlington N. & Santa Fe R.R. v. Bhd of Locomotive Eng’rs., 367 F.3d 675, 679 (7th Cir. 2004) (“A federal court may enjoin a labor strike arising out of a minor dispute in order to assure compliance with the mandatory arbitration procedures of the RLA, notwithstanding the anti-injunction section of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-105.”); see Bhd. of R.R. Signalmen v. Burlington N. R.R., 829 F.2d 617, 619 (7th Cir. 1987) (observing whether a dispute constitutes a major or minor dispute is a frequently litigated issue and has led to a substantial body of federal court decisions); see, e.g., Consol. Rail Corp., 491 U.S. at 304.


195. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1354 (11th Cir. 2003) (“This comprehensive framework establishes a system of adjustment boards with exclusive and mandatory jurisdiction to handle minor disputes . . . thus keeping them out of courts altogether”), cert. denied, Am. Airlines, Inc. v. Geddes, 2003 U.S. LEXIS 7447, at *1 (2003); e.g., Kozy v. Wings W. Airlines, Inc., 89 F.3d 635, 639 (9th Cir. 1996) (stating arbitration boards “are the mandatory, exclusive, and comprehensive system for resolving grievance disputes.”).
agreement (a minor dispute) and therefore a case that must be sent to mandatory arbitration. In other instances, the dispute is an effort to change the status quo (a major dispute) for which an injunction can issue to preserve the status quo pending the outcome of mandatory negotiations. But such logic, to date, has not always prevailed.


In Graf, the plaintiff sued his former employer in state court for wrongful discharge claiming that his discharge was in retaliation for his filing of a claim under the Federal Employers Liability Act ("FELA"). The plaintiff also sued his union for breach of the duty of fair representation alleging that it failed to process an appeal of his termination. After the union unilaterally removed the case to federal court, the propriety of which the plaintiff did not challenge, the district court granted the union's motion for summary judgment and dismissed sua sponte the plaintiff's wrongful discharge claim on the merits. On appeal, the Seventh Circuit affirmed the dismissal of the claims against the union but remanded the case to the district court for a determination of whether the plaintiff's wrongful discharge claim was viable. On remand, the district court found that the complaint stated a state law claim for wrongful discharge but that such claim was preempted by the RLA. The district court dismissed the case entirely. The plaintiff again appealed.

On appeal to the Seventh Circuit, Judge Posner considered whether the district court properly exercised original federal subject matter jurisdiction or pendent jurisdiction over the plaintiff's state law claim for wrongful discharge. Considering the difference between ordinary and complete preemption, Judge Posner posited the following question:

The question, then, is whether the plaintiff seeks to base his claim on a body of state law that cannot be applied to his case without violating federal law, or on a body of federal law whose provenance he coyly refuses to acknowledge. In the first situation the case is really a state case, blocked by a federal defense; in the second it is a federal case in state wrapping paper. A federal statute could bring about either situation. A statute that merely created a defense to a state claim would bring about the first, so the case to which it

198. Id. at 1343.
199. Id.
200. Id.
201. Posner noted that, for purposes of the case before him, removal jurisdiction and original federal jurisdiction were the same. Id.
applied would not be within the federal-question jurisdiction, which depends on the legal basis of the claim, not the defense. But a statute that took over the whole field, with the result that the claim necessarily arose under federal rather than state law, would place the case within the federal-question jurisdiction.202

Judge Posner then looked to cases evaluating complete preemption under § 301, finding:

The Supreme Court has held that section 301 provides the exclusive remedy for such breaches. Therefore anyone who brings suit to redress such a breach is, whether he likes it or not, basing his suit on section 301—on federal law—because federal law, which is supreme, does not allow such a suit to be based on anything else.203

Judge Posner further found:

Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, the cases hold that that remedy is exclusive; the worker has no state remedies. The explanation is the traditional mistrust—a steady theme in federal labor legislation—of state judicial intervention in disputes arising out of collective bargaining activities. But whether soundly based on the history and practicalities of the labor field or not, the principle of complete preemption in collective bargaining matters is too well settled to be disturbed by us; and the force of the principle is no less when the state happens to call wrongful discharge a tort rather than a breach of contract.204

Judge Posner concluded that "just as section 301 of the Taft-Hartley Act is the exclusive remedy for breaches of such contracts within the scope of that Act, so the Railway Labor Act provides the exclusive remedy for breaches of such contracts within its scope."205 Consequently, the Railway Labor Act, like the Taft-Hartley Act, completely preempts state law claims.206

The Eighth and Ninth Circuits later reached similar conclusions. In Deford v. Soo Line Railroad,207 the Eighth Circuit found that the RLA "pervasively occupies" the field of railroad labor disputes, completely preempts state law claims arising out of collective bargaining agreements.208 According to the Eighth Circuit, the RLA grants the Railroad Adjustment Board "exclusive power to resolve all minor disputes between an employee or group of employees and a carrier ... growing out

202. Id. at 1344-45.
203. Id. at 1345.
204. Id. at 1346.
205. Id. at 1345.
206. Id.
207. 867 F.2d 1080 (8th Cir. 1989).
208. Id. at 1085.
of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'"209

Several years later, the Eighth Circuit reiterated its position in *Gore v. Trans World Airlines*.210 In that case, the plaintiff was a mechanic with Trans World Airlines ("TWA"). After a co-worker overheard Gore say he was going to kill himself and several co-workers, Gore was unceremoniously handcuffed, patted down, and removed from the TWA worksite. Employee meetings were held with TWA employees to warn them that Gore was dangerous, and Gore’s picture was hung throughout the facility to enable TWA employees to recognize Gore if he attempted to enter the premises. After a psychologist determined Gore was not a threat to TWA personnel, TWA’s “termination board” ordered Gore’s reinstatement. Gore then sued TWA alleging false arrest, negligence, libel and slander, false light invasion of privacy, and public disclosure of private facts.211

TWA removed the case to federal district court, arguing that Gore’s claims were inextricably intertwined with consideration of the terms of the collective bargaining agreement governing Gore’s employment with TWA. The district court denied Gore’s motion to remand and ultimately dismissed Gore’s lawsuit as an RLA “minor dispute” subject to mandatory arbitration under the Act, finding that the court would have to analyze Gore’s rights and TWA’s duties under the collective bargaining agreement to resolve Gore’s claims.212 The Eighth Circuit affirmed, holding that the RLA completely preempted Gore’s state law tort claims because Gore could not establish liability for the state law tort “without demonstrating that the defendants’ actions were wrongful” under the parties’ collective bargaining agreement.213

In reaching its decision, the Eighth Circuit noted that “Congress’ purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes.”214 The RLA, therefore, creates the sole mechanism for resolving disputes involving the interpretation of an RLA-covered collec-

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209. *Id.* (citing 45 U.S.C. § 153(I)(i)).
211. *Id.* at 947-48.
212. *Id.* at 948.
213. *Id.* at 952.
214. *Id.* at 949 (quoting Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994)) (emphasis added). The Eighth Circuit emphasized that “[c]laims of preemption under the RLA are governed by a standard that is ‘virtually identical’ to that employed under § 301 of the Labor [] Management Relations Act . . . under this standard, ‘a state-law cause of action is not preempted by the RLA if it involves rights and obligations that exist independent of the [collective bargaining agreement].’”
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tive bargaining agreement and the sole source of remedies for such disputes. Because the RLA obligates the parties to arbitrate minor disputes, complete preemption applies when disputes involve "duties and rights created or defined by" collective bargaining agreements.215

In Schroeder v. Trans World Airlines, Inc.,216 the Ninth Circuit considered actions filed by several airline employees in state court alleging the employer engaged in unlawful business practices that were not authorized by the collective bargaining agreement between the employees and TWA. After the defendants removed to federal court, the district court dismissed the state law claims as being preempted by federal law.217 On appeal to the Ninth Circuit, the court found that federal question jurisdiction was properly exercised by the district court, stating that it was "clear from plaintiffs' complaints here, they intended to avoid application of federal law and relied solely on state law to articulate their claims."218 The Ninth Circuit noted that the Supreme Court had previously found that the RLA, in cases involving interpretation or application of a collective bargaining agreement, made the "federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another"219 and that "[o]nce the grievance has been heard by the adjustment board, exclusive jurisdiction rests with the federal court."220 Accordingly, the Ninth Circuit determined that the RLA and the necessity of interpretation of the underlying collective bargaining agreement in deciding the plaintiff's claims established the existence of a federal question, and thus provided a proper basis for removal.221

216. 702 F.2d 189, 190 (9th Cir. 1983).
217. Id. at 192.
218. Id. at 191.
219. Id. at 191 (quoting Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 325 (1972)).
220. Id. at 192.

221. Id. at 191. Since the Schroeder decision, the Ninth Circuit has noted an apparent intra-circuit conflict on the issue of whether the RLA has complete preemptive power. See Holman v. Laulo-Rowe Agency, 994 F.2d 666, 669 n.4 (9th Cir. 1993). See also Shafi v. British Airways, PLC, 83 F.3d 566, 569-570 (2d Cir. 1996) (finding state law claims removable based on RLA complete preemption).
C. THE OPPOSING VIEW—RAILWAY LABOR EXECUTIVES ASS'N v. PITTSBURGH & LAKE ERIE RAILROAD CO.; GEDDES v. AMERICAN AIRLINES, INC.; AND RODDY v. GRAND TRUNK WESTERN RAILROAD—FOCUSBING ON CONGRESSIONAL INTENT TO ALLOW REMOVAL

In Pittsburgh & Lake Erie Railroad, the plaintiff association filed suit in state court alleging that certain transactions undertaken by railroads and their officials were fraudulent transactions under the Pennsylvania Uniform Fraudulent Conveyance Act. After the defendants removed the case to federal court, the district court denied the plaintiffs' motion to remand and granted the defendants' motion to dismiss the suit because the state law claims were preempted by the RLA.

On appeal, the Third Circuit reversed the dismissal and ordered the case remanded to state court. The Third Circuit determined that the RLA and its legislative history provided no evidence of Congressional intent to permit removal of exclusively state court actions to federal court and, thus, that the RLA did not completely preempt state law. The Third Circuit found important the fact that the RLA provided no substitute federal cause of action for the state law cause of action that plaintiffs had asserted. Accordingly, the Third Circuit determined that the issue of whether state law was preempted by the RLA was an issue to be determined in the first instance by the state court.

In Geddes, the plaintiff was an American Airlines (“AA”) aircraft technician who was accused of threatening a co-worker. As a result of the complaint, Geddes was temporarily suspended while the company investigated. According to Geddes, AA “knew the accusation was false but nonetheless published it and failed to stop the spread of false statements related to it.” Geddes sued his employer for defamation, negligence, and negligent supervision and retention.

Contending that it was merely acting in accordance with the terms of the applicable collective bargaining agreement between the company and the Transport Workers Union of America, AA removed the case. AA

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223. Id.
224. Id.
225. Id. at 942.
226. Id.
227. Id. at 939.
229. Id. at 1351.
230. Id. at 1353.
231. Id.
232. Id.
argued that claims requiring the interpretation of a collective bargaining agreement in the airline industry are minor disputes governed by the RLA’s mandatory arbitration provisions and, as such, are completely preempted. The Southern District of Florida agreed and dismissed Geddes’ claims.

On appeal, the Eleventh Circuit held that removal was improper because the doctrine of complete preemption does not apply to claims arising under the RLA. Noting that the U.S. Supreme Court “has cautioned that complete preemption can be found only in statutes with ‘extraordinary’ preemptive force,” the Eleventh Circuit opined that the “‘extraordinary’ preemptive force must be manifest in the clearly expressed intent of Congress.” Thus, the complete preemption inquiry turns on the question of “whether Congress not only intended for a federal statute to provide a defense to state-law claims, but also intended to confer on defendants the ability to remove a case to a federal forum.”

In addressing whether the RLA completely preempted Geddes’ state law claims, thereby providing federal question jurisdiction on which removal could be based, the Eleventh Circuit first looked at the language and substance of the RLA. The Court noted that (1) the stated purpose of the RLA is “to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions” and (2) the RLA establishes a “comprehensive framework” for resolving labor disputes to keep those disputes out of court altogether. The Eleventh Circuit nevertheless reasoned that the “RLA permits narrow federal judicial review of adjustment board decisions . . . but the statute includes no language granting general jurisdiction over minor disputes to federal courts.” In the absence of such language, the Eleventh Circuit concluded the face of the statute did not evidence intent to allow removal and, therefore, did not completely preempt the plaintiff’s state law claims.

233. Id. at 1351-1352.
234. Id. at 1352.
235. Id. at 1353 (quoting Caterpillar Inc., 482 U.S. at 393 and Metro. Life Ins. Co., 481 U.S. at 65).
236. Id. at 1353 (citing Anderson, 287 F.3d at 1047).
237. Id. at 1353 (quoting Anderson, 287 F.3d at 1041) (emphasis added).
238. 45 U.S.C. § 151a (1934). See also Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (“Congress’ purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes.”).
239. Geddes, 321 F.3d at 1354 (quoting Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (“Congress considered it essential to keep these so-called ‘minor disputes’ within the Adjustment Board and out of the courts.”) and Pyles v. United Air Lines, Inc., 79 F.3d 1046, 1050 (11th Cir. 1996) (“Congress intended that these ‘minor disputes’ be resolved through the grievance procedures of the RLA rather than in federal court.”).
Ignoring the internal inconsistency in its reasoning regarding the implications of the language and substance of the Act itself, the Eleventh Circuit then turned to the statute's legislative history. The Eleventh Circuit opined that the legislative history evidenced "an agreement to arbitrate certain disputes," but did not evidence "that Congress intended to allow parties to litigate RLA minor dispute claims in federal court."241

The Eleventh Circuit's reasoning creates quite a logical conundrum: Why would a statute—that was expressly designed to keep disputes out of courts entirely and which gives exclusive jurisdiction over minor disputes to a federally-created system of adjustment boards—include a provision giving the federal courts general jurisdiction to decide those disputes or have a legislative history that reflects an intent of Congress to allow parties to litigate those disputes in federal court?242

The Eleventh Circuit ultimately based its decision on the lack of evidence "that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment."243 In reaching this conclusion, the court evaluated the language of the LMRA and ERISA—the two statutes under which the Supreme Court previously had found complete preemption. According to the Geddes court, both the LMRA and ERISA contain "express language creating a federal cause of action for the resolution of disputes"244 as well as clear legislative intent to create federal causes of action. The statutory language of the LMRA and ERISA, coupled with the Acts' legislative histories formed "the primary basis for concluding that Congress intended removability by complete preemption under the two statutes."245 In contrast, the "intent to authorize federal court jurisdiction" is not clear from either the RLA's language or its legislative history.246

The Eleventh Circuit noted that the standard for ordinary preemp-

241. Id. at 1354 (emphasis added).
242. A similar conundrum was created in the Eleventh Circuit's evaluation of complete preemption under the Medicare Act, which expressly strips federal courts of jurisdiction and provides for hearings before the Secretary of the Department of Health & Human Services. Dial v. Healthspring of Ala., Inc., 541 F.3d 1044, 1047-48 (11th Cir. 2008) (rejecting complete preemption).
244. Id. (citing 29 U.S.C. § 185(a)(1998) ("Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties") and 29 U.S.C. § 1132(f) (1999) ("The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.").
245. Id. at 1354-55.
246. Id. at 1355.
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The standard for complete preemption was different because “[t]he LMRA, unlike the RLA does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements.” The Geddes court further reasoned that complete preemption was necessary under the LMRA to assure a consistent federal common law of labor, while complete preemption was not necessary under the RLA because both state and federal courts are required to send minor disputes to mandatory arbitration where the consistent body of common law will be created.

Other circuits, sometimes relying on Geddes, similarly have concluded that the RLA does not reflect a Congressional intent to permit removal. For example, in Roddy, the Sixth Circuit addressed whether Grand Trunk’s formal investigation into Roddy’s off-duty arrest and detention for marijuana possession and ultimate termination of Roddy based on that investigation violated Michigan’s Civil Rights law. Roddy filed the case in the Circuit Court for the County of Shiawassee and Grand Trunk removed to federal district court on the basis of federal question jurisdiction. The district court denied Roddy’s motion to remand and subsequently granted Grand Trunk’s motion for summary judgment.

In evaluating whether Roddy’s state law claim was completely preempted by the RLA, the Sixth Circuit noted “Congress passed the RLA ‘to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes.’” However, the Sixth Circuit further opined: “[t]he existence of a mandatory arbitration provision, however, does not answer the question of whether Congress intended the RLA to occupy the field so completely that any ‘ostensibly

248. Geddes, 321 F.3d at 1355-56.
249. Id. at 1356.
250. See, e.g., Roddy v. Grand Trunk W. R.R., 395 F.3d 318, 326 (6th Cir. 2005); Price v. PSA, Inc., 829 F.2d 871, 876 (9th Cir. 1987) (“Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is ‘so powerful as to displace entirely any state cause of action.’”) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23 (1983)).
251. Roddy, 395 F.3d at or 321-22. Roddy was decided after Beneficial and purports to rely on Beneficial. However, in reading the conclusion that complete preemption does not arise under the RLA, the Sixth Circuit’s analysis utilizes the pre-Beneficial language and reasoning of the Third and Eleventh Circuits, not Beneficial.
252. Roddy, 395 F.3d at 321.
253. Id.
254. Id. at 321-22.
255. Id. at 325 (quoting Hawaiian Airlines, 512 U.S. at 252).
state law claim’ touching on railroad employment ‘is in fact a federal claim’ for purposes of removal jurisdiction.'\(^{256}\) Relying on Geddes, the Sixth Circuit concluded “Congress has not clearly manifested an intent to make all causes of action that touch on railroad employment removable to federal court.”\(^{257}\)

But is the prevailing emphasis on a standard that requires “the clear Congressional intent to permit removal”\(^{258}\) still good law following the Supreme Court’s 2003 decision in Beneficial National Bank? Arguably, the answer is no.\(^{259}\)

### IV. RLA Complete Preemption Revisited: Application of Beneficial National Bank to RLA Cases

Prior to Beneficial National Bank, the U.S. Supreme Court utilized several different standards for determining if “Congressional intent” warranted a finding that federal law provides the exclusive cause of action for the plaintiff’s claims. Many of the lower court cases evaluating whether complete preemption existed under the RLA relied upon the Court’s “Congressional intent to permit removal” standard enunciated in Metropolitan Life and found such intent did not exist in the language of the RLA or in the Act’s legislative history, and concluded the complete preemption doctrine did not apply.\(^{260}\)

In Geddes,\(^ {261}\) for example, the Eleventh Circuit required evidence that Congress intended “to confer on defendants the ability to remove a case to a federal forum”\(^ {262}\) for complete preemption to attach. In essence, the court looked for a parallel federal cause of action that could replace the underlying state claim and thereby give the federal court orig-

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256. *Id.* (citing AmSouth Bank v. Dale, 386 F.3d 763, 776 (6th Cir. 2004)).
257. *Id.* at 326.
259. But see Dunlap v. G&L Holding Group Inc., 381 F.3d 1285 (11th Cir. 2004) (paying lip service to Beneficial but ultimately relying on Geddes’ intent to authorize removal standard in finding state court claim involving trademarks was not completely preempted); Roddy, 395 F.3d at 318 (even mentioning Beneficial, the court concluded the RLA did not completely preempt state law claims). See also *In Re W. States Wholesale Natural Gas Antitrust Litig.* v. Encana Energy Servs., Inc., 346 F. Supp. 2d 1123 (D. Nev. 2004) (because no evidence of Congressional intent to completely preempt the regulatory field of natural gas law, state unfair trade practice claims not completely preempted); *In re Wireless Tel. Fed. Cost Recovery Fee Litig.* 343 F. Supp. 2d 838 (W.D. Mo. 2004) (although finding compelling policy reasons for retaining federal jurisdiction, no complete preemption by Federal Communications Act found because of lack of finding Congress intended to provide an exclusive federal remedy for the particular claim).
262. *Id.* at 1353 (quoting Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041 (11th Cir. 2002)).
inal jurisdiction over the claim before permitting removal. Finding no such substitute federal cause of action in the RLA, the Eleventh Circuit held there was insufficient evidence of Congressional intent to permit removal for the statute to completely preempt state claims. The court relied upon the RLA's grant of exclusive jurisdiction to national boards of adjustment in cases involving minor disputes—and Congress' resulting failure to provide a federal cause of action in federal court in such disputes—as evidence that Congress did not intend to create a federal cause of action upon which complete preemption could be based. "Looking to the legislative history of the RLA, we see that it represented an agreement to arbitrate certain disputes . . . but we find nothing to suggest that Congress intended to allow parties to litigate RLA minor dispute claims in federal court."

In Beneficial National Bank, the Court clarified that Congressional intent to make a cause of action removable is not a necessary element in the complete preemption analysis and, by implication, overruled the analysis used in Geddes. The Court instructed the lower courts to determine "whether Congress intended the federal cause of action to be exclusive." As the First Circuit recently noted: "Exclusive federal regulation alone might preempt state claims; but it is the further presence of a counterpart federal cause of action that allows the state claim to be transformed into a federal one."

To this end, lower courts must determine: "(1) Does federal law provide a cause of action for any of the claims asserted by the Complaint? (2) If so, does federal law provide the exclusive cause of action for that claim?"

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263. Id. at 1357.
264. Id.; cf. Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 277 (2d Cir. 2005) (noting "the RLA demonstrates that Congress knew how to create federal-court jurisdiction when it wanted to . . . . Had Congress wished to create a cause of action in federal court solely to determine whether a state-law claim was a minor dispute under the RLA, it could have done so.").
265. Geddes, 321 F.3d at 1354.
266. Beneficial Nat'l Bank, 539 U.S. at 9 n.5.
267. Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 46 (1st Cir. 2008) (while acknowledging that a state suit regarding rates could be completely preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), the court held there was no complete preemption of state nuisance suit because nothing in ICCTA provides for a nuisance suit before either a federal court or federal agency). But see Matthew J. Kleiman, Crossed Signals in a Wireless World: The Seventh Circuit's Misapplication of the Complete Preemption Doctrine, 14 Duke L. & Tech Rev. 1, 20-38 (2004) (arguing against complete preemption under the Federal Communication Act based on Beneficial); Valles, 410 F.3d at 1075 (without mentioning Beneficial, California meal period law held not completely preempted by § 301 of the LMRA).
268. In re Wireless Te. Fed. Cost Recovery Fees Litig., 343 F. Supp. 2d 838, 846 (W.D. Mo. 2004). See also Hoskins v. Bekins Van Lines, 343 F.3d 769, 778 (5th Cir. 2003) (finding the Carmack Amendments completely preempted state claim following Beneficial because the federal law provides the "exclusive cause of action" for breaches of contract by interstate carriers);
Arguably, in the context of the RLA, the answer to both questions is yes given the Act's purpose of providing a "comprehensive framework for resolving labor disputes." But the First Circuit answered each question with a resounding no.

A. AN EMERGING VIEW—SULLIVAN v. AMERICAN AIRLINES

In *Sullivan v. American Airlines* the plaintiffs were terminated for allegedly posting racist campaign fliers during a union election campaign. "To clear their names and recover from their loss of reputation, the plaintiffs filed a state-law defamation suit in New York state court against American, two of its managers and three union members who ran against them." AA removed the case to federal court on the grounds the claims against it were minor disputes under the RLA and, therefore, within the district court's jurisdiction. The district court agreed and subsequently dismissed the claim against AA on the grounds of ordinary preemption.

The Second Circuit reversed. Instead of relying upon the intent to remove seen in the *Geddes* line of cases, the Second Circuit instead focused on *Beneficial National Bank*'s "exclusive cause of action" standard. In somewhat circuitous fashion, the court noted that RLA minor disputes cannot be filed in federal court in the first instance. The court also noted that "only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant," because "[w]hen a state-law claim is removed to federal court . . . the district court may then adjudicate the claim on the merits under the relevant preemptive statute." Based on those two premises, and with no analysis of whether the federally mandated grievance and arbitration pro-

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269. *Hawaiian Airlines*, 512 U.S. at 252. This comprehensive framework seemingly fulfills the *Beneficial* emphasis on the National Bank Act's "procedures and remedies governing that cause of action" as well as the *Aetna Health Inc.* court's emphasis on ERISA's "integrated system of . . . enforcement." *Beneficial Nat'l Bank*, 539 U.S. at 8-9. *Aetna Health Inc.*, 542 U.S. at 208. However, "[t]here is disagreement [among the federal circuits] whether non-judicial claims alone can trigger complete preemption." *Fayard*, 533 F.3d at 47 n.5.


271. *Id.*

272. *Id.* at 268.

273. *Id.*

274. *Id.* at 276.

275. *Id.* (quoting *Caterpillar Inc.*, 482 U.S. at 392).

276. *Id.* at 276.
cures constituted a federal cause of action, the court concluded "that the RLA does not completely preempt state-law claims that come within its scope."278

The Eleventh Circuit rejected extending the complete preemption doctrine to the RLA in Geddes because it found that Congress did not intend to provide a defendant a right to remove a state court action to a federal district court, but rather conferred jurisdiction on a federally mandated arbitral board. Arguably, the Eleventh Circuit’s reliance on intent to provide a removal right is contrary to Beneficial National Bank’s guiding principles.

B. An Alternative View

Under Beneficial National Bank, complete preemption arises if the federal statute provides a federal cause of action and that action is exclusive. The RLA’s requirement that cases involving interpretation or application of a collective bargaining agreement be referred to the Board of Adjustment is tantamount to a federal cause of action (i.e., breach of contract) with a federal remedy (i.e., damages, injunctive relief, or specific performance). The case in controversy still “arises under” federal law because a federal statute provides the exclusive way to resolve a contractual dispute involving the interpretation or application of RLA collective bargaining agreements; that is, the RLA’s “comprehensive framework” for resolving disputes creates the Beneficial National Bank Court’s “procedures and remedies governing that cause of action” as well as the Aetna Health Inc. Court’s “integrated system . . . of enforcement.”281 The fact that the statute requires that an arbitral board com-

277. The First Circuit recently highlighted that the circuits are split on “whether non-judicial claims alone can trigger complete preemption; this turns in part on the weight given to conceptual as opposed to prudential underpinnings of the doctrine.” Fayard, 533 F.3d at 47 n.5. (comparing Lontz v. Tharp, 413 F.3d 435, 442-43 (4th Cir. 2005) (administrative cause of action insufficient) with Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1344-46 (7th Cir. 1986) (arbitrable claim sufficient).

278. Sullivan, 424 F.3d at 276. At least one court has rejected the Sullivan approach, noting “[t]he Sullivan court, respectfully, reads a bit more into Beneficial than this Court sees.” Sw. Airlines Employees Ass’n v. Sw. Airlines Co., Civ. Action No. 3:05-CV-1192-N (N.D. Tex. 2006) (holding union’s state law breach of contract case was completely preempted by RLA). However, relying on Sullivan, the Ninth Circuit reached the opposite conclusion. Moore-Thomas v. Ala. Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009) (holding no complete preemption because RLA does not provide an exclusive federal cause of action). Similarly circuitous reasoning was used by the Eleventh Circuit to reject complete preemption by the Copyright Act. Weitzman, LLC v. Microcomputer Res., Inc., 542 F.3d 859, 864 (11th Cir. 2008) (rejecting complete preemption because of lack of substitute federal cause of action).


posed of carrier, labor, and neutral representatives, all private parties, resolve the dispute does not lessen the fact that a federal law governing employer/union contracts compels the arbitration. 282

Moreover, as Judge Posner has written:

The National Railroad Adjustment Board ... while private in fact, is public in name and function; it is the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life liberty, or property without due process of law. 283

As a "tribunal" 284 authorized by federal statute to resolve disputes, 285 the Adjustment Boards are in essence a form of court created to hear the cause of action created by the federal statute. 286

In addition, despite the findings of the Third and Eleventh Circuits to the contrary, the RLA's history does contain evidence that Congress intended the RLA's procedures and remedies to be exclusive. Demonstrable evidence of Congress' intent to provide strictly a federal procedure and federal remedy is the fact that the decision of a board of adjustment is enforceable only in a federal district court. 287

If Congress

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282. Indeed, binding arbitration rather than litigation is synonymous with dispute resolution in the rail industry; a fact reflected in other rail-related legislation such as the Northeast Rail Service Act which specifically provides for binding arbitration if a commuter railroad and its union cannot resolve furlough issues stemming from the Act's enforcement. Northeast Rail Service Act, 45 U.S.C. § 1113(a) (2006).

283. Elmore v. Chi. Ill. Midland Ry., 782 F.2d 94, 96 (7th Cir. 1986). See also Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 751-752 (1945) ("The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making . . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established.") (quoting Lloyd K. Garrison, The Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567, 568-69 (1937)).

284. BLACK'S LAW DICTIONARY 1506 (6th ed. 1990) (defining "tribunal" as: "The seat of a judge; . . . the place where he administers justice . . . a judicial court; . . . ").

285. Bates v. Balt. & Ohio R.R., 9 F.3d 29, 30 (7th Cir. 1993) (characterizing the National Railroad Adjustment Board as "a tribunal created by Congress in 1934 under the Railway Labor Act to adjudicate disputes between railroad carriers and their employees"). BLACK'S LAW DICTIONARY 42 (6th ed. 1990) (defining "adjudicate" as: "To settle in the exercise of judicial authority").

286. See Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 372 U.S. 682, 695 (1963) ("Quite the contrary, the Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it 'intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice.'") (quoting Bower v. E. Airlines, 214 F.2d 623, 626 (3d Cir. 1954)).

287. 45 U.S.C. § 153(p). See Deford v. Soo Line R.R., 867 F.2d 1080, 1085 (8th Cir. 1989) ("Once the administrative remedy with the NRAB has been exhausted, the party may not relitigate the issue in an independent judicial proceeding.") (citing Andrews v. Louisville & Nashville
Complete Preemption Under the RLA

had not intended to confer the federal jurisdictional umbrella over the RLA arbitration mechanism, Congress could have simply made such decisions enforceable in "any court of competent jurisdiction." 288

Moreover, the court's jurisdiction to order arbitration in the federally created tribunal in minor dispute cases is premised on an enforcement of the RLA. 289 Analogously, there is an implied cause of action to consider and dismiss a removed cause of action that involves a question of interpretation or application of a collective bargaining agreement.

V. OTHER CONSIDERATIONS WEIGHING IN FAVOR OF COMPLETE PREEMPTION UNDER THE RAILWAY LABOR ACT

In addition to the exclusivity of the federal remedy and the integrated system of enforcement provided by § 153 of the RLA, numerous federal courts and commentators have considered other factors in support of a finding of complete preemption by the RLA.

A. THE CASE FOR COMPLETE PREEMPTION UNDER § 153 OF THE RLA IS EQUAL TO IF NOT STRONGER THAN THE CASE FOR PREEMPTION UNDER § 301 OF THE LMRA

Numerous courts, including the Supreme Court, have recognized the similarity between § 301 and § 153 with respect to the pervasive, extraordinary and exclusive character of each federal regulatory scheme. According to the Supreme Court in Andrews v. Louisville & Nashville Railroad, 290 the exclusive (and, by implication, the preemptive) effect of the federal remedy provided by the RLA may be greater than its counterpart. 291

This is evidenced by the fact that arbitration is mandatory under the RLA and voluntary under the NLRA. A rail or air carrier and the unions

R.R., 406 U.S. 320, 325 (1972); Schroeder v. Trans World Airlines, Inc., 702 F.2d 189, 192 (9th Cir. 1983) ("Once the grievance has been heard by the adjustment board, exclusive jurisdiction rests with the federal court. As a result, California state law is preempted from providing a basis for relief."); accord 45 U.S.C. 159 Sixth (National Mediation Board).


289. W. Airlines, Inc. v. Int'l Bhd of Teamsters, 480 U.S. 1301, 1302 (1987); United Transp. Union v. Gateway W. Ry., 78 F.3d 1208, 1213 (7th Cir. 1996) ("Although a federal court has no authority to interpret the terms of a collective bargaining agreement in order to resolve a minor dispute, the court may compel arbitration before the appropriate adjustment board and may enjoin the union from striking in the interim.").


291. Id. at 323 ("Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.").
that represent its employees must establish a grievance arbitration procedure and submit minor disputes to its processes. There is no counterpart beyond a policy statement in the LMRA. Express and extraordinarily limited procedures for review of adjustment board awards are set out in the RLA. The LMRA is silent. Complete preemption reflects a measure of federal interest in the dynamic calculus between state and federal responsibilities. As such, the federal interest is significantly more evident in the RLA.

In Andrews, the plaintiff sued his prior employer, the Louisville & Nashville Railroad, for wrongful discharge. The carrier removed the case to federal court and moved to dismiss the complaint for failure to exhaust the administrative remedies provided under the RLA, i.e., arbitration before a board of adjustment. The district court granted the motion and the Fifth Circuit affirmed the district court's decision.292 The plaintiff, who did not contest removal, appealed the dismissal on the merits.

The Supreme Court affirmed the district court's decision.293 Expressly overruling the Court's earlier decision in Moore v. Illinois Central,294 which held that the RLA did not prohibit state court damage actions for breach of a collective bargaining agreement, the Supreme Court held that the plaintiff's state court cause of action for wrongful discharge was foreclosed by the plaintiff's failure to seek the administrative remedy mandated by the RLA: arbitration before a board of adjustment.295 Comparing the exclusive remedy provision of the RLA to the LMRA, the Supreme Court stated:

Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the [Railway Labor] Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.

The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. He is limited to the judicial review of the Board's proceedings that

292. Id. at 320.
293. Id. at 326.
294. 312 U.S. 630, 634-36 (1941).
Similarly, the Ninth Circuit determined in *Grote v. Trans World Airlines* that, "because the RLA's preemptive force appears on the face of the statute and § 301 preemption is judicially imposed, ... preemption under the RLA is broader than under § 301." The Seventh and Eighth Circuits have also echoed the Supreme Court's observations regarding the similarity between § 301 and § 153. Accordingly, at the very least, § 153 of the RLA is as preemptive as § 301 of the LMRA, and a strong argument can be made that the RLA has a greater preemptive effect.

B. THE POSSIBILITY OF CONFLICTING STATE AND FEDERAL SUBSTANTIVE INTERPRETATIONS OF FEDERAL LABOR POLICY NECESSITATES A SINGLE BODY OF FEDERAL LAW UNDER THE RLA AND LMRA

In *Local 174 v. Lucas Flour Co.*, the Supreme Court recognized that § 301 of the LMRA "is peculiarly one that calls for uniform law" such that only federal courts should determine questions involving interpretation and application of collective bargaining agreements. According to the Supreme Court:

The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many

296. *Id.* at 323-25.
297. 905 F.2d 1307, 1309-10 (9th Cir. 1990). See also Arborgast v. CSX Corp., 655 F. Supp. 371, 373 (N.D. W. Va. 1987) ("courts interpreting the Railway Labor Act have typically found much broader preemption than under NLRA because of the different mechanisms established by the two acts .... In contrast to the more limited scope of the NLRA, the RLA created mandatory arbitration 'to provide for the prompt and orderly settlement of all disputes growing out of grievances, or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions'.") (quoting 45 U.S.C. § 151a(5)); *Gore*, 210 F.3d at 949 ("Claims of preemption under the RLA are governed by a standard that is 'virtually identical' to that employed under § 301 of the Labor [ ] Management Relations Act (LMRA). 29 U.S.C. § 185").
299. 369 U.S. 95, 103 (1962).
300. *Id.* at 103.
factors which bear upon competing state and federal interests in this area... we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.\footnote{301}

In \textit{International Ass'n of Machinists v. Central Airlines},\footnote{302} the U.S. Supreme Court found that the same need for a "single body of federal law"\footnote{303} under the LMRA is readily apparent in the RLA. In that case, six airline employees filed grievances against their employer for wrongful discharge. After the dispute was submitted to arbitration, which resulted in a deadlocked board of adjustment, the National Mediation Board appointed a neutral arbiter who rendered a decision in favor of the employees. The airline refused to comply with the board's decision, and the employees filed suit in federal district court seeking enforcement of the board's decision.\footnote{304} The carrier moved to dismiss for lack of subject matter jurisdiction, and the district court granted the motion. The Fifth Circuit affirmed.\footnote{305}

In considering the district court's dismissal for want of jurisdiction, the Supreme Court framed the issue as "whether a suit to enforce an award of an airline system board of adjustment [created pursuant to § 204 of the Railway Labor Act] is a suit arising under the laws of the United States under 28 U.S.C. § 1331 or a suit arising under a law regulating commerce under 28 U.S.C. § 1337."\footnote{306} At the outset, the Court emphasized the need for uniformity in the enforcement of a national policy based on the subject matter of interstate air commerce, stating:

\begin{quote}
It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. \textit{If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity.}\footnote{307}

\ldots
\end{quote}

To be sure, different airlines may use different contracts, and any one may have different agreements for different crafts, but such lack of uniformity

\footnotesize
\begin{itemize}
\item \footnote{301} Id. at 103-104 (citations omitted).
\item \footnote{302} 372 U.S. 682 (1963).
\item \footnote{303} \textit{Lucas Flour}, 369 U.S. at 104.
\item \footnote{304} \textit{Cent. Airlines}, 372 U.S. at 682-83.
\item \footnote{305} Id. at 684.
\item \footnote{306} Id. at 684-85.
\item \footnote{307} Id. at 691-92 (emphasis added).
\end{itemize}
represents a minimal burden on commerce. The lack of uniformity created by dividing everything by 50 (or however many States the system spans) would multiply the burden by a substantial factor and aggravate the problem to an intolerable degree.308

... [A] § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts.309

Similarly, in Burley,310 the Supreme Court noted:

From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.311

The interstate character of national railroads and airlines, especially since the recent consolidations in both industries, amply demonstrate the need for nationwide uniformity in the interpretation and application of collective bargaining agreements between rail carriers and transportation employee unions. Air and rail carriers covered by the RLA typically operate in multiple states, and many of their operating craft employees—locomotive engineers, pilots, trainmen, flight attendants—perform service throughout the carriers’ systems.

Class I railroads, for example, employ 167,216 workers in operations that span 44 states and the District of Columbia.312 The vast majority of those employees are represented by a union. The largest Class I rail carrier, the Burlington Northern Santa Fe Railroad (“BNSF”), operates in every State west of the Mississippi and in four States east of the Mississippi: Illinois, Tennessee, Mississippi and Alabama.313 Given that railroads subscribe to multiemployer collective bargaining agreements covering particular crafts, it is conceivable, if state courts are allowed to decide questions of preemption under the RLA, that the BNSF could be

308. Id. at 692 n.16.
309. Id. at 692.
311. Id. at 751.
subject to 26 differing State interpretations of what constitutes a major or minor dispute, or no dispute at all, under the RLA.\textsuperscript{314} Multiply that by the number of national unions with which the BNSF must coexist and the magnitude of the need for national uniformity should be readily apparent to all but the most pro-employee or pro-States Rights jurists.\textsuperscript{315} As the U.S. Supreme Court noted in Central Airlines: "Congress in 1936 could not . . . have thought that stability and continuity to interstate air commerce would come from the undulating policies . . . of the legislatures and courts (or both) of 48 [sic] states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration."\textsuperscript{316}

The Eleventh Circuit in Geddes downplayed the importance of a need for nationwide uniformity of law under the RLA, stating that the possibility of "competing legal systems" was precluded by the RLA's requirement that "[b]oth state and federal courts must dismiss a claim as preempted by the RLA once they determine that it requires interpretation of the collective bargaining agreement."\textsuperscript{317}

Geddes seemingly overlooked the fact that the preemption decision is itself a substantive decision that requires as much harmony from court to court as possible. When a court considers whether a state claim requires an interpretation of the collective bargaining agreement, the court is necessarily examining that agreement. This is the legal version of Heisenberg's uncertainty principle, in the sense that the examination cannot be made without impact on the agreement.\textsuperscript{318}


\textsuperscript{315} See Int'l Ass'n of Machinists v. Cent. Airlines, Inc, 372 U.S. 682, 691-92 (1963) ("[the] validity, interpretation, and enforceability" of agreements creating system board procedures "cannot be left to the laws of the many States . . . . The needs of the subject matter manifestly call for uniformity").


\textsuperscript{317} Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1356 (11th Cir. 2003).

\textsuperscript{318} J. HORGAN, QUANTUM PHILOSOPHY, http://members.fortunecity.com/templarser/qphil.html ("Werner Heisenberg's uncertainty principle then showed that our knowledge of nature is fundamentally limited - as soon as we grasp one part, another part slips through our fingers."); see generally STANFORD ENCYCLOPEDIA OF PHILOSOPHY, QUANTUM PHILOSOPHY, http://plato.stanford.edu/entries/qt-uncertainty/ (explaining the Uncertainty Principle).
Moreover, in its analysis, the Geddes court seemingly overlooked a basic premise of traditional labor law under which federal courts, in evaluating cases involving the interpretation or application of a collective bargaining agreement defer to the grievance and arbitration policies established by the parties in their collective bargaining agreements. The Geddes court’s emphasis on the § 301 cause of action as a basis to find complete preemption under the NLRA overlooks the fact that the courts typically defer disputed cases to arbitration. Under the NLRA, the court is a gatekeeper for the arbitration process. But courts play the same role under the RLA. The fact that arbitration is voluntary under the NLRA does not strengthen the case for complete preemption. To the contrary, the mandatory nature of arbitration in a statutorily created forum strengthens the case for complete preemption under the RLA.

In other words, when faced with a dispute involving the interpretation or an application of a collective bargaining agreement, the result is the same under both the RLA and LMRA—the cases are deferred to arbitration for an arbitrator (the exclusive interpreter of the meaning of collective bargaining agreements) to decide the dispute based on the federal common law of collective bargaining. And under both statutes, creation of a consistent body of federal common law on what disputes are arbitrable bolsters the argument for complete preemption.

C. FEDERAL V. STATE COURT: OUTCOME DETERMINATIVE

Strict constructionists often argue that principles of federalism require the elimination of the complete preemption doctrine in its entirety. Justice Scalia’s dissenting opinion in Beneficial National Bank v. Ander-


son, for example, lambasted the Supreme Court's development of the complete preemption doctrine, beginning with the Court's decision in *Avco*. According to Justice Scalia, the appropriate course of action in response to an unsustainable state law claim is dismissal by the state court, rather than removal to federal court and recharacterization of the claim as a federal claim. Any decision to provide removal jurisdiction to a federal court to determine whether a state court complaint states a federal question, according to Scalia, cannot reasonably be based upon the fear that state courts would erroneously rule on questions of federal preemption.

While this notion might be true in a perfect world with a perfect judicial system, numerous courts and commentators have recognized that the ultimate outcome of cases involving preemption questions often turn on whether those cases are heard in state or federal court.

322. *Id.* at 12-16.
323. *Id.* at 18-19.
324. *Id.* at 20-21. *See also* Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1346 (7th Cir. 1986) ("the argument amounts to distrust of the ability or willingness of state courts to enforce federal defenses. It would also be simpler to make federal preemption always a defense, so that parties to state court litigation could be sure whether the case was removable to federal court, or if removed whether it could be retained in federal court (the issue in this case), rather than having to speculate about whether the federal court would consider the case one of partial or complete preemption.").
325. Federal court jurisdiction over questions of federal law arose after the Civil War and during Reconstruction when Congress perceived that Southern State court judges might be less receptive to enforcing federal laws and protecting federal rights than their federal counterparts. Neil Miller, *An Empirical Study of Foreign Choices in Removal Cases Under Adversity in Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 372-73 (Winter 1992). In recent years, the focus of concern has shifted away from fears of post-Reconstruction bias to concerns about the need to protect (1) out-of-state litigants from local bias and (2) corporate litigants from prejudices of differing interpretations of federal law by the several States. *Id.* at 373-74. On-going concerns over the potential for state court bias has been noted in numerous court decisions, including decisions of the U.S. Supreme Court. *See, e.g.*, Arizona v. Manypenny, 451 U.S. 232, 241-42 (1981) (superseded by statute, Actions Removable Generally, 28 U.S.C. § 1441(e) (Supp. IV 1986)); Colorado v. Symes, 286 U.S. 510, 517-18 (1932); Maryland v. Soper, 270 U.S. 9, 32 (1926); Cochran v. Montgomery County, 199 U.S. 260, 272 (1905). *See also* Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (quoted in Yosef Rothstein, *Ask Not for Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b)*, 33 Colum. J.L. & Soc. Probs. 181, 182 (Winter 2000). Perceived bias in state courts was an enumerated reason for the passage of the Class Action Fairness Act of 2005, 109 P.L. 2 ("Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—(A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States"). *See also* S. Rep. No. 109-14, at 49-50, 60 (2005) (citing studies on abuses in state court system).
Even the Senate's Committee on the Judiciary has recognized that having a case brought in one of the "plaintiff-friendly" state courts "affects the substantive outcome of a lawsuit," and having cases heard in the federal courts provides "a forum where the threat of prejudice is significantly lower." Indeed the Committee's primary concern in explaining the need for the Class Action Fairness Act of 2005 stated:

One key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) . . . . Finally, many state courts freely issue rulings in class action cases that have nation-wide ramifications sometimes overturning well-established laws and policies of other jurisdictions.

Like class actions, the same "state court provincialism" and concerns that "a system that allows state court judges to dictate national policy on these and numerous other issues from the local courthouse steps" are equally problematic in the rail and airline labor relations fields where differing state court decisions on what constitutes a minor dispute could "have significant implications for interstate commerce and national policy."

In an area such as railway labor law where the need for uniformity is so great, the outcome determinative nature of the jurisdiction decision (noting that decisions by federal courts to defer to state courts are frequently outcome determinative operating as indirect decisions not the merits). See also Miller, supra note 325, at 388; Rothstein, supra note 325, at 182-83. Plaintiffs who file actions in state court only to have defendants remove the actions to federal court on the basis of diversity of citizenship or federal subject matter jurisdiction see their chances for success nearly cut in half. Kevin Clermont & Theodore Eisenberg, Do Case Outcomes Reveal Anything About the Legal System? Win Rate and Removal Jurisdiction, 83 Cornell L. Rev. 581, 593-600 (March 1998). Several commentators have observed that plaintiff-win rates are especially high in those jurisdictions in which judges are elected rather than appointed. Taylor Simpson-Wood, Has the Seductive Siren of Judicial Frugalities Ceased to Sing?: Data Flux & its Family Tree, 53 Drake L. Rev. 281 (Winter 2005).

328. Id. at 29.
329. Id. at 5.
330. Id. at 6.
331. Id. at 26.
332. Id. at 29. See also id. at 36 (noting "tendency of some state courts to be less than respectful of the laws of other jurisdictions").
333. See Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1346 (7th Cir. 1986) ("Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, the cases hold that that remedy is exclusive; the worker has no state remedies. The explanation is the traditional mistrust—a steady theme in federal labor legislation—of state judicial intervention in disputes arising out of collective bargaining activities."). See also Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 372 U.S. 682, 691-92 (1963) ("If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a
should tip the scales in favor of federal jurisdiction. The prospect of an ultimate discretionary review by the U.S. Supreme Court is not a satisfactory alternative.

In its *Study of the Division of Jurisdiction between State and Federal Courts*, the American Law Institute recommended that federal question jurisdiction be expanded by allowing defendants to remove cases to federal court based on the existence of a federal defense. Another commentator has suggested a narrower approach—that the removal statute be broadened to include removals by out-of-state defendants asserting a federal defense when diversity of citizenship is lacking. In either instance, expansion of federal court jurisdiction by allowing removal based on a federal defense would necessarily limit application of the well-pleaded complaint rule, but it would nonetheless further the purpose of removal jurisdiction by protecting uniformity in federal law interpretation.

Whether or not the courts revisit the well-pleaded complaint rule as a whole, the principles underlying that debate highlight the need for application of the complete preemption doctrine in the context of RLA cases. The potential tendency of state courts and juries to favor rail carrier employees over their employers, and the empirical studies statistically validating the fear of such bias, weighs in favor of allowing defendants to remove cases involving the interpretation or application of collective bargaining agreements cases to federal court to ensure a consistent body of common law arises governing what disputes are arbitrable.

VI. CONCLUSION

Historically, the courts have been divided on whether the RLA completely preempts state tort claims, giving federal district court's original jurisdiction to decide if a particular case involves a minor dispute requiring dismissal and referral to federally mandated arbitration or remand to state court. The historical divide primarily stems from the courts' interpretation of what Congressional intent is necessary before complete preemption attaches. Courts that have required an "intent to permit removal," as evidenced by a substituted federal cause of action in federal court, consistently have found complete preemption under § 301 of the

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LMRA and § 502 of ERISA because of the existence of a substitute federal cause of action. Those courts historically have eschewed extending complete preemption to RLA cases because of the lack of a substitute action in federal court. In contrast, courts that focused on Congressional intent to completely preempt an area of the law and required a statute to provide an exclusive federal remedy consistently have found complete preemption in RLA cases because the RLA creates the exclusive and mandatory adjustment board procedure as the counterpart to § 301 jurisdiction and provides the exclusive method for resolving disputes in the railroad and airline industries.

In today's litigious environment and the court's increased preference of alternative dispute resolution over litigation, the fact that one statute provides the remedy of arbitration and another provides the remedy of litigation in federal court should not have a conclusive effect upon the outcome of a particular case under the RLA. Instead, based on Beneficial National Bank, the RLA should completely preempt state law tort claims because the RLA, like the LMRA and ERISA, provides the exclusive federally mandated forum and remedy for the claim asserted that is tantamount to a cause of action. Moreover, based on Aetna Health Inc., the RLA should completely preempt state law tort claims because the RLA, like ERISA, establishes the “integrated system of procedures for enforcement” necessary to trigger complete preemption.

Complete preemption also would better fulfill the purpose of the Act by providing a uniform body of federal common law governing what disputes constitute “minor disputes” which must be deferred to the RLA arbitration procedures akin to the body of federal common law governing which disputes must be deferred to arbitration under the NLRA.
I. INTRODUCTION

In order to allow passenger rail to use freight rail property, freight rail companies require passenger rail agencies to assume all liability when sharing rights-of-way.1 Passenger rail agencies assume liability through indemnity provisions when negotiating shared use agreements to operate on freight owned rail corridors.2 With rising interest in public transportation, these issues could become increasingly contested.

There exists a conflict between the public's desire for expanded pas-
senger rail service at a minimal cost to taxpayers and the public policy goal of holding tortfeasors accountable to civil liability for reckless and negligent behavior. This issue affects both intercity rail, such as Amtrak, and inner-city commuter and light rail. This paper addresses this controversy. First, it outlines the terms and historical background surrounding the issue. Second, it presents state case studies dealing with indemnification as expansion of the rail system in states across the country illustrates this concern. Next, it covers the lofty insurance burden for passenger rail agencies and addresses the disregard for tort law principles if indemnity is granted. Finally, it offers potential solutions to resolve this debate.

II. TERMINOLOGY AND THE DEFINITION OF “SHARING”

In discussing the development of rail indemnification law it is helpful to understand the types of passenger rail vehicles sharing property with freight railroads and to define these cooperative relationships.

A. TYPES OF RAIL VEHICLES

Freight rail companies traditionally have led in ownership and rail rights. “In almost all circumstances, Class I and regional railroads are the owners/operators of the rail rights-of-way of interest to transit systems.”3 Four types of passenger rail vehicles interact with freight railroads: light rail systems, commuter rail, heavy capacity rail, and intercity passenger rail (Amtrak).

Light rail systems, also known as streetcars, tramways, or trolleys, are passenger rail cars operating individually or in short trains on fixed rails with rights-of-way in automobile traffic.4 Light rail often does not share track, but may share a corridor, with freight railroads.5 Interaction may occur when crossing a right-of-way grade.6

Commuter rail is an electric or diesel propelled railway for urban passenger service consisting of local short distance travel operating between a central city and adjacent suburbs.7 These long trains are strong enough to operate on freight train tracks.8 Services generally extend upwards of 70 to 80 miles from the city center and stop only at main population centers.9

Heavy capacity rail is called “metro, subway, rapid transit or rapid

3. SHEYS, supra note 1, at 4.
5. Id. at 17.
6. See id. at 15.
7. Id.
8. Id.
9. Id.
No Free Ride

rail . . . .” It is electric railway with high traffic capacity.10 “These systems interact with freight only where there is adequate exclusive right-of-way alongside a freight railroad.”11

Intercity passenger rail vehicles, which Amtrak utilizes, employ a combination diesel and electric locomotive driven vehicle with attached passenger cars.12

B. Property Sharing

There are four categories of freight/passenger property sharing. First, is “Shared Track and Mixed Operation: transit trains and freight trains are separated by headway intervals measured in minutes in an operating schedule.”13 The second type is “Shared Track and Time-Separated Operations: both transit and freight trains utilize the same track but are separated by time windows.”14 The final two types of sharing arrangements are shared right-of-way and shared corridor.15 The term “shared right-of-way,” means that the freight and passenger tracks are less than 25 feet apart from one another.16 If the tracks are more than 25 feet, but less than 200 feet, apart, then the term of art is a “shared corridor.”17

III. The Fall and Rise of Commuter Rail

A. Public Takeover of Passenger Rail

In 1887, Congress created the Interstate Commerce Commission (ICC) to regulate the railroad industry and determined that railroad companies had a common carrier obligation to provide both freight and passenger service to support interstate travel and the transport of goods.18 Private railroad companies could not abandon a passenger or freight line without permission from the ICC.19 However, “[i]n 1958, Congress passed legislation that allowed railroads to discontinue passenger trains with ICC approval.”20

10. Id.
11. Id.
13. Liu, supra note 4, at 17.
14. Id.
15. Id.
16. Id.
17. Id.
19. See Spitulnik & Rennert, supra note 18, at 322.
By 1970, passenger ridership plummeted resulting in a drop in the number of passenger trains from 20,000 in 1929 to less than 500.\textsuperscript{21} Therefore, due to a lack of financial sustainability for passenger rail, Congress created Amtrak through the Rail Passenger Service Act of 1970, thus relieving private rail companies of their passenger service obligation.\textsuperscript{22} By paying Amtrak to take over passenger lines, private rail relinquished the passenger requirement.\textsuperscript{23} In return, Amtrak could operate on the freight railroad’s line, but also was given the statutory right to force its way on to a line in the future if demand for passenger service reemerged.\textsuperscript{24} Other passenger rail agencies do not share this statutory right and therefore lack Amtrak’s ability to negotiate for shared use of a freight railroad’s line.\textsuperscript{25}

Amtrak’s relationship with freight companies is helpful to understand rail indemnification for all passenger rail agencies because Amtrak contractually indemnifies freight rail companies in the case of injury and because “over 95 percent of Amtrak’s 22,000-mile network operates on freight railroad tracks.”\textsuperscript{26} To protect the freight railroad from liability, Amtrak contractually indemnifies through no fault liability agreement for injuries “resulting from any damages that occur to Amtrak passengers, equipment, or employees regardless of fault if an Amtrak train is involved.”\textsuperscript{27}

B. Amtrak’s Indemnity Agreements Are Threatened

A fatal accident in 1987 tested Amtrak’s liability and track sharing relationship with freight railroads.\textsuperscript{28} A Conrail locomotive collided with an Amtrak train in Chase, Md. killing fifteen passengers and the Amtrak engineer, and causing numerous injuries to Amtrak passengers and employees.\textsuperscript{29} Fault for the accident lay directly on the Conrail engineer and crew. The engineer in control of the Conrail locomotive pled guilty to manslaughter and admitted that the crew had been under the influence of marijuana, was speeding, and failed to follow many safety regulations.\textsuperscript{30}

\textsuperscript{21} Spitulnik & Rennert, \textit{supra} note 18, at 322.
\textsuperscript{22} \textit{See U.S. GEN. ACCOUNTING OFFICE, supra} note 2, at 8.
\textsuperscript{23} \textit{See} Spitulnik & Rennert, \textit{supra} note 18, at 324.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 327.
\textsuperscript{26} \textit{U.S. GEN. ACCOUNTING OFFICE, supra} note 2, at 9 n.8.
\textsuperscript{27} \textit{U.S. GOV’T. ACCOUNTABILITY OFFICE, INTERCITY PASSENGER RAIL: NATIONAL POLICY AND STRATEGIES NEEDED TO MAXIMIZE PUBLIC BENEFITS FROM FEDERAL EXPENDITURES 148} (2006).
\textsuperscript{30} \textit{See id.} at 1067.
Amtrak attacked on public policy grounds the indemnity provision in its contract with Conrail, which stated:

Amtrak agrees to indemnify and save harmless Conrail and Conrail Employees, irrespective of any negligence or fault of Conrail or Conrail Employees, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any Amtrak Passenger, or for loss of, damage to, or destruction of the property of such Amtrak Passenger.\(^{31}\)

The issue at the District court was Conrail’s contention that liability must first be settled through an arbitration clause that was part of Amtrak’s operating agreement with Conrail.\(^{32}\) Amtrak prevailed in District Court in which the Court held that “public policy will not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue.”\(^ {33}\) However, the Appellate Court reversed the District Court and required the issue be settled via the arbitration clause.\(^ {34}\) Because of the indemnification clause, the recklessness of the Conrail crew cost Amtrak $9.3 million in compensatory damages.\(^ {35}\) This was not the only incident in which Amtrak has had to pay for a host railroad’s negligence. Between 1984 and 2004, Amtrak paid an estimated $186 million for accidents that were caused by host freight railroad companies.\(^ {36}\)

In the Conrail case, although the District Court’s public policy argument was overturned, the potential that future courts may weaken indemnity provisions in rail sharing contracts motivated congressional action to reinforce indemnification agreements.\(^ {37}\) The 1997 Amtrak reauthorization legislation included a $200 million liability cap for all rail passengers and it reinforced that “[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.”\(^ {38}\) The Senate report accompanying the legislation notes that this legislation will help inner-city transit agencies enforce indemnity agreements with owners of rights-of-way.\(^ {39}\) Significantly, the authors of the Senate report believed this liability cap would protect passenger rail agencies from freight railroads demands for higher compensation to cover the risk incurred for shared rights-of-way.\(^ {40}\)

\(^{31}\) Id. at 1068.
\(^{32}\) Id.
\(^{33}\) Id. at 1067.
\(^{34}\) Id.
\(^{35}\) Bogdanich, supra note 28.
\(^{36}\) Id.
\(^{37}\) Id.
\(^{40}\) Id.
This provision in the Amtrak reauthorization legislation has yet to be tested by the courts. Nevertheless, local transit agencies believe it gives them the power to enter into indemnity agreements.\textsuperscript{41} As will be discussed below, the escalating cost of indemnification insurance to passenger rail agencies may prove that the author’s desire of controlling this cost is unrealized. Additionally, it has not alleviated state and local policy makers concerns that releasing freight railroads of all liability is bad public policy.\textsuperscript{42}

The 1970 Amtrak authorization legislation provided relief for the railroad companies from intercity passenger rail obligations. However, Congress did not authorize Amtrak to take over inner-city commuter rail lines.\textsuperscript{43} In Boston, Chicago, New York City, New Jersey, and Philadelphia the major railroad companies attempted to maintain commuter rail lines despite declining profitability.\textsuperscript{44} Federal, state, and local policy makers recognized that commuter rail operations were hindering the railroads from successfully providing freight services and commuter rail services were transferred to local transportation authorities.\textsuperscript{45} Although local transit agencies took over failing commuter lines, their ability to expand service is hindered by lack of authority to force themselves onto freight railroad lines if they wanted to expand service.\textsuperscript{46} As a result, commuter rail agencies have to build their own right-of-way or negotiate access to a freight company’s right-of-way if they wish to expand commuter service.\textsuperscript{47}

\textsuperscript{41} Although the liability cap has not been tested, courts have upheld transit agencies indemnity agreements. See also Dewese v. Nat’l R.R. Passenger Corp., No. 06-4455, 2009 WL 222986, at *9 (E.D.Pa. 2009) (enforcing a liability agreement between Southeastern Pennsylvania Transportation Authority (SEPTA) and Amtrak requiring SEPTA to indemnify Amtrak for injuries to SEPTA passenger struck by an Amtrak train, and Pennsylvania sovereign immunity act did not prevent Amtrak from enforcing the agreement). See generally Mass Transit Admin. v. CSX Transp., Inc., 708 A.2d 298, 314-16 (Md. 1998) (holding MTA, a commuter rail service, was liable for damage to a backhoe through an indemnity provision when a commuter train struck a CSX contractor’s backhoe that was negligently left too close to the tracks).

\textsuperscript{42} Contra Association of American Railroads, Support Passenger Rail, But Not at the Expense of Freight Rail, Jan. 2009, available at http://www.aar.org/InCongress/~media/AAR/PositionPapers/290.ashx (last visited Oct. 4, 2009) (stating freight railroad companies believe it is bad public policy to require companies to shoulder the burden of liability for a public good because freight corridors are private property and by not providing adequate liability coverage, the freight rail companies are subsidizing passenger services).

\textsuperscript{43} Spitulnik & Rennert, supra note 18, at 325.

\textsuperscript{44} Id. at 326.

\textsuperscript{45} Id. (stating newly formed agencies included the Chicago Transit Authority, the Southeastern Pennsylvania Transportation Authority, The New Jersey transit Corporation, and the Massachusetts Bay Transportation Authority).

\textsuperscript{46} Id. at 327.

\textsuperscript{47} Id.
C. THE IMPENDING RISE

If demand for commuter transit rail remained stagnant at its 1970 levels, perhaps issues over right-of-way would have disappeared. But, interest in public transportation is increasing across the country. In 2008, light rail systems saw ridership growth greater than ten percent in Baltimore, Buffalo, Dallas, Denver, Minneapolis, Philadelphia, Sacramento, Salt Lake City, and New Jersey. Commuter rail agencies also witnessed ridership growth over ten percent in Oakland, Cal.; San Carlos, Cal.; Stockton, Cal.; New Haven, Conn.; Pompano Beach, Fla.; Portland, Me.; Albuquerque, N.M.; Harrisburg-Philadelphia, Pa.; Dallas-Fort Worth, Tex.; and Seattle, Wash. Amtrak is growing as well with the help of Virginia state government which "will provide $25.2 million in state funding to run two round-trip Amtrak trains serving Washington, D.C., over a three-year period."

IV. FREIGHT RAIL'S BARGAINING POSITION OF STRENGTH

The no-fault demands of the freight railroads on passenger rail agencies to enter into shared use agreements have not always been standard operating procedure. Older shared use agreements did not include "but for" liability; however, new shared agreements that require "but for" liability now are the standard. The simple explanation for no-fault indemnity requirements in shared operating agreements is that freight railroads have the negotiating advantage because they own well-established rights-of-way through developed areas. Federal law preempts passenger rail agencies from exercising eminent domain powers over freight railroads if the taking or local regulation will unreasonably burden the ability of the railroad to fulfill its common carrier obligation in interstate commerce.

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49. Id.
50. Id.
53. Sheys Address, supra note 52, at 2.
54. 49 U.S.C. § 10501(b) (2008); see also Hillsborough County v. Automated Med. Labs.,
Since local transit agencies lack the option to take railroad property, they must negotiate with rights-of-way owners. But, these agencies lack options. A transit agency displeased with an offer made by a freight railroad has limited options and cannot conveniently turn to another potential seller with a right-of-way through the heart of an urban center. The deficiency in the legal standing of transit systems creates problems “negotiating a reasonable and publicly acceptable purchase price.”

Freight railroads can demand no-fault indemnity agreements because they do not need the passenger services on their lines. For the railroads, denying access has little negative impact. Since the 1980s, the freight railroad companies have experienced a revival in their financial health. In 2008, Class I railroads saw their rate of return on investment climb to 11.21 percent from 10.10 percent in 2007. Sharing of lines has the potential to help freight railroads maintain profitability by helping to defray the cost of track maintenance. But, the existence of passenger rail agencies not only creates additional potential liability, it also decreases freight access and challenges their ability to service their customers.

Freight railroad officials argue that they are publicly traded companies with a duty to their shareholders to maximize shareholder returns on investments. One way to do this is to minimize liability and to transfer liability insurance premiums on to the passenger rail entities.

V. THE INDEMNIFICATION DEBATE IN THE STATES

Forty-one passenger rail agencies operating in the United States (exclusive of Amtrak) share property with freight railroads. These include commuter rail agencies, such as the Massachusetts Bay Transportation Authority, that share track and mixed operations, to Denver’s light rail system, that shares a right-of-way. Shared property arrangements are

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55. SHEYS, supra note 1, at 4.
58. SHEYS, supra note 1, at 3.
59. Id. at 4.
60. UNITED STATES GENERAL ACCOUNTING OFFICE, supra note 2, at 17-18.
61. See RONGFANG, supra note 4.
62. RONGFANG, supra note 4, at 69.
No Free Ride

contractual in nature and thus are not publicly debated; however, some transit agencies lack the authority to grant indemnification and therefore must get State Legislative approval. This debate was made public in Colorado in 2007 and is currently an open discussion in Florida and Massachusetts. It also has been up for debate in other states.

A. COLORADO

In 2004, Denver voters passed the FasTracks Referendum, authorizing a sales tax to add additional passenger rail lines to its current system to connect the metropolitan area to the Denver International Airport and suburban communities. The original expansion plans included use of Burlington Northern Santa Fe (BNSF) and Union Pacific (UP) rail corridors. The plans soon required state legislative intervention after BNSF and UP refused to grant the Regional Transportation District (RTD) access to their property unless the companies were released from any liability regardless of fault involving an accident with a passenger rail vehicle. This would mean that an accident caused by a negligent or reckless BNSF involving an RTD light rail train that resulted in the death of an RTD passenger would result in no liability to BNSF. Any tort damages awarded against BNSF to an RTD passenger would be paid by RTD through insurance on behalf of the negligent or reckless freight rail company. This is known as a "but for" arrangement—"but for the presence of the commuter rail service, the freight railroad would not be exposed to certain risks." Despite this, and fearing additional cost and time overruns of FasTracks, the Colorado legislature passed legislation allowing RTD to carry insurance covering BNSF and UP if an accident occurred even if it was the fault of the host freight rail company.


64. See Flynn, supra note 63; see Woolhouse, supra note 63; see Editorial, Put Commuter Rail on the Right Track, supra note 63.

65. See discussion infra Sections V.B., V.C., V.D.


68. Id.


When Colorado voters passed the FasTracks initiative in 2004, it was with the assumption that BNSF and UP would permit a shared usage agreement without a waiver of complete liability.\textsuperscript{71} In fact, not all shared use agreements require complete hold harmless indemnity clauses.\textsuperscript{72} But, as shared use agreements expire, freight companies are putting new demands on passenger rail agencies for greater liability protection, even for the railroads' negligence and recklessness.\textsuperscript{73}

A change in position on the indemnity requirement by BNSF and UP in Colorado was the result of a January 2005 accident in Glendale, California.\textsuperscript{74} A suicidal individual caused the accident when he parked his vehicle on a Metrolink track ahead of an oncoming commuter train.\textsuperscript{75} The individual fled the scene prior to the crash, but left his vehicle causing the death of 11 people and injuries to 180 more. The UP, which shares tracks with Metrolink, was initially a named defendant in the case. Later it was removed because Metrolink owned the Glendale tracks.\textsuperscript{76}

During the legislative debate over Colorado Senate Bill 07-219, there was much indignation aimed at the freight companies for their demands. The Senate sponsor stated, "I literally had to gag to do it [sponsor the bill]" and another legislator accused the freight railroads of "holding up" rail expansion and posing a "take it or leave it" situation for the legislature.\textsuperscript{77} Lawmakers' anger appeared to be rooted in the process of the bill's origin as much as in the substance of the bill. The rail lines in question were far into the planning stages, environmental impact statements were complete, and abandoning the plan to share lines would delay the completion of the rail line.\textsuperscript{78}

Lawmakers also struggled with the totality of the indemnity language in the bill. The legislation gives freight railroads "blanket indemnity" of "willful and wanton" conduct.\textsuperscript{79} This language allows RTD to enter into a shared usage agreement with a freight line in which RTD would pay all

\textsuperscript{71} See Kevin Flynn, Calif. Crash Ties up RTD Rail Plans: Railroads Want Legal Protection on FasTracks Lines, ROCKY MTN. NEWS, Apr. 9, 2007, at 4, available at 2007 WLNR 6741480 [hereinafter Flynn, Calif. Crash Ties up RTD Rail Plans].

\textsuperscript{72} RONGFANG, supra note 4, at 58.

\textsuperscript{73} U.S. GEN. ACCOUNTING OFFICE, supra note 2, at 17-18.

\textsuperscript{74} Flynn, Calif. Crash Ties up RTD Rail Plans, supra note 71.

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Flynn, Calif. Crash Ties up RTD Rail Plans, supra note 71; Jeffrey Leib, Bill Railed Against but OK'd Freight Lines Won't be Liable in Wrecks, DENV. POST, Apr. 12, 2007, at B05, available at 2007 WLNR 7002883.


\textsuperscript{79} Id.
damages if an RTD train were involved in an accident with a freight railroad even if the freight engineer was under the influence of drugs, as was the case in Chase, Md., in 1987. In addition, the statute folds the railroads into the state’s government immunity status by removing punitive damages for recklessness by a freight railroad that results in a passenger’s death or injury. The legislation, now law, in Colorado states the following:

A railroad operating in interstate commerce that sells to a public entity, or allows the public entity to use, such railroad’s property or tracks for the provision of public passenger rail service shall not be liable either directly or by indemnification for punitive or exemplary damages or for damages for outrageous conduct to any person for any accident or injury arising out of the operation and maintenance of the public passenger rail service by a public entity.

Lawmakers approved the legislation based on the strong public support for the FasTracks plan and any other option would result in more condemnations of private property along any new corridor. This indemnification legislation likely faced little opposition because voters already had approved rail expansion and the public expected it to be completed.

B. FLORIDA

The debate in Florida is operating prior to the implementation of a rail expansion plan and has seen much more opposition from state lawmakers. In the 2008 legislative session, Florida failed to pass a bill allowing indemnification because of liability concerns. The measure returned in the 2009 legislative session, but with the same apprehension over indemnity.

Under the plan, the state would purchase and renovate an existing CSX freight line into a commuter rail system for $150 million. Florida also would pay $496 million for improvements to CSX facilities and track separate of the passenger line. The federal, state, and local governments would pay $615 million on the commuter line; “That money would double-track the line to accommodate both rail and freight traffic.”

80. COLO. REV. STAT. §24-10-114(b) (2007); Telephone Interview with Marla Lien, General Counsel, Regional Transportation District, in Denver, Col. (March 25, 2009).
81. COLO. REV. STAT. §24-10-114(b) (2007).
82. Marsella, testimony, supra note 78 (At the Senate and House Judiciary hearings on the indemnity legislation, there was no testimony from opponents of the bill. Elected officials from the metro area testified in support, as did representatives from the real estate industry).
83. Editorial, Put Commuter Rail on the Right Track, supra note 63.
84. Id.
85. Id.
86. Id.
87. Id.
spite the infrastructure improvements promised by the different levels of government, Florida must first pass legislation to indemnify CSX in order to get a deal.

C. MASSACHUSETTS

Likewise, the Lieutenant Governor of Massachusetts, Timothy Murray, also has publicly complained about CSX’s demand for indemnity coverage. As in Florida, his concern is that the taxpayers will have to pay for the freight railroad’s recklessness in the event of an accident. In Massachusetts, the state wants to purchase additional lines from CSX to add commuter trips and would allow CSX to use the state owned right-of-way. However, CSX wants the deal to include no-fault liability, which Lieut. Gov. Murray declares a “deal breaker.” Political pressure for increased passenger rail is a major reason why lawmakers have accepted no fault indemnity agreements. In his statements, Lieut. Gov. Murray attempts to deflect that pressure to the freight railroad saying, “their demand for this unreasonable no-fault clause blocks what would otherwise be an important economic development, public safety, and environmental opportunity for Worcester and the Commonwealth as a whole.”

D. OTHER STATES

Similar to Colorado, Minnesota and Virginia also have statutes allowing a transit agency to enter into a contract that allocates liability and allows the agency to purchase insurance to cover such liability. These broad statutory powers permit the transit agencies the flexibility to enter into indemnity provisions without restricting the agencies to specific agreements on a particular right-of-way.

In contrast, the New Mexico Department of Transportation entered into a joint use agreement with BNSF for a specific right-of-way. The shared use agreement for the Rail Runner Passenger train included an indemnity provision that did not require legislative approval. In order

88. Woolhouse, supra note 63 (where Lieut. Gov. Murray is quoted as saying, “This whole issue of indemnification is outrageous”).
89. Id.
91. Id.
92. MINN. STAT. ANN. § 174.82 (West 2006); VA. CODE ANN. § 56-446.1 (West 2006).
93. See generally, COLO. REV. STAT. § 24-10-114 (West 2007); MINN. STAT. ANN. § 174.82 (West 2006); VA. CODE ANN. § 56-446.1 (West 2006).
95. Id.
to fund the insurance premium, New Mexico created a funding mechanism paid for with transportation bonds. Due to the innovative nature of this funding mechanism, the state’s department of transportation did not proceed with the agreement until the state’s Attorney General issued an advisory letter stating that such a shared use agreement was within state law.

The lesson learned from Colorado is that if legislative approval is needed, it is better to get a broad grant of authority that permits the transit agency to negotiate multiple indemnity agreements without fighting the same political battles multiple times. Although the New Mexico Department of Transportation was able to forego the legislative debate, the advisory letter lacks the authority of state legislative approval and leaves it more susceptible to judicial interpretation.

VI. THE HIGH COST OF INDEMNIFICATION INSURANCE

Indemnification agreements with freight railroads come at a cost to the passenger rail agency. Through these agreements, the passenger rail agency must pay any judgment awarded to a plaintiff against a freight railroad. To provide this indemnification, the passenger rail agency agrees to carry insurance to cover any judgment. Premiums for this type of insurance can cost a passenger rail agency up to “20 percent of their annual operating budget.” Freight rail companies demand a range of insurance coverage ranging from $100-500 million.

The cost of carrying indemnity insurance varies according to the operating agreement and the freight railroad. For the heavier commuter rail systems that share track, there are two insurance options: “1) [O]perators or transit systems maintain the insurance and hold freight harmless,” or “2) [I]nsurance liability is settled by [a] trackage agreement or service contract.” The cost of insurance to a transit agency for light rail depends on the “size . . . of services and strict separation” between the

96. Advisory Letter from Patricia A. Madrid, Attorney General, New Mexico, to Rhonda G. Faugh, Transportation Secretary, New Mexico (Feb. 28, 2006) (on file with New Mexico Attorney General’s Office and available at 2006 WL 1067862.)
97. Id.
98. See CSX Transp., Inc. 708 A.2d 298, supra note 41 (finding commuter rail service liable for damages through an indemnity provision when a commuter train struck a backhoe that was on the tracks due to freight operator negligence); see also Deweese 2009 WL 222986 (enforcing a liability agreement between Southeastern Pennsylvania Transportation Authority (SEPTA) and Amtrak that required SEPTA to indemnify Amtrak for injuries to SEPTA passenger struck by an Amtrak train).
100. Id.
101. Id.
102. Liu, supra note 4, at 36.
freight and passenger lines.\textsuperscript{103}

In Massachusetts, the Massachusetts Bay Transportation Association (MBTA) negotiated (a separate agreement from the issue discussed above) to use a section of Conrail track cost MBTA $3.8 million a year for $75 million of coverage.\textsuperscript{104} This amount of coverage was determined by the state legislature, which capped any tort damages for accidents on this line at $75 million.\textsuperscript{105}

The indemnification debate in Colorado developed around the same time that the FasTracks expansion began to face other budgetary pressures.\textsuperscript{106} When voters passed the FasTracks initiative the project was estimated to cost $4.7 billion. Over four years that price increased to $7.9 billion.\textsuperscript{107} Compounding the increased construction cost of FasTracks, RTD will pay an estimated $2 million a year for insurance to indemnify the freight railroads of all liability for shared usage of certain rights-of-way.\textsuperscript{108}

New Jersey has a complex liability and insurance agreement with Conrail. In the agreement, New Jersey Transit “pays Conrail $1.2 million annually” that are “funds that Conrail uses to defray its cost of insurance for operating” on a shared line.\textsuperscript{109} In totality, New Jersey Transit has paid as much as $4.2 million in a year for insurance that includes “$10 million of self-insurance per incident and up to $250 million in excess coverage per incident.”\textsuperscript{110}

The North County Transit District in San Diego, CA, pays an insurance premium of $1.7 million for insurance coverage.\textsuperscript{111} In their shared use agreement with BNSF, the transit district assumes liability for any damages up to $10 million and over $85 million.\textsuperscript{112}

The passenger rail industry is fortunate to have had relatively few accidents that resulted in death. However, when accidents do occur, they often result in damages that are financially crippling to both private and public entities. The cost of insurance is part of doing business, but the negative impact of indemnification agreements on a passenger rail

\textsuperscript{103} Id. at 41.

\textsuperscript{104} Murray, supra note 90.

\textsuperscript{105} Id.


\textsuperscript{107} Id.

\textsuperscript{108} Flynn, Calif. Crash Ties up RTD Rail Plans, supra note 71.


\textsuperscript{110} Id.

\textsuperscript{111} Id. at 3.

\textsuperscript{112} Id. at 5.
agency’s operating budget impacts the broader public policy goal of expanded, safe, and timely transit service. By reducing the cost of insurance premiums, the savings could be used to improve services provided by these agencies. In the United States, at least forty-one passenger rail agencies—either commuter, light, or heavy rail—have some type of shared use operating agreement with a freight railroad.\textsuperscript{113} If all of these agencies have to dedicate yearly operating cost to indemnify freight railroads for their own negligence or recklessness, then millions of dollars a year are being diverted from passenger rail services to insurance costs.

VII. TORT LAW PRINCIPLES

This paper has reviewed criticism of indemnity provisions that shift liability from the freight host railroads to the passenger rail agencies based on the cost to the transit agency and the inequities in the bargaining process. Underlying the criticisms of the agreements is the general proposition that these agreements erode the public policy goals of tort law that punishes and discourages negligent or reckless behavior. Indemnity agreements vary in scope. Some jurisdictions indemnify for negligence, while others indemnify freight railroads for willful and wanton conduct in addition to negligence.\textsuperscript{114} Freight railroads limit their liability by demanding hold harmless indemnity agreements using the theory of “but for” liability.\textsuperscript{115} This theory “is the freight railroad’s requirement that the passenger rail operator must bear all losses of any party (freight operator, itself or third-parties) that would not have occurred if the passenger rail operator had never arrived on the property.”\textsuperscript{116} “But for” liability places a contractual duty on passenger rail agencies to assume the tort liabilities of the freight railroad.\textsuperscript{117}

A. FLORIDA ACCIDENT

The freight railroads demand for “but for” liability is said to deprive accident survivors and their families of the justice gained through civil litigation. In 1991, negligent track maintenance by CSX in South Carolina caused multiple deaths and injuries to Amtrak passengers.\textsuperscript{118} A vic-

\textsuperscript{113} See Liu, supra note 4, at 67-70.
\textsuperscript{115} Sheys, Address, supra note 52.
\textsuperscript{116} Id.
\textsuperscript{117} U.S. Gen. Accounting Office, supra note 2, at 18.
tim’s widow sued CSX for punitive damages in the hopes of finding justice but Amtrak, rather than CSX, paid the judgment to her.\textsuperscript{119} The widow believed that the verdict was fair and that the punishment would encourage CSX to correct their behavior.\textsuperscript{120} However, after receiving her judgment, the widow soon realized that it was Amtrak that paid and not CSX; “First came disbelief, then anger, and finally tears. ‘I’m mortified,’ she said. ‘Everything I’ve been living under is a lie. I was feeling on a personal level at least I did my part, and now I find out I didn’t.’”\textsuperscript{121}

When the Colorado legislature passed the indemnification statute, they also removed a plaintiff’s ability to sue for punitive damages if a freight railroad’s behavior was reckless.\textsuperscript{122} Although this did not sit well with the state legislators, it is part of the required legislation for a freight railroad to allow passengers on their lines.\textsuperscript{123} Minnesota’s statute allows indemnification “for all types of claims or damages” and Virginia does not limit the types of claims that may be indemnified.\textsuperscript{124}

**B. Freight Railroads Lack of Concern for Safety?**

The pursuit of justice is one tort law principle; another tort law principle is to encourage safety.\textsuperscript{125} According to the trial judge in the Florida case, the indemnity provision with Amtrak removed CSX’s motivation to improve safety.\textsuperscript{126}

The evidence referred to in the Florida court’s opinion at least in part was a Federal Railroad Administration safety audit criticizing the railroad for failing properly to train employees and not providing their personnel adequate time to perform track maintenance.\textsuperscript{127} It is doubtful that an indemnity agreement shifting Conrail’s liability to Amtrak was part the Conrail engineer’s thinking when he decided to smoke marijuana prior to the Chase, Maryland crash; but critics of the railroads do draw

\textsuperscript{119} Bogdanich, \textit{supra} note 28.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} Marsella, testimony, \textit{supra} note 78.
\textsuperscript{123} \textit{Limitations on the Liability of Railroads that Make Their Property Available for the Provision of Public Passenger Rail Service: Hearing on S. 07-219 Before the H. Jud. Comm., 66th Gen. Assem. (2007) (statement by Rep. Terrance Carroll, Chairman, H. Jud. Comm.) (“I just have a certain distaste in my mouth for feeling like I’ve been bullied by the railroad industry into providing them additional indemnification. It just doesn’t sit well with me.”).}
\textsuperscript{124} \textit{MINN. STAT. ANN. § 174.82 (West 2006); VA. CODE ANN. § 56-446.1 (2009).}
\textsuperscript{125} \textit{ARTHUR BEST ET AL., BASIC TORT LAW 8 (2nd ed. 2007).}
\textsuperscript{126} CSX Transp., Inc. v. Palank, 743 So. 2d 556, 563-64 (Fla. Dist. Ct. App. 1999) (“This evidence showed that although cost-cutting measures may have saved Defendant over two billion dollars, society paid with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.”).
\textsuperscript{127} \textit{Id.} at 560-61.
such conclusions between managerial decisions regarding staffing levels and indemnity agreements.\textsuperscript{128}

The concern for safety and the misbalance in negotiating position between the freight railroads and passenger rail agencies was the concern of the district court in the Amtrak Conrail accident. The court held "public policy will not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue."\textsuperscript{129} The Supreme Court stated as far back as 1852 "when carriers undertake to convey persons by the powerful but dangerous agency of steam . . . public policy and safety required that they be held to the greatest possible care and diligence."\textsuperscript{130} What the court did not consider in this early railroad tort case was the fact that the carriers would be operating separately from the owners of the track on which passenger trains were operating.

Indemnity agreements may discourage safety simply because those in charge of safety are not faced with the responsibility of keeping those in their charge safe. However, Congress has determined that it is valid public policy to remove passenger carrier obligation from freight companies when it created Amtrak. For this reason, whether it is Amtrak or a local transit agency operating on freight rail lines, indemnity agreements may in fact be good public policy despite the cost to the passenger rail agency. Good policy because one entity is charged with safety and it puts the onus on the passenger rail entity to ensure those maintaining the passenger lines are behaving properly. In addition, freight railroads have little incentive to act so willfully negligent that an accident would occur on their lines that would also cause the freight railroad financial harm.\textsuperscript{131}

\section*{VIII. Solutions}

The indemnity provision required by BNSF and UP was not such a problem that Colorado lawmakers refused to allow the RTD the power to enter into such agreements. Of course, Colorado lawmakers were stuck between a rock (the voters) and a hard place (the railroads). The indemnity legislation in Colorado did not pass with reasonable debate; it passed because of pressure to continue with the voter-approved FasTracks plan.\textsuperscript{132} Not all legislative bodies hoping to expand passenger rail service will be willing to legislate under the same conditions. If both intercity and inner-city passenger rail is going to expand, indemnity provisions may restrict the growth of this valuable policy objective.

\textsuperscript{128} See Bogdanich, supra note 28.
\textsuperscript{129} Nat'l R.R. Passenger Corp., 698 F. Supp. at 972.
\textsuperscript{130} JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 211 (2001).
\textsuperscript{131} See Bogdanich, supra note 28.
\textsuperscript{132} Jeffrey Leib, Liability Pact Eases Path for FasTracks, supra note 70.
The problem is twofold. First, indemnity agreements transfer reckless liability of a private party on to the public. This considerable expense to the passenger rail agencies diverts millions of dollars a year to insurance policies instead of expanding passenger service. Additionally, statutes and contracts that limit damages against reckless conduct deprive a plaintiff justice through civil litigation. However, indemnity agreements provide a mechanism to lower costs that permit transit agencies to develop passenger rail and allows Amtrak to expand intercity rail. States have tried to solve this issue, but as passenger rail expands, a national solution may be required.

The decision by states and transit agencies to indemnify the freight railroads is a solution on its own. Policy makers consciously decide that access to freight right-of-way is more valuable than holding freight railroads accountable to tort claims if their negligence results in harm to a passenger.

Working within this framework, if states want to lower their liability and therefore lower the monthly insurance premium state legislatures could cap the amount of damages a passenger may receive in the event of an injury or fatality. Massachusetts capped damages to $75 million when it entered into a right-of-way agreement with Conrail.\textsuperscript{133} Obviously, this cap permitted the state to buy lower insurance to indemnify Conrail. Similar legislation in Florida during the 2008 legislative session would have required a cap on damages.\textsuperscript{134} This measure failed to pass in part because of opposition by trial lawyers.\textsuperscript{135} The new legislation for the 2009 session does not require a cap on damages.\textsuperscript{136}

A seemingly simple solution is for states to buy rights of way from the freight railroads. This is an easy fix if a freight railroad is abandoning a line and they will not have a presence on the right-of-way. An example of this is the limited liability faced by the UP after the California Metrolink crash that resulted from the suicidal individual that parked his SUV on the passenger rail tracks. Initially, UP was named as a codefendant, but was dropped from the lawsuit because Metrolink owned the tracks outright.\textsuperscript{137} However, as demonstrated in Florida, Massachusetts, and New Mexico, even when purchasing a section of line, the agency still may have to contract back with the freight railroad to allow access.\textsuperscript{138} In

\begin{footnotes}
\item[133.] Murray, \textit{supra} note 90.
\item[134.] S.B. 1666, 2008 Leg., 110th Sess. (Fla. 2008).
\item[135.] Editorial, \textit{Put Commuter Rail on the Right Track, supra} note 63.
\item[136.] \textit{Id}.
\item[137.] Flynn, \textit{Calif. Crash Ties up RTD Rail Plans, supra} note 71.
\item[138.] Editorial, \textit{Put Commuter Rail on the Right Track, supra} note 63; Murray, \textit{supra} note 90; Jones, \textit{supra} note 94.
\end{footnotes}
this case, the freight railroads are still demanding indemnity. Another solution to lower insurance premiums is through pooled insurance programs. This option would reduce premiums by allowing all transit agencies that share right-of-way to all by into a program together but the federal government would have to contribute if liability exceeded a certain amount.

A further option "could include establishing a federally funded railroad liability and indemnity program to which all U.S. transportation properties could subscribe and contribute that would provide the required railroad-required liability indemnification protection at less cost than when pursued on an individual basis."

The best solution, though, is increased public and private investment in both passenger and freight rail. The public wants more passenger service and the best way to accomplish expanded service is to invest in improvements that improves service for both freight and passenger railroads. Public money invested into passenger rail lines to expand dedicated passenger rail decreases the need for indemnity insurance and helps to increase customer satisfaction. Additionally, public investment in freight railroad lines provides added incentive for freight railroads to negotiate with transit agencies over shared rights-of-way.

Congress appears to be recognizing that the commuter railroad's lack of bargaining power is limiting their ability to negotiate shared use agreements with the freight railroads. In October 2008, Congress passed the Amtrak reauthorization bill entitled the Passenger Rail Investment and Improvement Act (PRIAA). PRIAA authorizes the Surface

139. Id.
140. Id.
141. Rail Capacity Constraints and Investment Needed to Maintain Efficient and Reliable Rail Passenger Service: Hearing on Rail Capacity and Infrastructure Requirements Before the Surface Transportation Board (2007) [hereinafter Zehner, testimony] (testimony of Dale J. Zehner, CEO, Va. Ry. Express on behalf of Am. Pub. Transp. Ass'n); U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 114, at 33 ("A group of organizations with similar characteristics, such as a group of commuter rail agencies, pool their assets to obtain a single commercial insurance policy, rather than obtaining individual commercial insurance policies.").
142. Zehner, testimony, supra note 141; accord U.S. GOV'T ACCOUNTABILITY OFFICE, supra note114, at 33 (GAO identified additional insurance options called captive insurance and risk retention group. "Captive insurance. A privately held insurance company that issues policies, collects premiums, and pays claims for its owners, but does not offer insurance to the public. Risk retention group. Similar businesses with similar risk exposures create their own liability insurance company to self-insure their risks as a group.").
Transportation Board to conduct nonbinding mediation between the parties if after a "reasonable period of negotiation, a public transportation authority cannot reach agreement with a rail carrier" for shared usage of track.\textsuperscript{144} The Board is to model the mediation from its current process it uses to settle rate cases.\textsuperscript{145} It is unclear whether this provision will assist commuter railroads because the provision calls for nonbinding mediation. This process still does not provide commuter railroads with the same leverage they would enjoy if they could utilize the power of eminent domain or if Congress would have simply made the arbitration binding.

Congress is poised to address commuter railroad's lack of bargaining further by creating model indemnity language. In the appropriations legislation for the Department of Transportation is language in the accompanying report that authorizes the Surface Transportation Board to identify indemnification language that may be used as a model for shared use agreements.\textsuperscript{146}

\textit{The Committee directs the STB to review the issues surrounding the inclusion of indemnification in agreements between entities responsible for passenger rail service and rail carriers. This review should address historic precedent, current practice, and should identify draft contractual language that, in the opinion of the STB, would reasonably address rail carriers' concerns over liability resulting from passenger rail operations while balancing the needs of public transportation authorities, as well as Amtrak, and other entities providing or operating passenger rail service to develop improved and expanded passenger rail service, and while providing appropriate incentives to assure safe operation of passenger trains.}\textsuperscript{147}

Assuming the appropriations bill passes with the above language, railroads will have boilerplate language to guide their negotiations. Model contract language may in fact prove helpful in these shared use negotiations. The model language could identify what the industry considers a reasonable indemnity provision. A party that is deviating from the reasonable provision could then be coaxed into a reasonable indemnity agreement through the mediation process. However, if Congress were interested in leveling the playing field between the parties, at minimum it would create a binding arbitration process to accompany the model contract language.

\textbf{IX. CONCLUSION}

As ridership increases and more and more cities add rail to their

\begin{footnotes}
\item\textsuperscript{144} 49 U.S.C.A. § 28502 (West 2008).
\item\textsuperscript{145}  Id.; 49 C.F.R. § 1109.4 (2009) (governing the mediation process for rate cases).
\item\textsuperscript{147}  Id.
\end{footnotes}
transportation portfolio, a shift in political attitudes toward passenger rail on a national level also will increase the need for shared rights-of-way and will further shine a spotlight on indemnification agreements. The stimulus package President Obama signed into law in reaction to the 2009 recession provides "$17.7 billion for mass transit, Amtrak, and high-speed rail." And this appears to be only the beginning of the Administration's investment in rail. According to Transportation Secretary Ray LaHood, "President Obama wants to make high-speed rail a signature achievement of his presidency." 

Indemnity agreements for shared rights-of-way are in fact a solution to a problem. But, the solution itself creates controversy because it requires other policy goals to be compromised. States such as Colorado, Minnesota, and Virginia have made a decision that access to right-of-way trumps the cost of indemnity insurance and allowing reckless behavior to go unpunished. Not all legislatures will agree and this constraint threatens to hinder passenger rail expansion. But, as passenger rail service grows and until policy makers decide that it is worth additional investment, indemnity agreements will be the crutch on which transit agencies rely.

Tailor-Made: State Regulation at the Periphery of Federal Law

Zachary Smith*

Toward the end of the trip, he [Theodore Roosevelt] came squarely with this declaration: "I believe the time has come when we must have Federal supervision or Federal control of railroads. I am utterly opposed to the Government ownership of railroads. However, I believe that, if we do not get Government supervision or control, the radical demand for Government ownership will come with force and, perhaps, sweep the people along with it."

Interview by Forrest Crissey with H.H. Kohlsaat, recalling Theodore Roosevelt’s opinion on the railroad trust, reproduced in N.Y. TIMES, July 6th, 1907.

INTRODUCTION

Over the last several years, legal scholars have documented the increased reluctance of courts to invoke the presumption against preemption.¹ Instead, empirical studies show courts now invoke preemption

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more often than before. In general, these rulings decrease the power of the states; chipping away at the traditional state police power through which states regulate health, safety, and public welfare.

In no other context is this growth of the preemption defense clearer than in the context of railroads. Traditionally, railroads have asked courts to exempt the industry from state regulations, like local land use laws and road crossing regulations, on the basis that major federal railroad regulating statues have either occupied the field or have express grants of pre-emption. The new tactic of the railroad industry, however, is to claim that laws like the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempt states from regulating railroads based on the cooperative nature of federal environmental laws, such as the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), and the Comprehensive Environmental Response, Compensation and Recovery Act ("CER-CRA"). Even though states are fulfilling federal government-mandated objectives, the railroads argue laws such as the ICCTA preempt these landmark environment laws. The railroad's position, this paper argues, violates the Supremacy Clause, the presumption against preemption, and the doctrine requiring courts to harmonize co-equal federal statutes.

However, an opportunity to end judicial acquiescence to this faulty line of logic has arisen. The Ninth Circuit will examine Association of American Railroads v. South Coast Air Quality Management District ("SCAQMD"), a case in which a local air quality district passed three very specific rules to clean the air around urban rail yards in Los Angeles. The railroads challenged the rules, claiming that the district: (1) either acted without authorization from the CAA, and thus the ICCTA preempted rules based solely on the state police power; or (2) that even if the district acted appropriately, that the ICCTA preempts any regulation of the railroads except that authorized by the ICCTA. The District Court wrongly found the air quality district was not acting under the CAA cooperative federalism mandate. The Ninth Circuit can fix that error by properly considering how the ICCTA and the CAA can interrelate.

The case is monumentally important to reestablish a presumption

\[\text{notes from Unwarranted Environmental Risks: A NEPA Solution for ICCTA Preemption, 91 MINN. L. REV. 836 (2007).}\]

2. Strickland, supra note 1, at 1152.
5. Id.
6. Id. at *6.
against preemption, and a return to harmonizing co-equal federal statutes. This article examines previous arguments scholars have made suggesting courts should return to the presumption against preemption and for the harmonization of conflicting statutes. While those arguments are compelling, they offer little practical advice for state regulators. Instead, this article examines how SCAQMD offers innovative techniques in defeating preemption claims.

Part I focuses on the railroads as the key to the growth of the commerce clause. Part II examines the law and policy of preemption and harmonization. Part III examines the case Association of American Railroads v. SCAQMD in which SCAQMD promulgated three air emissions rules, which targeted railroads.

PART I: RAILROADS AND THE EXPANSION OF THE COMMERCE CLAUSE: A BACKGROUND

Association of American Railroads v. SCAQMD is not the first time railroads have argued railroad-specific federal laws preempt general-applicability federal laws. In the midst of the anti-trust fervor that brought William McKinley and his Vice-President running mate, Theodore Roosevelt, to the White House in March of 1901, the railroads were busy looking for a way to avoid dissolution, having witnessed the populist wrath embodied in the passage of Sherman Anti-Trust Act of 1890. The state of Ohio had already successfully sued another industry giant – Standard Oil – on anti-trust grounds, but the state suit only applied to Standard's possessions in Ohio, so Standard simply spun off Standard Oil of Ohio (now a part of BP). So, it was clear at the turn of the century that the pressure was rising on the railroads. Moreover, given the nature of railroad operations, state-by-state evasion (like with Standard Oil) could not possibly succeed.

When the U.S. finally brought an anti-trust action in federal court in Kansas against eighteen railroads that had signed onto a rate-setting agreement, it was clear that the railroads needed a new litigation strategy. Accordingly, the railroads collectively chose to examine how Congress already regulated them. The railroads argued that in the Interstate Commerce Act of 1887 ("ICA"), Congress had created such a broad regulatory scheme that any rate-setting agreements had the implicit permission of the railroad regulatory body, the Interstate Commerce Commission ("ICC"). Thus, the railroads believed the ICA shielded

8. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
9. Id. at 341.
10. Id. at 364.
them from the Sherman Anti-Trust Act.

The railroads were surprised when the U.S. Supreme Court ruled in favor of the government:¹¹

Does, therefore, the implication irresistibly arise that Congress intended in the act of 1890 to abrogate, in whole or in part, the provisions of the Act of 1887, regulating interstate commerce? It seems to me that the nature of the two enactments clearly demonstrates that there was no such intention. The act to regulate interstate commerce expressed the purpose of Congress to deal with a complex and particular subject which, from its very nature, required special legislation. That act was the initiation of a policy by Congress looking to the development and working out of a harmonious system to regulate the highly important subject of interstate transportation.¹²

The Supreme Court explicitly acknowledged that Congress must act at different times on different issues; however, that does not imply that Congress writes one federal law into a vacuum, preempting other federal laws. Instead, as the court writes plainly, different laws work in a "harmonious system," and that it is the Court's province to sort out any inconsistencies.¹³

Before Congress passed the ICA of 1887, railroads were chartered under state law and—early on—entirely state regulated.¹⁴ Predictably, as railroads expanded and became interstate entities, incompatible and onerous regulations at each state boundary created the need for federal regulation.¹⁵

States did regulate railroads under their police power to protect their citizens' health, safety, and welfare. In an early example of local environmental regulation, the City of Richmond, Virginia, banned steam engines from city streets.¹⁶ Steam engines posed a number of hazards in urban areas, from creating fire-starting sparks to producing excessive soot.¹⁷ In this case, the Supreme Court weighed the authorization granted to the railroad under its charter for laying line, against the inherent police powers of the city.¹⁸ The Court determined that the city had neither overstepped its authority nor infringed on the railroad's charter.¹⁹ "The power to govern implies the power to ordain and establish suitable police regulations."²⁰ This ruling, however, pre-dated the ICA.

¹¹. See JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 100 (2001).
¹². Trans-Missouri, 166 U.S. at 358 (sic).
¹³. Id. at 358.
¹⁴. See ELY, supra note 11, at 78.
¹⁵. See id. at 106.
¹⁷. ELY, supra note 11, at 131.
¹⁸. Richmond, 96 U.S. at 527.
¹⁹. Id. at 529.
²⁰. Id. at 528.
As railroads grew, they began to cross state boundaries, creating problems for each company to comply with the different laws that lay along the same line of track. The creation of dormant commerce clause jurisprudence gave railroads a useful tool to quash burdensome state regulations. In the Supreme Court decision Wabash, St. Louis & Pacific Railway v. Illinois, the Court struck down an Illinois state law that deemed some rebates as unjust discrimination. The Court held the Commerce Clause:

would be a very feeble and almost useless provision . . . if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing [sic] this commerce.

Thus, the judicial branch was already invalidating state laws which "unreasonably burdened" interstate commerce just as Congress created a federal regulatory framework. However, states retained the power to enforce regulations that only incidentally touched commerce absent federal legislation, such as minimum requirements for train drivers.

As the railroads continued to grow a patchwork of state regulations, hampered by the dormant commerce clause, proved ineffective. In response to growing reports of monopoly-like corruption and contract rate fixing, Congress passed the ICA and created the ICC, a regulatory body charged with applying the ICA. The ICA made rebates and pooling unlawful; forced the railroads to publish fares; and required fees to be "reasonable and just." Notably, all of the ICA's provisions addressed activities of an economic nature. The ICA could issue orders, but relied on federal courts for enforcement.

Many felt the ICC's powers were too limited, so Congress amended the ICA several times: once in 1906 under the Hepburn Act, allowing the ICC to determine a numerically just and reasonable rate; and again in

22. Id. at 576-77.
23. Id. at 573.
25. Id at 110-15.
26. Id. at 90-93.
27. See Herbert Hovenkamp, Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem, 97 YALE L.J. 1017, 1039-40 (1988) (discussing that railroads created pools—contracts to share traffic and fees—to reduce the negativities of competition).
28. See Ely, supra note 11, at 91, (Congress did not originally give the ICC any parameters for a "reasonable and just" determination, a lack of guidance, critics say, which rendered the early ICC impotent).
29. Id. at 93.
1910 under the Mann-Elkins Act, which allowed the ICC to alter rates and suspend new, but suspect rates.\textsuperscript{30} Through this amendment process, Congress gradually gave the ICC enough teeth to clamp down on the perceived corruption in the railroad industry. It is important to note that the ICC's powers were focused largely on rate fixing.

The ICC regulated railroads until 1995.\textsuperscript{31} Congress, in response to seven major recent railroad bankruptcies, ditched the ICC entirely in the ICCTA.\textsuperscript{32} The ICCTA attempted to "unpeel the many layers of regulations that had accumulated after the passage of the [ICA]," and make railroads competitive with the trucking and shipping industries again.\textsuperscript{33} The ICCTA abolished the ICC in favor of the Surface Transportation Board ("STB").\textsuperscript{34} In sum, ICCTA "consolidated the few remaining economic regulations in the Board [STB] and preempted conflicting state economic regulations."\textsuperscript{35} The contentious jurisdictional and preemption clause of the ICCTA comes in § 10501:

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.\textsuperscript{36}

The extent of preemption Congress intended from this paragraph is at the heart of \textit{Association of American Railroads v. SCAQMD} and nearly every other case involving a local or state government's attempt to regulate railroads in any capacity, because preemption based on this section is the railroad industry's first line of defense. This article will examine the validity of those arguments in Part III, but first a discussion of preemption and harmonization is necessary.

\textsuperscript{30} Id. at 226-27.


\textsuperscript{32} See Strickland, supra note 1, at 1159-60 (discussing the "deregulation of rail economies" following the bankrupting of seven railroads).

\textsuperscript{33} Id.


\textsuperscript{35} Strickland, supra note 1, at 1161 (emphasis added).

A number of commentators have pointed to the increasing willingness of courts to preempt the traditional state police powers of protecting the health, welfare, and safety of the local residents. Empirical evidence also suggests this is true.

Preemption is a doctrine based on the Supremacy Clause of the U.S. Constitution: "[T]he laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or laws of any State to the Contrary notwithstanding." The Supreme Court has delineated three types of preemption: (1) express preemption where the intent of Congress to preempt state law is clear and explicit; (2) field preemption where state law intrudes in an area that Congress has reserved for federal jurisdiction; and (3) conflict preemption, where enforcement of state law cannot be accomplished while simultaneously complying with federal law. Because Congressional preemption power is limited only by "the self-restraint that it exercises for political or other reasons," the judiciary has carried a presumption against preemption. This presumption, commentators argue, no longer exists in some federal circuits.

A. Preemption by ICCTA in Past Railroad Cases

When a municipality or a state concerned with its citizens' well-being passes a law aimed at a railroad, the railroad invariably looks to the ICCTA for protection. Auburn v. U.S. is one of the most cited of these cases. In Auburn, Burlington Northern announced its intention to refurbish some track, which ran through a mountain pass. Two nearby cities in Washington State, Auburn and Kent, asked the STB for a declaratory order stating that Burlington Northern must abide by local and state environmental, building, and land use permitting authority. Burlington Northern replied that these police-power-derived state laws were just the kinds of laws preempted by the ICCTA's jurisdictional and preemption section, § 10501(b). Because the rail work was either "con-
struction” or “operation,” only the STB has jurisdiction over their work, thus preempting any remedies provided by other state or federal law. The STB agreed:

Local law also is preempted where there is a compelling need for uniformity. We believe that there is such a need in connection with the interstate rail system, which spans every state in the continental United States.

As a result, we believe that state or local laws that would impose a local permitting or environmental process on BN’s operations on, or maintenance or upgrading of [the line] are preempted to the maximum extent permitted by the Constitution.48

The STB, however, qualified the language by adding some important statements regarding agency discretion to their holding. While referring to the CAA, the STB held “[n]othing in . . . this decision is intended to interfere with the roles of the states and local entities in implementing these [CAA] federal laws.”49 The STB understood the overlapping Congressional purposes between the ICCTA and the CAA. Moreover, the STB understood the cooperative federalism component inherent in major federal environmental laws: states have the responsibility to implement federal law, so any preemption of that implementation is not preemption of a state law, but a preemption of federal law. As discussed later, when two federal laws are seemingly in conflict, a court is required to harmonize rather than preempt.

STB seemingly used a hybrid dormant commerce clause/preemption analysis, perhaps to protect its own jurisdiction, by adding a ‘reasonableness’ element:

not all state and local regulations that affect interstate commerce are preempted. A key element in the preemption doctrine is the notion that only “unreasonable” burdens, i.e., those that “conflict with” Federal regulation, “interfere with” Federal authority, or “unreasonably burden” interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law.50

The local cities appealed the STB decision to the Ninth Circuit.51 The Ninth Circuit upheld the STB’s holding, but articulated a different, slightly more ambiguous test:

the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute.

47. Id. at *4.
48. Id. at *5 (citations omitted).
49. Id. at *4.
50. Id. at *5.
51. Auburn, 154 F.3d at 1027.
For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.52

The Ninth Circuit did, however, reiterate the authority of a state agency regulating a railroad under delegated federal law.53

Armed with Auburn, the railroads found sympathetic courts across the United States. In Seattle v. Burlington Northern Railroad,54 Seattle passed two ordinances regulating train crossings at busy streets. The Washington Court of Appeals overturned the ordinances, holding that Seattle drafted the ordinances too broadly.55 The court understood the city passed the ordinances under the police power as general welfare statutes, but held they still overly restricted railroad operations.56 However, like in Auburn, the court saw an opportunity for local regulation: "we could foresee properly drafted ordinances which serve to prohibit the intentional and unnecessary blocking of the roadways as a valid police power."57 Thus, the court suggested a carefully crafted local regulation might slip through a crack in the bulky ICCTA.

One such local regulation did pass the muster, oddly, in the context of terrorism.58 Following the September 11th attack on the Pentagon, the District of Columbia passed the Terrorism Prevention Act, which prohibited the transport of ultra-hazardous materials within 2.2 miles of the U.S. Capitol.59 CSX sued, claiming preemption under a number of federal laws, including the ICCTA.60 The court disposed of the ICCTA preemption claim briskly, holding "[t]he flaw in plaintiff's argument is that it interprets the ICCTA in a 'contextual vacuum,' completely ignoring the existence of the surrounding statutory framework. . . . This court cannot blindly apply the ICCTA preemption clause without also considering the purpose, structure, and application of the well-established federal-state rail safety framework."61 Because CSX ignored the federal-state relationship present in the applicable Federal Railroad Safety Act ("FRSA"),

52. Id. at 1031.
53. Id.
55. Id. at 263.
56. Id. at 262-63.
57. Id. at 263.
60. Id. at *6.
61. Id. at *12.
the court found no ICCTA preemption.62

Interestingly, the DC court did comment on Auburn, saying that if “there existed a federal law preserving an explicit sphere of state authority for railroad environmental laws, as the FRSA does in the area of rail safety, the City of Auburn case may have come out differently.”63 Additionally, the court commented on the curious hybrid test the STB created in Auburn.64 The Court held “[t]he Board also seems to engraft a 'reasonableness' inquiry (which does not appear in the text of the ICCTA) into the STB Order's analysis of state legislative actions under section 10501(b);” suggesting the STB may be applying the wrong test to ICCTA preemption claims.65

Clearly, as recognized by the DC court, a niche must remain for some state or local authority in regulating railroads and other industries that have large federal regulatory schemes. The size of that niche, however, is unclear. Auburn suggests it may be quite small. But that case, coming just a couple of years after the passage of the ICCTA, seems to have interpreted the breadth of the ICCTA's preemption clause much more than necessary to fulfill Congressional intent in passing ICCTA, and certainly broader than other circuits.66

Auburn holds that any environmental regulation is essentially economic in nature because environmental regulation could change the way the railroad must operate. At its core, the holding is not a 'test' in the traditional sense. Under Auburn, if a regulation is of an environmental nature, then it is an economic regulation subject to ICCTA preemption. Two points undermine this brash preemption test.

First, while the Auburn court could find no distinction between environmental and economic regulation, Congress certainly could, and did, regarding the ICCTA. As the legislative history states:

The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.67

62. Id. at *13.
63. Id. at *12 n.20.
64. Id. at *17.
65. Id.
66. See Strickland, supra note 1, at 1167. Strickland notes that the Third, Sixth, Eight, and Eleventh Circuits have ruled more narrowly than the Ninth. See id.; see also Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3rd Cir. 2004); Tyrell v. Norfolk S. Ry. Co., 248 F.3d 517 (6th Cir. 2001); Iowa, Chi. & E. R.R. v. Wash. County, 384 F.3d 557 (8th Cir. 2004); Fla. E. Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001).
The Aubern court dismissed the legislative history in a technical construction argument, giving it no actual consideration.68 Congress understood and articulated that the ICCTA preempted economic regulation only. Congress explicitly drew the line between state police powers of non-economic regulation, and preempted state powers of economic regulation.69 If Congress wanted to preempt environmental regulation as well, it would have either included that desire within § 10501 or left some clue in its legislative history. It did neither.

Second, assuming Aubern is correct in holding there really is no distinction between environmental and economic regulation, is the U.S. Environmental Protection Agency’s (“EPA”) role in regulating railroads then impermissible? In 1997, the EPA finalized rules that finally regulated locomotive emissions, one of the last remaining unregulated sources of nitrogen oxide (“NOx”) emissions.70 The CAA required the EPA to regulate emissions as part of this environmental statutory scheme.71 Is Aubern suggesting that the EPA’s own direct regulation of locomotives is void or repealed because the EPA-forced manufacturing changes upon the railroad industry are also economic? Obviously not, clearly Congress endowed the EPA with that authority under the CAA.72 It is beyond elementary that Congress regulates different topics under different laws. Nevertheless, if Aubern is correct, then the CAA is actually an economic regulation. Thus, the STB, not the EPA, should regulate railroads. This leads to an absurd result, an interpretation courts must strive to avoid.73

In the future, courts must draw a line on ICCTA ‘economic preemption,’ because, as one court pointed out, that “reasoning, taken to its logical conclusion, could mean that railroads cannot be required to put postage on their mail.”74 Whatever strange result might come from the Aubern ruling, nothing affects a court’s duty, when faced with co-equal federal statutes to harmonize.

B. Finding the Harmony

In the case Iowa, Chicago & Eastern Railroad v. Washington County,

68. Aubern v. United States, 154 F.3d 1025, 1029-30 (9th Cir. 1998).


72. FINAL EMISSIONS STANDARDS FOR LOCOMOTIVES, supra note 70, at 1.

73. See United States v. Turkette, 452 U.S. 576, 580 (1981) (arguing that absurd administrative results should be avoided).

74. Strickland, supra note 1, at 1168 (citing Holland v. Delray Connecting R.R. Co., 311 F. Supp. 2d 744, 757 (N.D. Ind. 2004)).
the Eighth Circuit provided a better-reasoned discussion of the limits to the ICCTA's preemptive effect. In the case, the court thoroughly explored other applicable federal statutes and concludes that choosing one statute to override the rest does not follow Congressional intent nor is judicially appropriate.

Washington County, Iowa, requested that the railroad company pay for replacing old, substandard railroad bridges. The railroad refused, and then argued the County had no authority to force the railroad to pay because of preemption by the ICCTA. Upon hearing the case, the Eight Circuit began by explaining that:

Congress in ICCTA occupied the field of economic and facilities regulation of railroads. The argument is simple, but it is deceptively simple, for it ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than the ICC or the STB, and that Congress left intact in enacting the ICCTA.

Because the bridges were a matter of safety, the court looked at FRSA, and determined that the two statutes must be applied in pari materia, or together. Without expressly saying it, the court endorsed the presumption against preemption, leading the court to a harmonization analysis of conflicting or related federal statutes. The court determined that, in fact, FRSA's preemption clause was the correct law to follow. Because neither the district court nor the appellate briefs brought up the FRSA, the court did nothing more. In parting, however, the court did opine that if the "ICCTA preempted this type" of state regulation, that holding would consist of an implied repeal of the FRSA.

When two statutes appear to be in conflict, "[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest." And as legal commentators have noted, "Congress acts with the knowledge that it never writes on a clean slate." Moreover, the Supreme Court has held, "[w]here provisions in the two acts are in irrec-

75. See Iowa, Chi. & E. R.R. v. Wash. County, 384 F.3d 557 (8th Cir. 2004).
76. Id. at 558.
77. Id.
78. Id. at 559.
79. Id. at 560 (citing Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 522 (6th Cir. 2001)).
80. See id. at 560.
81. Id.
82. Id. at 561.
84. Amanda L. Tyler, Continuity, Coherence and the Canons, 99 Nw. U.L. Rev. 1389, 1439 (2005); see also Bernadette Bollas Genetin, Expressly Repudiating Implied Repeals Analysis:
Irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.”85 Thus, the first line of inquiry is to determine if the conflict is in fact irreconcilable.86 If not, then according to Professor Bernadette Bollas Genetin, “the courts must give effect to both statutes if the provisions can coexist even if the result is a strained interpretation of the provisions.”87 The courts must push for harmonization, and as implied, courts must disfavor repeal.

A recent Supreme Court case provides a good example of judicial restraint in implied repeals. In National Association of Home Builders v. Defenders of Wildlife (“NAHB”), the Court faced conflicting provisions of the CWA and the Endangered Species Act (“ESA”).88 CWA § 402(b) provides that the EPA “shall approve” transfer of discharge permitting authority to a state, providing the state has met nine specific criteria.89 Section 7(a)(2) of the ESA requires federal agencies to consult with the Fish and Wildlife Service (“FWS”) or the National Marine Fisheries Service to “insure” that a proposed agency action is unlikely to jeopardize a threatened or endangered species.90 When the EPA decided to transfer certain permitting powers to the state of Arizona, the FWS objected, claiming the EPA had not yet done a jeopardy analysis.91 The Court contemplated whether the jeopardy analysis was in fact, a tenth criterion that should be included in the EPA’s analysis.92 The Court characterized the action of adding a criterion as essentially repealing the exclusive list of nine.93 Because implied repeals are disfavored, the Court declined to add the ESA requirement to the CWA.94 Instead, the Court relied on an FWS regulation, which stated ESA § 7 would apply “to all actions in which there is discretionary Federal involvement or control.”95

The Court held the regulation “harmonizes the statutes by giving effect to the ESA’s no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors.”96 The Court then held the FWS met the Chevron

86. See Genetin, supra note 84, at 704.
87. Id. at 703.
92. Id. at 656.
93. Id. at 662-64.
94. Id. at 664.
95. Id. at 665 (citing 50 C.F.R. § 402.03 (2007) (emphasis added by the Supreme Court)).
96. Id.
deference test. An ironic result, as the FWS disputed the final ruling.

The dissent found that the majority opinion simply cut away at the ESA, violating TVA v. Hill. The dissent suggested two alternative harmonization strategies that would better preserve each act: (1) the ESA consultation process could move forward, allowing the agencies to work out the differences; or (2) the EPA could bind the new permitting authority with an MOA (“Memorandum of Agreement”) to protect endangered species at a later time.

In sum, NAHB provides two tools for state and local regulations: the doctrine of no implied repeal and agency deference. As the next section will show, SCAQMD must rely on both above-mentioned doctrines to overcome ICCTA preemption.

PART III: DOES A NICHE EXIST: CAN A STATE FILL THE FEDERAL REGULATORY GAPS WITH CAREFUL DRAFTING?

A CASE STUDY

The Los Angeles basin, and California in general, have long been testing grounds for new ideas in pollution control. The California Air Resources Board (“CARB”), in search of ways to further reduce pollution from railroad yards in Los Angeles, entered into a Memorandum of Mutual Understandings and Agreements (“MOU”) in 1998 with the two largest freight railroads in the U.S.: Union Pacific and Burlington Northern. Later, in 2005, the same railroads entered into another voluntary MOU with CARB in which the railroads entered into several agreements, most importantly, adding idling reduction devices on intrastate lo-

97. Id. at 666-67. In Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) the Court developed the Chevron deference test. According to the Court [when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the state, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.


99. See id. at 684-90.

100. See 42 U.S.C. § 7543 (1990). Clean Air Act exempts California from national car emissions standards, allowing California to create more vigorous emission controls. Other states can adopt either the national or California standard.

comotives and limiting "non-essential" idling to not more than sixty minutes. SCAQMD objected to the MOU for two reasons. First, it left the definition of "non-essential" to the railroads, allowing them to determine when a locomotive should cease idling. Second, because the MOU contained a release clause allowing the railroads to back out under certain circumstances, SCAQMD felt it was entirely unenforceable.

A. SCAQMD EFFORT AND THE SUBSEQUENT DISTRICT COURT RULING

SCAQMD publically objected to the terms CARB and the railroads set. SCAQMD then promulgated three rules ("the Rules") between 2005 and 2006 aimed to strengthen control of air pollution from locomotives. SCAQMD Rule 3503 requires railroads to calculate and disclose the public health risks associated with rail yard operations. Rule 3501 requires railroads to submit basic information about the locomotives operated in the Basin. Beginning in August, 2006, railroads must record instances of locomotives idling for 30 minutes or more.

The most important, and controversial of the rules, however, is Rule 3502, which prohibits idling in the Basin in certain specific circumstances starting in August, 2006, if:

1. the crew of the locomotive "consist" (i.e. group of locomotives) has been relieved and the relief crew has not arrived; (2) the crew has left for a meal or personal break or for personal reasons; (3) the locomotive is within the rail yard; (4) the locomotive is queuing for fueling, maintenance, or servicing; or (5) maintenance or diagnostics being conducted on the locomotive do not require the engine's operation.

In addition, Rule 3502 prohibits trailing locomotives (locomotives other than the lead locomotive in a group) from idling for more than 30 minutes if either (1) "the dispatcher or yardmaster notifies the operator of a delay that will exceed 30 minutes, or (2) a locomotive failure or breakdown will result in a delay of more than 30 minutes." Alternatively, the railroad can equip its locomotives with anti-idling devices or

103. Id.
104. Id.
105. Id. at 53.
106. See Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 3-6, Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist., No. CV06-1416 JFW(PLAx), 2006 WL 4700625 (C.D. Cal. April 17, 2006).
107. Id.
108. Id.
109. Id.
submit an emissions plan.\textsuperscript{110}

One can infer quite readily that SCAQMD understood the STB hybrid test of the "unreasonable burden to interstate commerce." Indeed, SCAQMD narrowly crafted Rule 3502 in order to avoid burdening railroad operations.\textsuperscript{111} Rule 3502 only requires a locomotive to be off when the railroad itself it not using it. In fact, many times when Rule 3502 requires a locomotive to be shut off, no railroad employee is even inside or operating the locomotive. Under the slippery-slope \textit{Auburn} test,\textsuperscript{112} however, practically any environmental regulation can be expanded to an economic regulation, and thus fall under ICCTA preemption. Again, the rules require nothing of the railroad when the railroad is actively doing a railroad-related activity. Only during queuing or nonoperational times must the railroad shut off its engines. Thus, arguably, no operation is regulated.

The Association of American Railroads, a railroad industry group, along with Union Pacific and Burlington Northern, sued SQAQMD in the U.S. District Court of the Central District of California in 2006.\textsuperscript{113} Shortly thereafter, SCAQMD agreed not to enforce the contested Rules until the district court made its judgment.\textsuperscript{114}

The railroads' first claim of relief was that ICCTA § 10501(b) pre-empted SCAQMD's rules.\textsuperscript{115} The court laid out the preemption rule, cited \textit{Auburn}'s recognition of long-standing Congressional intent to regulate railroads, and pointed to § 10501(b)'s preemption and jurisdiction clauses.\textsuperscript{116} The court quoted \textit{Friberg} as holding "[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of [the Railroads'] train operations . . . is under the exclusive jurisdiction of the STB."\textsuperscript{117}

Next, the court reaffirmed that the CAA does delegate rule adoption: "[t]he CAA also requires each state to adopt 'state implementation plans' which contain enforceable measures to attain the NAAQS [National Ambient Air Quality Standards]."\textsuperscript{118} This delegation of power represents the CAA approach to cooperative federalism. However, the

\begin{itemize}
  \item \textsuperscript{110} See Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., No. CV 06-01416-JFW(PLAx), 2007 WL 2439499, at *3 (C.D. Cal. April 30, 2007).
  \item \textsuperscript{111} See id.
  \item \textsuperscript{112} Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).
  \item \textsuperscript{113} Ass'n of Am. R.R., 2007 WL 2439499, at *1.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id. at *4.
  \item \textsuperscript{116} Id.; see also 49 U.S.C. § 10501(b) (2008) (BOARD'S JURISDICTION OVER TRANSPORTATION RAIL CARRIERS AND THE PREEMPTION CLAUSE).
  \item \textsuperscript{117} Ass'n of Am. R.R., 2007 WL 2439499, at *4 (quoting Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001)).
  \item \textsuperscript{118} Id. at *5.
\end{itemize}
court held, after reviewing the California Health and Safety Code ("CHSC"), that CARB was the state agency to which this delegated authority belongs, not SCAQMD.\textsuperscript{119} Thus, the CAA and ICCTA required no harmonization because SCAQMD acted \textit{ultra vires}, deriving its authority from something other than the CAA.\textsuperscript{120}

The court then ruled that if, in fact, SCAQMD is acting under state police power (instead of the CAA for which it lacked authority under state law), those rules must fall into a category of rules applicable to all businesses, "including the railroads, such as building and electrical codes."\textsuperscript{121} SCAQMD’s three rules, the court found, were not similar types of regulations because the rules intended to regulate railroads directly.\textsuperscript{122} Additionally, the court brushed aside the STB balancing tests of "undue restriction" and "unreasonable burden."\textsuperscript{123} As "the Rules directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable."\textsuperscript{124} Because the court ruled on the first claim of relief, it did not address any dormant commerce clause issues or other federal railroad statutes.\textsuperscript{125} SCAQMD has appealed the ruling, and the case now sits before the Ninth Circuit.

\textbf{B. Analysis of the Court's Ruling: Suggestions for the Ninth Circuit}

The court misread SCAQMD authority, and thus escaped the importance of this case. The Ninth Circuit’s duty is to close that escape hatch and grapple with how the ICCTA and CAA \textit{must} be harmonized.

1. \emph{The District Court misread the California Code, which does grant this authority to SCAQMD}

The railroads relied heavily on CHSC § 40702 to argue CARB, not SCAQMD, is the appropriate state agency to promulgate air quality rules for locomotives. "No order, rule, or regulation of any district shall, however, specify the design of equipment, type of construction, or particular method to be used in reducing the release of air contaminants from railroad locomotives."\textsuperscript{126} On its face, this regulation would only pass the jurisdiction of Rule 3502 to CARB. Rules 3501 and 3503 only require

\begin{itemize}
    \item \textsuperscript{119} \textit{Id.}
    \item \textsuperscript{120} \textit{Id.} at *6.
    \item \textsuperscript{121} \textit{Id.} at *7.
    \item \textsuperscript{122} \textit{Id.}
    \item \textsuperscript{123} \textit{Id.}
    \item \textsuperscript{124} \textit{Id.}
    \item \textsuperscript{125} \textit{Id.} at *8.
    \item \textsuperscript{126} \textit{Cal. Health & Safety Code} § 40702 (West 2009).
\end{itemize}
information from the railroads. Thus, the District Court erred in invalidating all three rules, because 3501 and 3503 cannot at all be considered a regulation under CHSC § 40702.

Furthermore, Rule 3502 prescribes no particular method to the railroads for reducing emissions. Instead, the Rule requires that in lieu of complying with the Rule’s idling requirements, an operator may submit an Emissions Equivalency Plan demonstrating that there is no increase in the total cancer potency-weighted emissions in the air contaminants, and demonstrating that any reductions will be greater than or equal to the annual emission reductions contained within the rule. Prescribing a particular method is discouraged because it monopolizes one technology and inhibits innovation. However, because the railroads have a choice, SCAQMD has not prescribed a particular method.

Regardless, even if the Ninth Circuit affirms the District Court’s ruling in total, states should be heartened because it means that the Ninth Circuit implicitly agreed that CARB has the authority to regulate locomotives, pursuant to any future rulings which might harmonize the CAA and ICCTA. That ruling would give state agencies permission to begin to plug federal regulatory gaps without fear of industry preemption challenges.

2. In disfavoring implied repeals, what is the result of harmonization of the ICCTA and the CAA?

The District Court itself said that the ICCTA did not preempt the CAA. This holding is consistent with Auburn and the opinion of the STB. Thus, the Ninth Circuit must embark on an analysis of two seemingly conflicting statutes, the ICCTA and the CAA.

The CAA makes a regulatory distinction between the EPA’s authority regarding new vehicles and vehicles “in use.” Section 209(a) states “[n]o political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emission from new motor vehicles or

129. Id.
130. Ass’n of Am. R.R., 2007 WL 2439499, at *5 (“state law dictates that CARB is the entity with authority over locomotives.”).
131. Id. at *7-8.
132. See Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998); King County, WA—Petition for Declaratory Order—Burlington N. R.R. Co., STB Finance Docket No. 33095, 1 S.T.B. 731, 1996 WL 545598 (Sept. 25, 1996).
new motor vehicle engines.”134 Standards are emission controls that manufacturers include on new vehicles.135 However, Section 209(d) states “nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.”136 Thus, “Congress specifically refused to interfere with local regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers.”137

While the CAA does not include locomotives in the “motor vehicles” definition,138 the 1990 amendments created the same distinction for railroads:

No state or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles . . . .

. . . (b) New locomotives or new engines used in locomotives.139

As with cars, Congress authorized the EPA to set standards for new locomotives, but this time remained silent on whether states could regulate “in use” locomotives. The EPA interpreted the silence in the statute and concluded that state could, an interpretation upheld by the courts.140 Thus, the CAA allows states under EPA delegated authority to regulate locomotives “in use.”

With both the CAA provisions and the ICCTA now detailed, the Ninth Circuit must determine if Congress, when passing the ICCTA, intended to repeal this section of the CAA. Two strong points indicate Congress did not wish to repeal these sections of the CAA: (1) Congress is presumed to have been aware of the CAA when it passed the ICCTA, yet modified neither the CAA nor the EPA’s interpretation;141 and (2) in the ICCTA legislative history, Congress spoke only of economic preemption.142 As discussed above, without facial or legislative history to sup-

134. Id. § 7543(a).
139. 42 U.S.C. § 7543(e)(1).
140. See Engine Mfr. Ass’n v. Envtl. Prot. Agency, 88 F.3d 1075 (D.C. Cir. 1996); see also 40 C.F.R. Part 89, Subpt. A, App. (1997) (“EPA believes that states are not precluded under Section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass mission limits, or sulfur limits on fuel”).
port repeal, only the disfavored implied repeal is left to consider. If the statutes are irreconcilable, then an implied repeal must take place, but “the courts must give effect to both statutes if the provisions can co-exist even if the result is a strained interpretation of the provisions.”

Here, the Ninth should follow the Supreme Court’s roadmap from NAHB. The Supreme Court confronted two conflicting statutes and settled the discrepancy by examining the appropriate regulations. Moreover, it rejected the dissents ideas to simply have the opposing agencies work out a solution or attach a MOU. This recent and related precedent should then guide the Ninth Circuit to look at the EPA’s interpretation of CAA § 209 and the STB’s opinion that “[n]othing in . . . this decision is intended to interfere with the role of states and local entities in implementing these [CAA] federal laws.” By giving the same agency deference as the Supreme Court did in NAHB, the Ninth Circuit should hold that the ICCTA does not prevent local and state regulation of railroads if it is properly pursuant to federal law.

After the Ninth Circuit reaches that conclusion, it must revisit SCAQMD’s rules. Two rules only require the railroad to collect, analyze and transmit information regarding locomotive emissions. Certainly, there is no conflict between the ICCTA and the CAA in promulgating those Rules. SCAQMD carefully drafted Rule 3502 to fit on the outsides of § 10501:

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

Nothing in Rule 3502 requires anything related to spur construction and related activities to be laid out in (2). Likewise, by definition, Rule 3502 requires nothing of railroad operators in “transportation.” Any time an operative locomotive is transporting, Rule 3502 does not apply.

143. See Genetin, supra note 84, at 703.
144. Id.
146. Id. at 663-65.
147. See id. at 673.
Some instances do trigger Rule 3502, such as when a locomotive is unable to transport for a given amount of time. Thus, because SCAQMD's rules are carefully tailored, no overlap with the ICCTA § 10501 exists. Moreover, the court, in the interest of fulfilling both instances of Congressional intent, should allow the Rules to stand.

**CONCLUSION**

The Ninth Circuit must realize that Auburn's test, while misguided in its own right, is not even applicable to this set of facts. Furthermore, it should not give any weight to the STB's illogical amalgamation of the dormant commerce clause analysis with the preemption analysis. Instead, the court should focus on reapplying the correct tests to ensure the court does not judicially preempt one instance of Congressional intent by another instance. Otherwise, the court will get lost in some Auburn-like maze of reasonableness determinations.

As Professor Howard Leaner has pointed out, increased federalism in courts has impeded the cooperative federalism schemes that defined the nature of the major environmental laws of the 1970s. For example, the CAA authorizes states to develop and enforce federally approved plans (State Implementation Plans, or SIPs) to meet federally determined emission levels. Likewise, the CWA authorizes the appropriate state agency to issue pollution discharge permits, as long as total discharges are below the EPA-approved level. Moreover, in the redevelopment of brownfields, property owners likely subject to CERCLA (Comprehensive Environmental Response, Compensation and Liability Act) liability may enter into voluntary clean-up agreements with state agencies to minimize that liability.

Congress has determined that states must play a significant role in the protection of the national environment. When courts inhibit the cooperative nature of federal environmental laws, they are arbitrarily choosing one federal regulatory scheme over another. However, when courts realize they must harmonize federal statutes, it is imperative for local officials to draft regulations carefully—to attempt only to regulate

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151. See Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).
152. For examples of "reasonableness" tests in a wide variety of contexts see generally Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (deciding an undue burden test problem based on state's interest and women's liberty); Wisconsin v. Yoder, 406 U.S. 205 (1972) (balancing an individual's First Amendment rights against the state's interest in education); Saratoga Fishing Co. v. Marco Seattle Inc., 69 F.3d 1432, 1440 (9th Cir. 1995) (holding that reasonableness in tort law involves a cost determination).
153. See Learner, supra note 1, at 663.
at the outer edge of major federal regulatory laws like the ICCTA. If successful, state and local regulatory bodies can reassert a measure of local control.