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Motor Carrier Limitations of Liability

By:
Wesley S. Chused
Looney & Grossman LLP
101 Arch Street
Boston, Massachusetts 02110
Telephone: (617) 951-2800
E-mail: wchused@lgllp.com

Motor Carrier Limitations of Liability

AGENDA

1. Origins of Motor Carrier Cargo Liability
2. Limitations of Liability Principles
3. Questions

1. Origins of U. S. Motor Carrier Liability

- Interstate Commerce Act of 1887
 - Regulated Interstate Rail Transportation
- Hepburn Act / Carmack Amendment (1906)
 - Codified Common Law
- Motor Carrier Act (1935)
 - Extended Carmack Amendment to Motor Carriers
- Interstate Commerce Commission Termination Act (1995)
 - Latest codification of Carmack Amendment as to motor carriers.
 - 49 U.S.C. § 14706

Statutory Basis for Strict Liability for Cargo Loss and Damage

The Carmack Amendment, 49 U.S.C. 14706(a)(1)

Motor Carriers and Freight Forwarders. A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III . . . are liable to the persons 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 place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Statutory Basis for Limitations of Liability — Continued

49 U.S.C. § 14706(c)(1)(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 . . . establish rates for the transportation of property (other than household goods . . .) 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.

The Statutory Basis for Limitations of Liability — Continued

49 U.S.C. § 14706(c)(1)(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.

The “Four-Point Test”

- 1) Did the carrier maintain an approved tariff with the ICC?
- 2) Did the carrier obtain the shipper’s written declaration of his choice of liability?
- 3) Did the carrier give the shipper a reasonable opportunity to choose between two or more levels of liability protection?
 - Notice of Limitation of Liability?
 - Access to information necessary to make a deliberate, well-informed choice?
- 4) Did the carrier issue a receipt or bill of lading prior to moving the shipment?

- *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978).
 - First court to articulate “4-Point Test,” requiring motor carrier to prove it (1) maintained an approved tariff; (2) obtained the shipper’s declaration of his choice of liability; (3) gave the shipper reasonable opportunity to choose between two or more levels of liability; and (4) issued a receipt or bill of lading, in order to enforce 60¢ per pound limitation.
 - Since carrier had failed to issue a receipt or bill of lading, there was no indication that shipper was offered a choice of different liability levels, and carrier was held liable for full amount of plaintiff’s claim.

Hughes v. United Van Lines, Inc., 829 F.2d 1407
(7th Cir. 1987)

- Hughes (shipper) retained United Van Lines (motor carrier) to move household goods from New Jersey to Chicago.
- Goods destroyed by fire in transit.
- Shipper claimed \$111,848.31 in damages.
- Carrier admitted liability but challenged extent of liability (claiming liability limited to \$3.00/pound).
- Court applied “four-point test”.

1) ICC-Approved Tariff.

- Plaintiffs conceded that carrier maintained a tariff in compliance with ICC requirements.

2) Shipper's Agreed Choice of Carrier Liability.

- Shipper claimed he unknowingly signed bill of lading "in the dark" and that carrier misled him into agreeing to "insure" the goods at \$3.00/pound by not explaining the limitation of liability in the "full value protection package".
- Carrier claimed shipper was college educated, well-trained businessman who shipped household goods on 11 prior occasions and who did not dispute: (1) he was aware that cost of move was based on weight/mileage, (2) he could declare a value for his goods, (3) payment was due after goods delivered and (4) he signed bill of lading and related paperwork without reviewing.
- Court concluded that shipper did agree.

3) The Shipper's "Fair Opportunity to Choose" Level of Carrier's Liability.

- Shipper maintained he was misled into signing contract containing limitation of liability.
- Carrier maintained shipper was intelligent, experienced and received adequate information about specific limits available and terms and conditions.
- Court agreed with carrier.

4) Carrier Provided Bill of Lading.

- This element was met despite fact that carrier, rather than shipper, filled in the declared value and bill of lading did not "perfectly" comply with ICC regulations.

Trepel v. Roadway Express, Inc., 194 F.3d
709 (6th Cir. 1999)

- Dr. Trepel (shipper) retained Transfer International Packing & Shipping to arrange for transportation of a wood carving (Baga serpent) from New York to Arizona.
- TIPS selected Roadway Express (motor carrier) to transport the carving.
- The carving was found to be in three pieces at destination (paid \$15,000 but allegedly worth \$2.5+ million).
- Roadway denied claim (no “specific and determinable” damages and “inadvertence clause”).
- Jury awarded \$80,000 to Trepel.
- Both parties appealed.

- **Carrier relied on inadvertence clause:**

“Articles tendered with an invoice value exceeding 50.00 per pound, per package, will be considered to be of extraordinary value. Such articles will not be accepted for transportation unless the shipper requests excess liability coverage. Articles inadvertently accepted with an invoice value exceeding 50.00 per pound, per package, but without excess coverage will be considered to have been released by the shipper at 50.00 per pound, per package. In the event of loss of and/or damage to any shipment, the carrier's liability will not exceed 50.00 per pound, per package, subject to a maximum liability of 250,000 per shipment, unless the shipper has requested excess liability coverage. If the shipper desires to tender a shipment requiring carrier liability in excess of 50.00 per pound, per package, or 250,000 per shipment, whichever is lower, then the shipper must indicate in writing on the bill of lading at the time of shipment the total dollar amount of excess coverage requested. . . .”

- Serpent weighed 20 pounds, so carrier claimed liability limited to no more than \$1,000.

Court's Holding:

“Because TIPS was most likely aware of the tariffs in the bill of lading, Roadway contends that Trepel is charged with knowledge of the tariff, relying on the rule that all shippers and their consignees are charged with such knowledge. . . . However, we have previously held that ‘where a carrier is attempting to limit its liability for full actual damages, the caselaw is clear that the carrier must show more than an appropriate tariff schedule; the carrier must show, among other things, that liability was limited by a written agreement.’ *Baker Perkins, Inc. v. Midland Moving and Storage Co.*, 920 F.2d 1307, 1307 (6th Cir. 1990) (emphasis omitted). Here, there is no written agreement to limit Roadway's liability. The delivery receipt is the only writing between the parties, and it does not contain the tariff upon which Roadway is attempting to rely. Accordingly, we hold that Roadway cannot limit its liability, and we affirm the district court's judgment in this respect.”

Erosion of Four-Point Test

- Trucking Industry Regulatory Reform Act (1994).
 - Eliminated tariff filing requirements for non-household goods carriers.

- Interstate Commerce Commission Termination Act (1995).
 - Replaced former statute and establish new criteria under which a shipper may waive full Carmack liability and a motor carrier may establish rates for the transportation of property under which its liability is “limited to a value established by written or electronic declaration of the shipper or by written agreement between carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.” 49 U.S.C. § 14706(c).

Hollingsworth & Vose Co. v. A-P-A Transportation Corp., 158 F.3d 617 (1st Cir. 1998)

- Hollingsworth (shipper) retained A-P-A (carrier) to transport a large metal cylinder from Virginia to Massachusetts.
- A-P-A hired Wilson Trucking Company to make pickup since it did not serve the origin point.
- Wilson delivered cylinder to A-P-A in damaged condition.
- A-P-A relied on the limitation of liability contained in Wilson's tariff (10 cents per pound) incorporated into bill of lading.

Court's Analysis

- No dispute that carrier satisfied the first and second prongs of the “four-point test.”
- Focus was on third prong – the “fair opportunity to choose”:

“This ‘fair opportunity’ language, which was in some measure surplus, has taken on a life of its own, and later circuit cases have treated the rubric almost as if it were an independent requirement of the Carmack Amendment. What has developed is a continuing controversy about how to decide whether there has been such a ‘fair opportunity.’ The problem is that the circuit courts have not been able to agree on any single, bright-line test for what is a ‘fair opportunity.’ Partly this results from the diversity of fact-patterns (e.g., obscure bill-of-lading language, affirmative carrier misrepresentations). But partly it may be due to a resistance, in the face of the ‘fair opportunity’ language, to the ordinary law of contracts and tariffs that makes a party pretty much responsible for whatever he or she signs and charges the shipper with knowledge of filed tariffs.”

- The court revisited earlier precedent (including *Anton* and *Toledo Ticket*) and concludes:

“We see no reason to choose between the ‘on-the-facts’ approach of the Second Circuit majority in Mechanical and the ‘bright line’ approach endorsed by Judge Winter in the same case (and arguably by the Tenth Circuit in Norton, 901 F.2d at 830) It is enough that the tariff made both coverages available, the bill of lading afforded the shipper a reasonable opportunity to choose between them (it was actually proposed by Hollingsworth), and the shipper was a substantial commercial enterprise capable of understanding the agreements it signed. In our view, that is normally enough to give this shipper a ‘fair opportunity’ to opt for more coverage in exchange for a higher rate.

“Since our facts are fairly typical (apart from the last-minute switch of carrier), this outcome makes the law predictable in the ordinary case involving a sophisticated commercial shipper and standard language. Yet, as the circuit cases illustrate, there are so many variations--including inadequate bills of lading and affirmative misrepresentations by carriers--that we cannot lay down a universal rule for cases that deviate from the ordinary case.”

EFS National Bank v. Averitt Express, 164 F.Supp.2d 994 (W.D. Tenn. 2001)

- EFS (shipper) retained Averitt (carrier) to transport three pallets of computer equipment from Tennessee to California.
- One pallet was missing at destination and EFS submitted a claim to Averitt for \$58,050.
- Carrier denied claim based upon tariff limiting liability to \$25 per pound since the bill of lading indicated the cargo was received subject to the terms of the tariff:
 1. Articles tendered with an invoice value exceeding \$25.00 per pound per package will be considered to be of extraordinary value. Such articles will not be accepted for transportation. Articles inadvertently accepted with an invoice value exceeding \$25.00 per pound per package will be considered to have been released by the shipper at \$25.00 per pound per package.
 2. In the event of loss of and/or damage to any shipment, carrier's liability will not exceed \$25.00 per pound per package, subject to a maximum liability of \$250,000.00 per shipment.
- Shipper maintained tariff was ineffective because providing notice through bill of lading is inadequate notice under *Toledo Ticket*, etc.
- Trial court granted summary judgment in favor of carrier.

Court's Analysis

- 49 U.S.C. 14706(c)(1)(B) now states that “if the motor carrier is not required to file a tariff with the Board, it shall provide . . . **on the request of the shipper**, a written or electronic copy of the rate classification rules and practices” (Emphasis added)
- Looked to legislative history -- H.R. Conf. Rep. No. 104-422 (1995) to reveal Congressional intent:
 - To “return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment.”

- “The intention of this conference agreement is to replicate, as closely as possible, the practical situation which occurred prior to the enactment of the [TIRRA]. . . . Prior to the enactment of TIRRA, carriers had the ability to limit liability as 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 and terms of the tariff. It was the responsibility of the shipper to take an affirmative step to determine what was contained in the tariff An unintended 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.”
- *Toledo Ticket* and *Trepel* were decided pre-TIRRA.

Critical Holding:

“Given 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. The requirement that the carrier must maintain approved tariff rates with the ICC cannot possibly apply because the ICC Termination Act of 1995 eliminated the ICC itself. . . . It is unclear whether the second and third requirements . . . should still apply. . . . These two requirements, to some extent, are contrary to the congressional intent behind the new law. The legislative history indicates that Congress intended to make it the shipper’s responsibility to ask for a copy of the relevant rate classification rules from the carrier.”

- Shipper failed to request a copy of tariff.
- Shipper failed to identify a “declared value” on bill of lading.
- Therefore, carrier’s liability was limited.

Werner Enterprises, Inc. v. Westwind Maritime International, Inc., 554 F.3d 1319 (11th Cir. 2009)

- Nextel (shipper) used Westwind (broker) to arrange for the transportation of cell phones from Florida to Texas.
- Invoices indicated that third party carriers might limit liability for loss or damage:

“Declaring Higher Value to Third Parties. Third parties to whom the goods are entrusted may limit liability for loss or damage; the Company will request excess valuation coverage only upon specific written instructions from the Customer, which must agree to pay any charges therefore; in the absence of written instructions or the refusal of the third party to agree to a higher declared value, at Company’s discretion, the goods may be tendered to the third party, subject to the terms of the third party’s limitations of liability and/or terms and conditions of service.

- Nextel received this invoice 250 times.

- Westwind brokered to Transpro Logistics.
- Transpro Logistics entered into a broker-carrier agreement with Werner:

“Carrier’s liability for loss, damage or injury to cargo occurring while in the possession or under the control of Carrier hereunder, and resulting from Carrier’s performance of the services provided for in this Agreement, shall be the same standard of liability imposed by 49 U.S.C. Section 14706 and applicable common law. Provided, that the Carrier’s maximum liability for loss or damage to cargo shall not in any event exceed Two Hundred Thousand Dollars (\$200,000.00) per truckload shipment unless a higher degree of liability is specifically assumed in writing by an authorized representative of Carrier. . . . ”
- Cell phones worth \$1.2 million were stolen.
- District Court granted summary judgment for Werner to limit its liability to \$200,000.

Court of Appeals Affirms; Critical Holding:

“*Kirby*’s teaching is not limited to maritime law [C]ontracts for carriage on land as well as sea may involve extended chains of parties and agreements. Thus, the benefits of allowing carriers to rely on limitations of liability negotiated by intermediaries are equally as great here as under maritime law. . . . To hold otherwise would defeat the principle of efficiency that motivated the *Kirby* holding.”

“Therefore, we conclude that Werner and Transpro entered into a written contract providing the shipper with a reasonable opportunity to choose between two or more levels of liability. As we held in *Siren*, this is all that is required under the Carmack Amendment. The manifest itself did not need to include the choice of levels of liability and rates; that choice was provided in a separate written contract, and Transpro chose not to increase the liability for this shipment or any of the shipments on behalf of Nextel.”

Sophisticated Shipper Cases

- Where a shipper rather than the carrier drafts the bill of lading and chooses the released rate, the limitation of liability found on the shipping documents will be enforced against the shipper. *Siren, Inc. v. Estes Express Lines*, 294 F.3d 1268, 1274 (11th Cir. 2001); *American Cyanamid Co. v. New Penn Motor Express, Inc.*, 979 F.2d 310, 314 (3rd Cir. 1992).
- - *Calvin Klein, Ltd. v. Trylon Trucking Co.*, 892 F.2d 191 (2nd Cir. 1989):
 - -Shipper sued motor carrier for loss shipment of clothing worth \$150,000.
 - -On prior shipments carrier had sent shipper an invoice which contained language limiting carrier's liability to \$50 per shipment.
 - -Defendant's truck driver stole the truck and the shipment.

- -Court ruled that even gross negligence did not void limitation of liability.
- -Court ruled parties' course of dealing afforded shipper opportunity to negotiate amount of carrier liability by declaring value for 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.”
- -This allocation of risk and liability applies “regardless of the degree of carrier negligence.”
- *Emerson Electric Supply Co. v. Estes Express Lines Corp.*, 324 F. Supp. 2d 713, 729 (W.D. Pa. 2004):
 - Shipper will be held to the terms of negotiated shipping contract where the terms were “negotiated between people of at least equal economic stature and commercial awareness or acuity.”

- *Insurance Company of North America v. NNR Air Cargo Service (USA), Inc.*, 201 F.3d 1111, 1113 (9th Cir. 2000):
 - “Invoice terms and conditions may supplement shipping agreements if there has been a sufficient course of dealing” between shipper and carrier.
- *First Pennsylvania Bank, N.A. v. Eastern Airlines Inc.*, 731 F.2d 1113, 1122 (3rd Cir. 1984):
 - Prominent Philadelphia bank bound by carrier’s \$500 liability limitation on lost checks worth millions of dollars based on prior course of dealings.
- *Rational Software Corporation v. Sterling Corporation*, 393 F.3d 276 (1st Cir. 2005):
 - Regardless of when the bill of lading was delivered and whether the carrier adhered to the terms of its tariff, the shipper knew from the parties’ prior course of dealings that the carrier’s liability was limited to 60¢ a pound where after each shipment the carrier provided the shipper with an invoice declaring its liability was limited unless the shipper declared a higher value and paid a correspondingly higher price. Based on this prior course of dealings, the Court ruled shipper was bound by the motor carrier’s limitation.

Attacks on Limitations of Liability

1. Conversion.

- “Conversion” is a common law remedy preempted by the Carmack Amendment. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407 (7th Cir. 1987); *Rini v. United Van Lines, Inc.*, 103 F.3d 502 (1st Cir. 1997).
- Motor carrier may properly limit its liability even where there is conversion by its own employees. *Glickfield v. Howard Van Lines*, 213 F.2d 723, 727 (9th Cir. 1954).
- “[N]othing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent the liability limitations in a released value provision. This is an understandable and desirable result, as a shipper can protect itself from loss by paying for a higher level of protection.” *American Cyanamid Co. v. New Penn Motor Express Inc.*, 979 F.2d 310, 315-316 (3rd Cir. 1992).

- “Only an appropriation of property by the carrier for its own use will vitiate limits on its liability” *Deiro v. American Airlines Inc.*, 816 F.2d 1360, 1366 (9th Cir. 1987).
- Where defendant carrier had knowledge of rampant employee theft on prior shipments and made no meaningful effort to prevent future thefts from occurring, the “conversion exception” to the released valued doctrine will not apply in the absence of evidence that the carrier’s conduct was so egregious as to rise to the level of conversion for the carrier’s own use. *Kemper Insurance Companies v. Federal Express Corp.*, 252 F.3d 509, 512 (1st Cir. 2001).

2. Deviation.

- The terms “deviation” or “material deviation” derive from maritime commerce and should have no application in a Carmack Amendment claim or lawsuit.
- The “material deviation” admiralty doctrine “has no application and the context of regulated commerce, which is governed by the overriding federal policy of uniformity.” *Rocky Ford Moving Vans, Inc. v. United States*, 501 F.2d 1369, 1372 (8th Cir. 1974). See also *Hill Construction Corp. v. American Airlines*, 996 F.2d 1315, 1319 (1st Cir. 1993) (“In the case before us there was no breach of a special transport promise. Nor was there any ‘deviation’ from the kind of thing one might expect to find when a carrier has ‘loss, damage, or delayed cargo.’”).
- “Ordinarily, where an agreement limiting liability under the Carmack Amendment exist, as is the case here, liability is governed exclusively by that agreement, irrespective of the degree of negligence attributable to the carrier. *Praxair, Inc. v. Mayflower Transit Inc.*, 919 F. Supp. 650, 653 (S.D. N.Y. 1996).

- Even if the shipper can establish an intentional deviation from the terms of the bill of lading, the limitation on the defendant motor carrier's liability would still apply. *American Cyanamid Co. v. New Penn Motor Express Inc.*, 979 F.2d 310, 316 (3rd Cir. 1992).
- Material deviation doctrine has not been extended beyond admiralty context. *Kansas City Fire and Marine Insurance Co. v. Consolidated Rail Corp.*, 80 F. Supp. 2d 447, 451 (E.D. Pa. 1999).
- “Although the material deviation doctrine in admiralty law and the released valued doctrine in motor carrier law have coexisted for nearly 100 years, it is only recently that a handful of courts has decided to merge the two. Significantly, Congress has statutorily regulated both admiralty and motor carrier law, and it has never seen fit to adopt a material deviation doctrine in the later (*sic*) context. *KLLM Inc. v Watson Pharma, Inc.*, 634 F. Supp. 2d 699, 708 (S.D. Miss. 2009).

- The “material deviation” doctrine “has been applied and limited circumstances, however, where the shipper has paid an additional charge to ensure specialized safety measures to reduce the risk of damage to its cargo and the carrier fails to perform those very measures which resulted in damage to the cargo. *The Limited Co., Inc. v. PDQ Transit, Inc.*, 160 F. Supp. 2d 842, 845 (S.D. Ohio 2001), citing *Praxair v. Mayflower Transit Inc.*, 919 F. Supp. 650, 656 (S.D.N.Y. 1996) and *Nippon Fire and Marine Insurance v. Skyway Freight Systems*, 67 F. Supp. 2d 293 (S.D.N.Y. 1993).
- “In the regime of released valued rates, what governs the size of a recovery is not the degree of the carrier’s negligence but rather the validity of the contract term for the released value. If a liability limitation is valid, recovery cannot exceed the released value no matter how negligent the carrier was. . . . It matters not, apparently, whether the goods were stolen, either while in transport or while being stored, even if an employee of the carrier stole them, indeed not even if an employee of the carrier deliberately set fire to them.” *Quasar Company v. The Atchison Topeka and Santa Fe Railway Company*, 632 F. Supp. 1106, 1108-1109 (N.D. Ill. 1986) (internal citations omitted).

Intrastate Transportation

- Purely intrastate transportation does not necessarily implicate tests adopted under the Carmack Amendment.
- However, UCC 7-309 governs limitations of liability:

“Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier’s liability may not exceed a value stated in the bill or transportation agreement **if** the carrier’s rates are dependent upon value **and** the consignor is afforded an opportunity to declare a higher value **and** the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier’s liability for conversion to its own use.” (Emphasis added)
- There are few reported cases involving intrastate cargo claims and limitations.
- *Rational Software Corporation v. Sterling Corporation*, 393 F.3d 276 (1st Cir. 2005). Court recognized application of UCC § 7-309 and held shipper to be bound by limitation and carrier’s bill of lading and invoices based on prior course of dealings between the parties.
- *Lloyd’s Syndicates v. Horizon Air Services, Inc.*, 2010 U.S. Dist. LEXIS 60959 (D. Mass. 2010).

Waiver under 49 U.S.C. 14101(b)(1)

- Parties can avoid application of “four-point test” through express waiver of rights and remedies under 49 U.S.C. 14101(b)(1):

“If the shipper and the carrier, 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 and may not be subsequently challenged on the ground that it violates the waived rights and remedies.” (Emphasis added)

- Waiver, however, can be very risky.

Section 14101(b)(1) waiver

- The waiver of Carmack Amendment rights duties and liabilities under Section 14101(b) must be expressed and in writing. *Celadon Trucking Services Inc. v. Titan Textile Co., Inc.*, 130 S.W. 3d 301, 303 (Tex. App. 2004); *MidAmerican Energy Co. v. Start Enterprises, Inc.*, 437 F. Supp. 2d 969, 972-73 (S.D. Iowa 2006); *Continental Insurance Co. v. Saia Motor Freight Line, Inc.*, 210 Fed. Appx. 381, 382 (5th Cir. 2006).
- Waiver of Carmack remedies can open the floodgates to a constellation of state law claims.
- *Great American Insurance Company of New York v. T.A. Operating Corporation*, 2008 U.S. Dist. LEXIS 101758 (S.D. N.Y. 2008)
 - Instructive as to potential consequences, for motor carriers, of Section 14101(b) waiver.
 - Subrogating insurance company sued truck stop and motor carrier from which a shipment of pharmaceuticals worth \$30 million was stolen.

- Motor carrier pled that its liability was limited to \$100,000 pursuant to an express provision in its contract with the shipper. *Id.* at [*6].
- The contract also contained a clause waiving all remedies under the Carmack Amendment. Though it is difficult to discern from the Court's decision whether or to what extent the § 14101(b) waiver affected the outcome, the judge nonetheless apparently considered the "material deviation" doctrine and the co-defendant truck stop's cross-claim for contribution against the motor carrier and denied the motor carrier's motion for summary judgment on its limitation defense.
- Pursuant to 49 U.S.C. § 14101(b). *Id.* at [*7].
- In an apparent contradiction, after noting that all remedies (which would include preemption) under the Carmack Amendment had been waived under § 14101(b), the Court nonetheless ruled the plaintiff's state law claims were preempted.

Celadon Trucking Services, Inc. v. Titan Textile Company,
2003 Tex. App. LEXIS 8990 (Tex. 2003):

- Shipment of 300 cases of synthetic yarn (\$30,000.00) from South Carolina to Mexico by motor carrier.
- Shipment was stolen while in Mexico.
- Carrier claimed it was not responsible due to the following:

“All Mexican trans-border shipments are treated as either originating or terminating at the border point in the U.S. Celadon is not responsible for loss or damage occurring in Mexico. Mexican cargo insurance is available from customs broker.” (Emphasis added)

“ . . . we hold that this provision requires such a waiver to be contained in a written agreement between the shipper (Titan) and the carrier (Celadon) that expressly waives all rights and remedies under the Carmack Amendment for the transportation covered by the Contract. The statute specifically requires that the parties /expressly waive’ these rights and remedies. See 49 U.S.C. 14101(b)(1). The plain meaning of ‘expressly’ is ‘clearly and unmistakably communicated; directly stated.’ Black ’ s Law Dictionary 601 (7th ed. 1999); see also *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192 B 93, 200, 205 B 06 (Tex. 2001) (equating " express " with "states with unmistakable clarity" and with "clearly and unequivocally states").

- “Congress's requirement that the waiver be express preempts any Texas law that would allow implied waiver by conduct or that would interpret the Contract to waive Celadon's liability for losses in Mexico without an express waiver of the Carmack Amendment in the Contract. Finally, Celadon argues that, because it attempted to disclaim liability for loss or damage in Mexico in Section 19, and because this disclaimer would be inconsistent with the Carmack Amendment, Section 19 is an express waiver by Titan of its rights and remedies under the Carmack Amendment. We disagree. Section 19 does not clearly and unmistakably communicate or directly state an intent to waive the protections of the Carmack Amendment. Under the plain meaning of "expressly," Titan and Celadon have not expressly waived these protections as required by 49 U.S.C.'14101(b)(1) . . . Absent an express waiver, Titan is not precluded from asserting its claim under the Carmack Amendment.”

QUESTIONS?