

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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## BY LAND OR BY SEA . . . A COMPARISON OF THE FUNDAMENTALS OF THE CARMACK AND COGSA LIABILITY REGIMES—PART I & II

By Steve Block

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### Introduction

Transportation industry and law are rapidly evolving with the modes' operational merging; globalization of business; improvements in technology stemming from containerization and electronic data systems; recent federal court decisions and their progeny; and deregulation. These dynamics are forcing transportation law practitioners, courts and industry participants to move their focus away from viewing statutes and treaties governing water and surface carriage as mutually exclusive, and toward the significance of the regimes' differences and compatibilities. Rapidly vanishing are the days when the transportation industry was defined by interlinking participants with mode-specific expertise and operations. Law governing the industry is - or at least should be - one step behind, and keeping pace with that evolution.

Transportation as a commercial essential, business practice, and subject of specialized law has been around virtually as long as humankind. Few industries can point to the long history that transportation enjoys, including the benefits of examining infinite legal issues that have come to form transportation law's core. But such a perennial history has its downsides. Legal principles, when well entrenched in the common law, evolve slowly. Attitudes and conceptual understanding, of lawyers and non-lawyers alike, are difficult to retool. Legislatures and courts of all levels with more pressing issues typically feel no

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urgency to modify applicable law, and their most compelling constituencies are not apt to pressure them in that direction. Concurrently, however, transportation technology and practices, along with their governing environments, move forward inexorably.

To place this in perspective, consider that ocean shipping is millennia old; railroad transit is perhaps a couple hundred years old; the age of trucking as a major transportation mode dawned about 75 years ago, and air cargo has been a significant option for only about 40 years. Containerization was adopted as the world's primary intermodal mechanism beginning about 35 years ago, taking firm hold on the industry maybe a decade later. Deregulation of the various modes throughout the 1990s drastically altered government's role in transportation and, concurrently, business practices evolved with the demise of mandatory common carriage. Computer and internet technologies revolutionized transportation management and administration beginning in the mid-1990s, with improvements emerging at every turn. Thus, industry developments have made lightning-fast advancements in the last few decades relative to the length of transportation's existence as a major component of commerce.

On the other hand, ocean carriage in the United States is still governed by the same federal

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statute, the U.S. Carriage of Goods by Sea Act ("COGSA"),<sup>1</sup> enacted in 1936 after being taken nearly verbatim from the Hague Rules, an international treaty which the United States and most other signatories ratified in 1924.<sup>2</sup> Amendments to COGSA over its 73-year life have been minimal.

Similarly, the Carmack Amendment to the Interstate Commerce Act of 1887, subsequently renamed and recodified as the Carmack Amendment to the Interstate Commerce Commission Termination Act ("Carmack"), originally was enacted in 1906, long before the first commercial truck undertook an interstate transport.<sup>3</sup>

This paper reviews the origins of Carmack and COGSA, and compares and contrasts the two regimes' most significant aspects. Attention is given to their compatibility in light of recent federal case law addressing intermodal liability. This paper is not an exhaustive treatment of the two statutes' differences and similarities, as such would require a treatise-length effort. Rather, it seeks to provide practitioners and industry participants who focus on claims administration from the perspective of a single mode a conceptual understanding of the similarities, differences and interplay of the United States' two primary cargo liability regimes.

### *Origins of Carmack and COGSA*

Carmack and COGSA present a common challenge to legal and academic analysis: both are virtually devoid of legislative history. COGSA's statutory language was reproduced almost verbatim from the Hague Rules. While there are records of discussions in the international proceedings leading to the Hague Rules' adoption, these are not recorded with the same specificity as would be typical in legislative proceedings. Moreover, litigants cannot point to a clearly stated "Congressional intent" when referencing Hague discussions.

Carmack was promulgated in 1906 in the context of particularities and complexities peculiar to railroad carriage, years before motor carriage was even conceived. The concept of imposing responsibility for lost/damaged cargo on the initial rail carrier was easily tied to motor carriers, especially when the practice of interlining created the same difficulties

for trucking shippers that rail shippers encounter in determining which of two or more carriers is liable and why, as well as where such carrier(s) might be sued.<sup>4</sup> Early case law interpreting Carmack held that Congress' intent was to create an encompassing and uniform legal structure preemptive of state and common law concepts that vary in different jurisdictions.<sup>5</sup> A review of the cited case law, however, reveals a dearth of citation to legislative history unusual for pronouncements of this nature.<sup>6</sup>

### Carmack

The original 1906 Carmack statute consisted simply of the following language:

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 therefore 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, 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 [emphasis added].**

Modern practitioners might be surprised by the statute's last sentence. By its express terms, Carmack originally appeared intended to complement, rather than preempt, state and common law remedies. However, judicial interpretation of the circumstances in which Congress enacted Carmack demonstrates that full preemption was intended. The legislation originated with shipper claims in various states alleging negligence and breach of contract, and seeking to hold invalid carrier limitations of liability. The analyses differed in each venue, with some states allowing contractual limitation of liability and some refusing to enforce such

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terms for public policy reasons. Courts revealed their confusion about how inherently multi-jurisdictional issues should be addressed in this regard.<sup>7</sup> Thus, Carmack was born out of concerns about transportation law uniformity.

The U.S. Supreme Court finally declared Carmack's preemption of state and common law claims in 1927.<sup>8</sup> Its application was extended to include motor carriers in 1935.<sup>9</sup>

The propriety of a statute imposing essentially strict liability on railroads was also a concern from conception. The first published Carmack case noted that:

There is much force in the contention that this amendment is in violation of the fifth and fourteenth amendments of the Constitution of the United States, which forbid that either Congress or any of the states "shall deprive any person of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." In that connection it is insisted that the imposition upon the defendant, as initial carrier, of liability for loss, damage, or injury of the flour occasioned by the act, neglect, or default of the Southern Railway Company, or any other connecting carrier over whose line of flour passed, deprives the defendant of its property without due process of law.<sup>10</sup>

The absence of legislative history complicated the analysis.

### COGSA

COGSA originated overseas. In 1921, the International Law Association, in coordination with Comité Maritime International,<sup>11</sup> convened at the Hague to negotiate terms of a comprehensive international ocean cargo liability regime.<sup>12</sup> The principal focus of the early Hague talks was development of international standards for ocean bills of lading. British law and custom in the Nineteenth Century allowed English vessel operators to insert enforceable clauses in bills of lading that shielded them from liability for lost or damaged freight. This prompted the United States to enact the Harter Act in 1893, which

was designed to protect the American merchant marine in an international commercial environment. The early Harter Act statute provided as follows:

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.<sup>13</sup>

Other countries followed suit. It soon became apparent that the international trend of legislation protecting individual countries' industry participants was unworkable.<sup>14</sup> The Hague Rules were adopted by most of the world's primary ocean shipping partners in the years following the treaty in 1924, assuring (for the most part) that shipping partners would be treated identically regardless of the venue of a maritime law dispute over bill of lading issues. The United States enacted COGSA in 1936, shortly before formally ratifying the Hague Rules.

COGSA is identical to the Hague Rules with certain exceptions. For example, COGSA imposed a \$500.00/package liability limitation, as opposed to the Hague Rules' £100.00/package.<sup>15</sup> Five hundred dollars was no meager sum in 1936, and some have

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analyzed this figure as being more of a ceiling than a floor. Today, \$500.00 may still be higher than the cents-per-pound limitation of liability allowed by Carmack and its interpretational case law, but it typically is embraced as a near-complete defense to liability. With COGSA, Congress deviated from the Hague Rules in response to the shipping public's demands by holding carriers liable for damage resulting from improper storage or operation of an unseaworthy vessel. COGSA largely supplanted the Harter Act, leaving the latter to apply mostly to domestic water carriage within the United States, and to portions of international transportation outside of COGSA's dominion.

Subsequent international treaties revising the Hague Rules have followed, but the United States has declined to ratify those treaties, and has adhered to COGSA.<sup>16</sup>

With such divergent beginnings, and in light of the primary transportation modes' operational differences, it is not surprising that statutes governing surface and water carriage take dissimilar approaches to similar issues. The following section compares

### *Applicability and Jurisdiction*

#### Carmack

Carmack by its own terms, including separate provisions for rail and motor carriage, governs carrier liability for lost/damaged cargo in interstate surface transportation.<sup>17</sup> Questions arose as to whether Carmack should apply to transit commencing in the United States and ending in Canada or Mexico, and/or commencing in one of those foreign countries and ending in the United States. The Interstate Commerce Act's original jurisdictional provision, which was applied to Carmack, was as follows:

#### General jurisdiction

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(2) by water carrier and rail carrier or motor carrier from a place in a State to a place in another State, except that if part of the transportation is outside the United States, the Commission only has

jurisdiction over that part of the transportation provided—

(A) by rail carrier or motor carrier that is in the United States; and

\*\*\*

(3) by water carrier or by water carrier and rail carrier or motor carrier between a place in the United States and a place outside the United States, to the extent that—

(A) when the transportation is by rail carrier or motor carrier, the transportation is provided in the United States . . .<sup>18</sup>

In 1978, this provision was rewritten to provide "between a place in . . . the United States and a place in a foreign country."<sup>19</sup> Carmack now applies to interstate surface transit that is within the United States, or commences in the United States and ends in a foreign country. However, Carmack does not apply to a shipment originating in a foreign country and which ends in the United States, unless a separate bill of lading is issued for the segment within the United States.<sup>20</sup>

As mentioned above, Carmack is designed and applied to alleviate the difficulties shippers would otherwise face when their cargo is interlined between two or more carriers, possibly without knowing who possessed their cargo at the time of a loss, when, where, and under what circumstances. Carmack will hold the initiating surface carrier, i.e., the carrier that issued a bill of lading, liable for cargo loss, even if the cargo was not in that carrier's possession at the time of the loss. Upon issuance of a bill of lading, the initiating carrier assumes statutory responsibility for safe delivery, and may be left with third-party claims against other entities who actually are at fault. In other words, Carmack is not concerned with physical possession; rather, it imposes essential strict liability on the surface carrier that enters into a contract of affreightment - usually the bill of lading - with a shipper.

Jurisdictionally, Congress did not intend Carmack litigation to be subject exclusively to primary federal jurisdiction, although under the judicial code in place at the time of its enactment, all Carmack claims were removable.<sup>21</sup> After a

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number of amendments (the last being in 1977, when Congress enacted 28 USC § 1337), Carmack was structured so as to allow original filing in and removal to federal courts only of claims for which bill of lading values (which cannot be combined to exceed the jurisdictional threshold) exceed \$10,000.00.

### Endnotes

<sup>1</sup> COGSA originally was codified as an amendment to § 25 of former Title 49. After amendments in 1981, it was recodified at 46 USC App. §§ 1301-1315, which is the citation most frequently encountered in modern case law. It was again recodified in 2006 at 46 USC §§ 30701-30707.

<sup>2</sup> See Admiralty and Maritime Law Guide - International conventions, available at <http://www.admiraltylawguide.com/conven/hague/rules1924.html>. The Hague Rules were amended by a treaty known as the Hague-Visby Rules in 1968, but the United States did not ratify the latter treaty.

<sup>3</sup> Originally part of the Hepburn Act, ch. 3591, 34 Stat. 584 (1906) and codified at 49 USC § 20(11); recodified in 1978 at 49 USC § 11707; and recodified again in 1996 at 49 USC § 14706 for motor carriers, freight forwarders and others, and at 49 USC § 11706 for rail carriers.

<sup>4</sup> *Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 502 (1950).

<sup>5</sup> See, e.g., *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1913); *Atchison, Topeka & Santa Fe Ry. v. Harold*, 241 U.S. 371, 36 S.Ct. 665, 60 L.Ed. 1050 (1916); and *New York, New Haven & Hartford R.R. v. Nothnagle*, 346 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953). A summary of this early jurisprudence is presented in *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 704-05 (4th Cir. 1993).

<sup>6</sup> For an in-depth study of Carmack's lack of legislative history and federal preemption issues, including case law noting that circumstance, see Tarkington, *Rejecting The Touchstone: Complete Preemption And*

*Congressional Intent After Beneficial National Bank V. Anderson*, 59 S.C. L. REV. 225 (Winter 2008).

<sup>7</sup> For an in-depth study of Carmack's origination, including its paradoxes, see Kaiser, *Moving Violations: An Examination Of The Broad Preemptive Effect Of The Carmack Amendment*, 20 W. NEW ENG. L. REV. 289 (1998). Ms. Kaiser argues persuasively that Congressional intent with respect to Carmack has been subverted since the statute was first implemented.

<sup>8</sup> *Missouri Pac. R. Co. v. Porter*, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672 (1927).

<sup>9</sup> Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935).

<sup>10</sup> *Norfolk & W. Ry. Co. v. Stuart's Draft Milling Co.*, 63 S.E. 415, 416-417 (Virginia 1909).

<sup>11</sup> Self-described as a "descendant of the International Law Association," Comité Maritime International is the oldest international organization devoted to the development of a uniform maritime law. See CMI's website at <http://www.comitemaritime.org/>.

<sup>12</sup> See 1 The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules 273 (Michael F. Sturley ed., 1990).

<sup>13</sup> US Code ch.105, Sec. 3, 27 Stat. 445. as found in 1893.

<sup>14</sup> See, generally, Yancey, *The Carriage Of Goods: Hague, Cogsa, Visby, And Hamburg*, 57 TUL. L. REV. 1238 (1983).

<sup>15</sup> See discussion below addressing limitation of liability.

<sup>16</sup> For example, the Hague Rules were followed by amendments known as the Hague-Visby Rules and, later, the Hamburg Rules. See, generally, *id.*

<sup>17</sup> 49 USC § 14706 and § 11706.

<sup>18</sup> PL 95-473, 1978 HR 10965; 49 USC § 10730.

<sup>19</sup> 49 USC § 10501(a)(2)(F) (1996).

<sup>20</sup> *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394 (7th Cir. 1992) and cases cited therein.

<sup>21</sup> See Tarkington, 59 S.C. L. REV. 225, *supra*.

## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

**Shipper's purchase of insurance confirms its understanding of carrier's limitation of liability, and a cargo's high value alone doesn't suggest carrier stole it.**

*E&S International Enterprises, Inc. v. Yellow Freight System, Inc.*, et al, 2009 WL 202030 (C.D. Cal 2009)

Shipper E&S booked a load of iPods with carrier Yellow for transport from California to Ohio. The bill of lading of lading incorporated Yellow's terms and conditions, which contained a \$25/pound limitation of liability clause. E&S marked the bill of lading to request an additional \$300,000 of liability insurance coverage, which Yellow procured.

The iPods disappeared en route. Yellow paid the limited liability amount of \$31,625, and the insurer ponied up another three hundred grand, but the total was still \$44,195 below the iPods' actual value. E&S sued, and Yellow moved for summary judgment.

The Central District of California granted Yellow's motion. The carrier had jumped through all Carmack-imposed hoops to limited its liability, offering two separate freight rates, an election by the shipper, and issuance of a confirming bill of lading. There could be no dispute that E&S was aware of Yellow's limited liability, as this was confirmed by its election to purchase additional insurance coverage. E&S argued that the cargo's high value suggested the carrier might have converted the iPods, i.e., that its employee(s) allegedly took them. The shipper argued that the "conversion doctrine" bars carriers from limiting their liability.

The court considered this argument and suggested it might be applicable, although it noted no presented case has ever applied the conversion doctrine to a Carmack case. But here, there simply was no evidence Yellow stole the freight.

The mere fact iPods are small and valuable doesn't create an inference of theft.

**Ocean transportation intermediaries are not subject to Carmack for motor carrier cargo losses.**

*Swiss National Ins. Co. v. Blue Anchor Line, et al*, 2009 WL 161067 (SDNY 2009)

This opinion takes the Second Circuit's recent decision in *Rexroth Hydraudyne v. Ocean World Lines, Inc.*, 547 F.3d 351 (2<sup>nd</sup> Cir 2008), a step further. *Rexroth* was something of a departure from the Second Circuit's *Sompo Japan* determination that Carmack governs cargo losses incurred during the surface leg of an intermodal move for which a through bill of lading is issued. *Rexroth* held a non-vessel operating common carrier not to be liable for a rail carrier's damage to cargo on the ground the NVOCC - a species of ocean transportation intermediary - never actually transported or even touched the freight.

In *Swiss National Ins. Co. v. Blue Anchor Line*, the Southern District of New York originally applied *Sompo Japan* to claims against two ocean transportation intermediaries, finding them potentially liable for a loss caused by a motor carrier. After *Rexroth*, the court reversed its earlier ruling, finding that OTIs are not Carmack carriers, and therefore cannot be liable even though they participated in the process pursuant to a through bill of lading. The plaintiff subrogated insurer tried to distinguish *Rexroth* by labeling the intermediaries as "receiving" and "delivering" carriers, and by asserting that *Rexroth* was limited to railroad losses, but the court didn't buy it. Carmack is Carmack, and surface carriers (for relevant purposes) are defined identically.

**Neither shipper nor broker is liable for driver's injuries from poorly loaded cargo.**

*Camp v. TNT Logistics Corp., et al*, 553 F.3d 502 (7<sup>th</sup> Cir. 2009)

Driver Lola Camp, under lease to motor carrier DeKeyser Express, was dispatched to haul three pallets of automotive parts from shipper Trelleborg YSH within Illinois. Trelleborg had

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booked the transit through freight broker TNT Logistics.

The three pallets would fit in Camp's rig only if one was loaded on top of the other two without securement. This looked unstable to Camp, and she advised TNT of her concerns. Trelleborg wanted the load delivered in one haul, and signed a damage waiver on the bill of lading. Before leaving with the loaded trailer, Camp opened its rear door, whereupon the top-stacked pallet fell and hurt her shoulder. She sued Trelleborg and TNT in the Central District of Illinois. She didn't fare well in court.

Affirming the trial court's dismissal of TNT and Trelleborg on summary judgment, the Seventh Circuit found that TNT was acting solely as a broker. True, FMCSA regs require *motor carriers* to ensure that loads are properly distributed and secured. However, TNT had only arranged the transport. Its role in directing that the third pallet be loaded atop the other two didn't equate to it being a "engaged in the transportation of goods or passengers for compensation" as 49 USC § 13102(14) defines motor carriers. The fact TNT actually held a motor carrier license didn't mean it was operating as one in this transaction. TNT even dictated Camp's route and number of stops, but that control still isn't enough to make it a carrier.

Moreover, Illinois law (as well as that of other states) provides that a plaintiff cannot recover from a defendant for aiding and abetting the plaintiff's own tortious conduct. Camp was responsible as a driver under 49 CFR § 329.9(a)(1) for securing her trailer. Under state and common law, TNT didn't owe Camp a duty of care under these circumstances.

Nor did Trelleborg. Shippers aren't charged with knowing safe loading procedures. This shipper could not reasonably have foreseen that Camp, who knew the load was unstable, would open the trailer door. The court wasn't prepared to broaden shippers' responsibilities in transportation relationships.

Why transportation claims should be prosecuted by transportation lawyers.

*D.M. Best Company, Inc. v. Summit Worldwide, LLC*, 2009 WL 103595 (S.D. Tex 2009)

Here's a humorous little decision that does little more for American transportation jurisprudence than demonstrate why transportation law expertise is needed for transportation litigation. Humorous unless you're the shipper who just saw its claims dismissed.

D.M. Best Company ("Best") bought some sort of equipment in an internet auction. It wasn't quite sure from whom it actually bought the equipment, but KBA North America ("KBA") appears to be the prime candidate. Best hired transportation broker Summit Worldwide ("Summit") to arrange transportation of the equipment from Pennsylvania to Texas. Summit hired a motor carrier to effect the transit, and the equipment arrived damaged.

Best sued everyone involved, asserting that KBA was a shipper - yup, "shipper" - subject to Carmack liability and Summit was a "broker." In response to those two entities' motions for summary judgment, Best changed direction and claimed Summit was a freight forwarder subject to Carmack liability. Too late for that, ruled the court. The deadline for amending pleadings had passed and nothing in the record suggested Summit had operated as a forwarder. And for the same reasons, KBA wasn't a shipper, or carrier for that matter, subject to Carmack. Motions granted. You gotta have the players and their roles straight to play in this game.

**Motor carriers may charge back to owner operators the cost of federally mandated insurance coverage.**

*Owner-Operator Independent Drivers Association v. United Van Lines, LLC*, 2009 WL 331038 (8<sup>th</sup> Cir. 2009)

United Van Lines requires its owner operators to sign leases which provide that the operators pay back United costs the carrier incur to procure cargo and accident insurance coverage as FMCSA regs require. OOIDA recently took issue with United on this, urging the Eastern District of

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Missouri and, unsuccessful there, the Eighth Circuit, to hold United's practice improper. The drivers' association fell short before the appellate court as well.

Motor carrier Truth-in Leasing regulations at 49 CFR § 376.12(j)(1) include the following provision regarding insurance:

The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to FMCSA regulations under 49 U.S.C. 13906. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

OOIDA felt this provision prohibited carriers from charging back to drivers insurance costs. The trial court dismissed the claim

based on the reg's last sentence, which seems to contemplate that a carrier can charge back "for any of this insurance," which would include, presumably, all insurance requirements. OOIDA urged that "any of this insurance" referred to the preceding sentence, which was limited to coverage specified in the lease as being the driver's responsibility.

The Eighth Circuit affirmed. The last sentence would've included "other" after "any" if it were meant to qualify only the preceding sentence. Semantics can make all the difference in the world when it comes to interpretation of regs and statutes!

True, the reg's drafting history and financial responsibility statutes showed that FMCSA intended insurance coverage to be carriers' non-delegable responsibility. However, nothing is said about who had to pay for it. Absent a provision, carriers can collect from whom ever is willing to pay.

This case also presents an interesting analysis about whether ICCTA's two-year statute of limitations, or the general federal four-year time bar, applies to Truth-in-Leasing claims. OOIDA prevailed on that issue; four years generally is the limit.

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## CONTACT INFORMATION

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