



# THE LANE LAW LETTER

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## Carrier Protection Limited in Carmack Amendment Claim

*We are a litigation firm with a practice emphasizing transportation, insurance and construction law in New York and New Jersey.*

*We hope that you find The Lane Law Letter both enjoyable and useful in keeping you updated on legal developments important to you.*

*Questions or Comments?*

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In a recent decision in *Lewis v. Atlas Van Lines*, the Third Circuit Court of Appeals undertook an analysis of the Carmack Amendment and federal regulations in a claim for breach of contract in failing to complete a household goods move on time, subjecting the customers to additional mortgage payments and other costs. The goods were eventually delivered, and there was no claim for any cargo damage.

Before the move, Mr. and Mrs. Lewis advised the local Atlas agent, Warners Moving & Storage, of the exigencies of their move from Pennsylvania to New York. They told Warners that they had a sales contract that obliged them to be out of their house, with all of their household goods, by a certain date. Warners and Atlas apparently did not dispute that they were on notice of the schedule deadline. The moving van showed up on the appointed date but took only part of the shipment. Warners was not able to send another truck, and thus the Lewises could not empty the house, as they were required to do under their real estate contract. They lost their sale and had to re-market their house.

Eventually the Lewises obtained another buyer, at a price \$35,000 lower than the first contract. After the goods were finally delivered and a bill of lading issued, the Lewises gave written notice to Atlas of their

claim. They could not provide all of the specific loss figures, but did set forth the nature of the losses and the means by which they would be determined. These also included the payment of additional months of mortgage payments.

Atlas moved to dismiss on the ground that the notice of claim had insufficient detail of the claim to meet the requirements of the Carmack Amendment and of 49 CFR § 370.3(b)(3). That regulation calls for a "written communication" that makes a "claim for a specified or determinable amount of money." The Third Circuit, reversing the District Court in Pennsylvania, held that the information provided by the Lewises was adequate. As the court said, a "determinable" claim "need not include any dollar amount." All that is required "is that the claim provide enough information to make it possible to assign a dollar amount . . . after the claim itself is filed." By this notice, "Atlas knew the nature of that claim, and how the amount of it would ultimately be determined." The Court said that the regulation requires nothing more.

The decision would seem to apply to a notice given in any kind of damage in a Carmack Amendment claim. The holding is one that, although adverse to motor carriers, does give guidance to those making and receiving such claims.

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## Duck!

Denise Sciarotta was injured while seated at a hockey game in Trenton, New Jersey. She was several rows back from the ice, and not in the particularized danger areas near the goals and the corners where netting and plexiglass barriers are provided. During warm-up, a puck hit in a practice goal shot bounced off the frame of the goal and flew into the seats, striking this plaintiff.

Denise sued the arena, in *Sciarotta v. Global Spectrum*, for failing to provide sufficient protection. The Supreme Court of New Jersey said that Denise cannot sue for her injuries because the arena had done all it needed to do to protect her, and the "limited duty rule" applies to warm-up activities as well as the actual hockey game. Next time, wear a helmet!

## A Christmas Wish



Our country has been hit with an economic distress the likes of which most of us have never seen. It leaves some folks scared, some out of work or worried about their jobs and health benefits, others worried that they may lose their home. We have seen two quasi-federal mortgage agencies and a mighty insurance company seem to crumble and require the government to bail them out of trouble, powerful Wall Street firms go out of business or be bought out, and the once invincible American automobile industry beg Congress for loans to stay in business. All of this means federal spending in amounts we cannot comprehend. Not since the Great Depression or the darkest days of World War II has our nation had reason to feel a greater sense of stress.

We are blessed, however, to know at this season of the year that we do not face these stresses alone, and that we will have the strength to pull ourselves, our neighbors and our country back, however slowly, to better health and prosperity. We wish all of you the very best of health, happiness, and peace at this special time of year and throughout the next year.

In lieu of sending Christmas cards this year, we are making a donation to those in our area who are feeling the particular pangs of hunger and homelessness. We wish all of you, our friends and colleagues, the peace of Christmas, the joy of Hanukkah, and a happy and successful New Year.

## No Jurisdiction in New Jersey over Upstate New York Trucker

In *NII Brokerage v. Roadway Express, Inc.*, a case handled by our office, the New Jersey federal court dismissed a complaint against an upstate New York trucker for lack of personal jurisdiction. Roadway Express was hired by NII to transport some computer scanner units from New Jersey to its customer in upstate New York. Roadway hauled the units to its terminal in that region. Our client, Aaction Freightways (named for the children of its owners) and Yellow Transport made the local deliveries. The buyer claimed one or two units arrived damaged and rejected the sale. NII sued all three truckers in New Jersey for damages resulting from the loss of the sale.

Senior Judge Harold Ackerman granted our motion to dismiss for lack of personal jurisdiction

over Aaction on the ground that Aaction had no connection with New Jersey, as to this transaction or in its business generally. Aaction is a small local trucker, located and operating exclusively in upstate New York and in nearby Canada. Judge Ackerman also denied NII's request for jurisdictional discovery from Aaction, because it was so clear that it would lead nowhere. In fact, the court stated that NII's claim of jurisdiction was "clearly frivolous."

The court also granted Roadway's motion to dismiss plaintiff's claims under state common law theories, limiting the complaint to those remedies and limitations provided exclusively by the Carmack Amendment. It was a good day for the trucking defendants.

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## New Jersey Court Expands Lawful Role of Chiropractor

Carol Bedford sued her chiropractors for negligent treatment resulting from their adjustments of her left knee. As evidence of negligence, she cited regulations that define chiropractic practice to include adjustments to the spine "and related structures." Carol urged that the chiropractors exceeded their licensed authority when they manipulated her left knee as it is not "related" to the spine. The trial judge held that the statutory definition of chiropractic practice was broad enough to include adjustment of the knee.

The Appellate Division reversed, holding that chiropractic medicine includes "adjustments to the articulations of the spine," but not to articulation of the extremities. The Supreme Court modified that ruling, in a very long opinion coupled with concurring and dissenting opinions, and remanded the case to the trial court for a new trial. The majority held that under certain circumstances the adjustment to an extremity can be related to the condition of the spine, and thus a proper object for chiropractic care.

## Graves Amendment Constitutionality Upheld

The 2005 highway bill, entitled the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) - only Congress could come up with that - contains an important provision known as the Graves Amendment and codified at 49 U.S.C. § 30106 which protects lessors of motor vehicles from statutory vicarious liability if they are otherwise not culpable. Three states, New York, Maine and Rhode Island have such statutes. New York's Vehicle & Traffic Law § 388, for example, makes the otherwise innocent lessor of a rental car, or the lessor of a tractor or trailer, vicariously liable for the negligence of the driver or lessee of that vehicle. The statute provides financial protection to injured victims of accidents but wreaks havoc upon the leasing industry. The Graves Amendment preempts the state statutes and holds that the lessor shall not be liable under any such state law as long as the lessor is in the trade or business of renting or leasing motor vehicles, and that there is no negligence or criminal wrongdoing on its part.

In *Graham v. Dunkley*, the well-respected Second Department of the New York Appellate Division, held that the Graves Amendment was a valid exercise of Congressional power pursuant to the Commerce Clause of the federal Constitution, because it aids in the regulation of the national market for leased and rented automobiles, which are "the quintessential instrumentalities of modern interstate commerce." That it does so by preempting rules of state tort law "does not make it unconstitutional."

In most states, including New Jersey, the established case law protects lessors from liability in accident cases. In New York, the Graves Amendment eliminates the abhorrent effect of Vehicle & Traffic Law § 388. In either case, we strive to obtain dismissals for lessors at an early stage of the lawsuits that we defend.

*The New York statute provides financial protection to injured victims of accidents but wreaks havoc upon the leasing industry.*

## Federal Maritime Limitation of Liability Act Applies to a Boating Accident

Susan Garvey was the lone passenger on Jules Abadi's 28-foot pleasure boat, the M/V Playpen. After a pleasure ride on the navigable waters of Miami-Dade County, Mr. Abadi returned the boat to the Miami Beach Marina. As the boat reached the dock, Mr. Abadi left the steering wheel, allowing the boat to collide with the marina's concrete seawall. Ms. Garvey's hand was pinned in the collision between the boat and the seawall, causing traumatic amputation of part of her thumb.

Garvey sued Abadi for her injuries in New York state court. After an unsuccessful removal to federal court, that lawsuit was remanded to state court. Abadi then filed a separate lawsuit in Manhattan federal court, in which he sought to limit his liability, under the Limitation of Liability Act, to \$95,000, the value of the boat. Garvey moved to dismiss the Limitation Action for lack of federal jurisdiction and for failure to state a cognizable claim. Judge John F. Keenan of the Southern District of New York denied both of Garvey's motions and upheld federal jurisdiction in *Matter of Abadi v. Garvey*, dated August 1, 2008. He had earlier ordered a stay of all

other actions, including Garvey's state court lawsuit, as authorized by the Act.

The Limitation of Liability Act provides that a vessel owner's liability for injuries resulting from maritime accidents is limited to the value of the vessel if the owner is without "privity or knowledge" regarding the accident. The Act allows the owner to bring a limitation action in federal court, whereupon the court will take jurisdiction of all resulting claims and enjoin all other lawsuits, anywhere in the country. The Supreme Court has extended the reach of the Act to pleasure craft, provided that the incident occurs on the navigable waters of the United States and is related to a traditional maritime activity. The injury to Garvey occurred in Miami harbor, a navigable waterway, during the docking of the boat, a traditional maritime activity.

The decision on this preliminary motion did not reach the issue of whether Abadi, who was personally navigating the vessel, was without "privity or knowledge" regarding the Garvey accident.



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## A Boiler-Room Brokerage Firm

While our national focus has been fixed recently upon the reported greed and excesses in the Wall Street banks and brokerage firms, a story unfolded at the Securities and Exchange Commission and the federal court in Manhattan, that shows that greed and fraud can exist on a much smaller scale, even in a Brooklyn storefront boiler room. Vigilante by the SEC put them out of business, and the federal court supported the agency, in *SEC v. Rabinovich & Associates, LP*, (SDNY, November 17, 2008).

Joseph Lovaglio and Alex Rabinovich operated Rabinovich & Associates, LP. Through a team of salesmen operating out of a storefront boiler room in Brooklyn, they bilked 150 investors out of a net amount of \$2,300,000. They held themselves out as a member of the New York Stock Exchange, NASD, and the Securities Investor Protection Corporation (“SIPC”). They were a member of none. The court found their Wall Street address was a cover for the Brooklyn boiler room. There, the sales force en-

gaged in high-pressure phone sales. Their website claimed that their moderate growth fund had earned 127 percent, while “beyond a doubt” their funds all lost money every quarter of the firm’s existence. The representations were all made fraudulently or recklessly, says the court. In fact, Lovaglio failed to disclose that Rabinovich had been forced from dealing with any NASD members and also faced SEC enforcement.

The court issued a permanent injunction, closing down the operation, and issued fines against Lovaglio, who the court says has shown no remorse. In March 2008, Rabinovich pleaded guilty to securities fraud, was sentenced to jail, and ordered to pay back the \$2,300,000 taken from the investors.

Greed exists at all levels. It motivated Lovaglio and Rabinovich, and also the investors who fell for their lies. Thanks to the SEC, the operation is no more.

