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Cover Page Footnote

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ALLOCATION OF THE RISK OF LOSS IN THE TRANSPORTATION OF FREIGHT—THE FUNCTION OF INSURANCE

*SAUL SORKIN**

I. INTRODUCTION

IT has been estimated by the Select Committee on Small Business of the United States Senate Commerce Committee that pilferage, vandalism and hijacking have resulted in property losses of 1.2 billion dollars a year,[1] exclusive of losses resulting from other causes. However, the lack of a uniform standard of liability precludes a rational system of allocating the risk of these losses.

For instance, numerous factors affect the ability of a shipper to recover compensation from a carrier for loss or damage to goods. One such factor is the mode of transportation involved in the carriage, *i.e.*, whether it is a shipment by rail or truck, a shipment by ocean carrier, or a shipment by air. The laws concerning carrier liability have developed independently for air carriers, carriers of goods by sea, and overland carriers, resulting in a significant variation among the different modes of transportation in both the allowable exemptions from liability and the limitations of liability applicable to each mode of transportation.

When a particular shipment is involved in more than one mode of transportation, the exemptions from liability and limitations upon the liability of the carrier may vary as the shipment is transferred. For example, if the shipment was moved initially by truck and then was transferred to an air carrier, the liability of the carrier would change from a high standard to a limited standard.

In recent years there has been a continuing trend toward the use of containerized freight. A shipper may load a trailer-sized container with freight in good condition, seal the container, and deliver it to a trucker for transportation. During the trip the container may be transferred to rail carriers which carry the container piggy-back on top of flat cars. It may then be transferred to an ocean carrier for carriage to a foreign port. Ultimately the container is delivered to its destination and opened for the first time since the shipper parted with possession. If upon opening the container the freight is discovered to be damaged, the determination of which carrier is liable and the extent of the carrier's liability may present a formidable problem.

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1. 164 N.Y.L.J., Sept. 30, 1970, at 1, col. 4.

The technological advances in the transportation industry and the increased trend toward combining the different modes of transportation into a unified transportation system create problems with regard to the relevant standards of liability. Should there be one standard of liability for all carriers—land, sea, air, domestic and foreign—and what should that standard be? What problems do the carriers and shippers face? What are the economic factors and the equities to be considered?

In most commercial shipments insurance is involved in relation to the risk of loss or damage. Insurance against such risks is generally carried by the shippers. Liability insurance for risk of loss or damage to cargo is also generally carried by the carriers, sometimes because such insurance is required by statute[2] and sometimes solely as a matter of prudent business practice. In the United States carriers have for over a century attempted to exempt themselves from liability or limit their liability to the extent of the amount that a shipper has been compensated for his loss by the shipper's insurance carrier. The carriers have attempted this by inserting in their bills of lading a provision giving the carrier the benefit of insurance effected upon the shipment.[3] This benefit of insurance provision has been and continues to be the subject of substantial litigation.

This article will examine the standards of liability, the problems created for the carrier and shipper by the myriad rules of liability, the nature of the controversy concerning the benefit of insurance clauses in the bills of lading, and the function insurance should play in the allocation of the ultimate burden of risk of loss or damage—all with the hope that such an examination of the problem will lead to a uniform, functional and economic method of allocating the risk of loss and damage.

II. The Liability of Overland Carriers

A. *Common Law*

At common law a carrier was regarded as an insurer. The carrier was liable for goods stolen from him or lost from his charge except where the loss resulted from an act of God or the public enemy.[4] The common law, in imposing liability, dispensed with the necessity of a shipper proving that damage to a shipment was caused by the negligence of the carrier.[5] The justification for making the common carrier an insurer has been said to be to prevent negligence or collusion between dishonest carriers and thieves to the prejudice of the shipper, since geographic remote-

2. E.g., 49 U.S.C. § 315 (1964).
3. See text accompanying notes 100-58 infra.
4. O. Holmes, The Common Law 180 (1881).
5. Secretary of Agriculture v. United States, 350 U.S. 162, 173 (1956) (concurring opinion).

ness of the shipper from the property while it was in transit would make proof of such collusion difficult, if not impossible.[6] To reduce the effectiveness of this harsh doctrine of liability, the carriers provided in their contracts for an exemption from liability or for the limitation of liability to an agreed value. In some instances the carriers attempted thereby to exempt themselves from liability for their own negligence.

Prior to the passage of the Interstate Commerce Act[7] the validity of such agreements depended upon state law. However, the law then applied by the Supreme Court of the United States was that a common carrier could, by contract, limit his common-law liability but could not by agreement exempt himself from liability for his own negligence.[8] The test applied by the Supreme Court to limitations upon the common law liability of a carrier was whether the limitation was just and reasonable.[9] A common carrier, in the absence of fraud or special contract, was liable for loss even if he was ignorant of the contents of the package and regardless of its value.[10] But if a special agreement was made between the shipper and carrier which limited the liability of a carrier to an "agreed valuation" and the freight rate varied with the valuation, then in the event of loss, the shipper was limited in his recovery to the agreed value since the limitation was deemed just and reasonable.[11] The rationale behind this theory was that it would be unjust to allow a shipper to be paid a large sum after a loss occurred if he had induced the carrier to accept a lower freight rate by claiming before the loss that the goods were worth less. Furthermore, the rule was held not to induce a lack of care by the carrier since the carrier could provide protection in accordance with the disclosed value.[12]

In 1887 Congress passed the Interstate Commerce Act to regulate transportation.[13] The Act as originally adopted contained no provision concerning the liability of carriers for loss or damage to goods, and no provision prohibiting carriers from exempting themselves from or limiting their liability by agreement in the bill of lading or otherwise. Consequently, the validity of conditions limiting a carrier's liability in bills of lading used in interstate commerce continued to be determined by state law. Many states, either by statute or by rule of law, did not permit car-

6. Chicago & E. Ill. R.R. v. Collins Produce Co., 249 U.S. 186, 192-93 (1919).
7. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.).
8. Hart v. Pennsylvania R.R., 112 U.S. 331, 338 (1884).
9. Id. at 338-39.
10. Id. at 340.
11. Id.
12. Id.
13. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

riers to limit their liability. In *Pennsylvania Railroad v. Hughes*,[14] the Supreme Court held that in the absence of congressional legislation a state had the right to require a common carrier to be liable for the full value of goods which were lost or damaged despite the existence of a special contract limiting the carrier's liability to a stated amount or agreed value. It has been said that it was the rule enunciated in this case which led to the enactment of the Carmack Amendment.[15]

B. *The Carmack Amendment*

In 1906 Congress passed the Hepburn Act.[16] For the first time carriers receiving goods for transportation from a point in one state to a point in another state were required to issue a bill of lading. The receiving carrier was made liable for any loss or damage caused by it or by any connecting carrier to which the property might be delivered. All exemptions from liability by contract or rule were prohibited. The liability provision was popularly known as the Carmack Amendment.

In 1915 the Interstate Commerce Act was further amended by the Cummins Amendment[17] which made the carrier liable for the "full actual loss or damage or injury" to property. While the act continued to make unlawful and void any limitation of liability contained in the bill of lading, receipt, rule, or regulation, it added a proviso for goods hidden from view by wrapping, boxing or other means whereby the carrier was not notified as to the character of the goods.[18] In such instance, the carrier was authorized to require the shipper to specifically state the value of the goods. Thereupon the carrier was relieved from liability beyond the amount specifically stated by the shipper, often called the released value. The Interstate Commerce Commission (ICC) was authorized to establish freight rates based on such values. In 1916 the Interstate Commerce Act was further amended by the Second Cummins Amendment[19] which required that rates dependent on the value of the property shipped be filed as part of the tariff filed by the carrier with the ICC. If, in the opinion of the Commission, such released rates were just and reasonable the Commission could, by its order, authorize the rate.

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14. 191 U.S. 477 (1903).

15. C. Miller, Interstate Commerce Commission Law and Procedure 344 (1939). For a partial history of the Interstate Commerce Act see C. Miller, The Legislative Evolution of the Interstate Commerce Act (1930).

16. Act of June 29, 1906, ch. 3591, 34 Stat. 584.

17. Act of Mar. 4, 1915, ch. 176, 38 Stat. 1196.

18. The Hepburn Act had overlooked this vital problem. Prior to 1906 carriers could limit their liability in the bill of lading to a fixed amount unless the shipper stated the value of the goods and paid an extra charge.

19. Act of Aug. 9, 1916, ch. 301, 39 Stat. 441.

Today, except for limited exclusions permitted by statute and common law, carriers receiving or delivering property and subject to the provisions of the Carmack Amendment to the Interstate Commerce Act[20] —railroads, motor carriers, freight forwarders, and express companies— are

liable to the lawful holder of . . . [a] bill of lading . . . for the full actual loss, damage, or injury to such property caused by it or by any such 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, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void . . . .[21]

However, the carrier *can* limit its liability if the carrier and shipper have agreed upon a released rate and that rate has been approved by the ICC as part of the carrier's tariff.[22] The exception for released value is no longer limited to goods hidden from view.[23]

The contract between the shipper and the overland carrier—the bill of lading—generally also provides that the carrier shall not be liable for loss or damage caused by an act of God, the public enemy, authority of law, an act or default of the shipper or owner, natural shrinkage, or losses resulting from a defect or vice in the property shipped.[24] Thus, although subjected to a high standard of care by statute and the common law, an overland carrier is not liable for every loss from any and every cause.[25]

To establish the prima facie liability of either the receiving or delivering carrier, the shipper in most instances need prove only that the shipment was delivered in good condition to the initial carrier and was either not delivered, delivered short or delivered damaged.[26] The initial and delivering carriers are liable although they may be in no way responsible for the loss or damage, as in those instances where the loss or damage occurs on the line of an intermediate connecting carrier.

20. The Carmack Amendment is expressly applicable to motor carriers and freight forwarders. 49 U.S.C. §§ 319, 1013 (1964).

21. Id. § 20(11).

22. Id. There can be a limitation on property "received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper . . . ." Id.

23. See note 18 supra and accompanying text.

24. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134, 137 (1964).

25. Adams Express Co. v. Croninger, 226 U.S. 491, 506 (1913).

26. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134, 138 (1964).

In many instances a carrier will accept goods for shipment in a sealed or closed package or container. The realities of the transportation of freight do not permit a carrier to inspect the contents of each shipment before accepting it for transportation. Usually such shipments are delivered to the consignee in the original packages or containers with no exterior visible evidence of damage. When these packages or containers are opened by the consignee, the contents may be in a damaged condition. There is no way, short of inspection of the contents of each shipment, for a carrier to determine whether the goods were in fact in good condition when packed by the shipper or, if the damage is discovered sometime after delivery, whether the damage occurred between the time of delivery to the consignee and the time of discovery. Although it may be more difficult for a shipper to make out a prima facie case against a carrier in concealed loss or damage cases, the area remains one where the carrier can be at the mercy of a fraudulent claimant.

Thus, as between the shipper and the carrier, the burden of the risk of loss has been placed on the carrier who has undertaken to carry the goods for compensation. Although carriers may not be liable for loss or damage in every circumstance, the areas of liability without probable fault are extensive and go beyond theft, pilferage and hijackings.

C. *The Special Problem of Articles of Extraordinary Value*

Section 5 of both the motor carrier and freight forwarder bills of lading provides that no carrier will carry or be liable in any way for any documents, specie or any articles of extraordinary value not specifically rated in the tariffs unless there is a special agreement made by the carrier and a stipulated value endorsed on the agreement.[27]

If the goods being shipped are fraudulently misdescribed by a shipper, such as the shipment of a package of diamonds described on the bill of lading and carton as candy gum balls, the courts would generally not permit recovery against the carrier.[28] The problem with the "extraordinary value" liability exclusion is two-fold. First, railroads,[29] motor carriers[30] and freight forwarders[31] may charge for the transportation of property only those rates which have been published by the carrier in its tariff filed with the ICC. These rates are subject to the Commission's approval and must be just, reasonable, and non-discriminatory. Advance notice of the filing of the tariffs must be given and the tariffs and rates are subject to investigation, protest and suspension.

27. See Contract Terms & Conditions of Uniform Order & Straight Bill of Lading § 5.

28. E.g., Southern Express Co. v. Wood, 98 Ga. 268, 25 S.E. 436 (1896); see Annot., 1 A.L.R.3d 736 (1965).

29. 49 U.S.C. § 6 (1964).

30. Id. §§ 317-18.

31. Id. §§ 1005-06.

While the classifications are required to be reasonable, rates are established for categories of property which often do not take cognizance of all items and their variations in value within a specific category. The examination of a typical tariff and classification of a carrier will show that the carrier has attempted to list separately all of the different types of items within a particular category. Thus, if there were a category for hair, there might be separate rate items for cattle hair, rabbit hair, human hair, etc. However, a carrier cannot carry an item for which there is no rate established. Consequently, for each category there will generally be a catch-all classification and rating usually followed by the letters "NOI" or "NOIBN" which indicates that the goods are "not otherwise indexed" or "not otherwise indexed by name." If the shipment is rated for the catch-all classification as NOI or NOIBN, then there is a "specific" rate in the tariff for the item carried and it is not excluded under section 5.

Thus, in *Salon Service, Inc. v. Pacific & Atlantic Shippers, Inc.*[32] the tariff of the defendant freight forwarders contained a rate for "Hair goods, human or imitation hair, NOIBN, in boxes." There was no specific rate for "wigs."[33] The carrier's cost of shipping 12 cartons of human hair weighing 130 pounds may not have varied significantly from the cost of a shipment of 12 cartons of human hair wigs weighing 130 pounds, but the risk or loss or damage incurred by the carrier was significantly different. Thus the carrier accepted a shipment of 12 cartons of wigs at a transportation charge of $7.22[34] and thereby subjected itself to a potential liability of $23,100.00 for the alleged value of the shipment which subsequently disappeared. When such a risk factor is added to the general difficulty of handling small shipments profitably, it compounds the problem of solving the needs of shippers of small shipments and constitutes an additional consideration militating against the imposition of liability upon the carrier.[35] The carrier does not always receive sufficient consideration to enable him to profitably assume the risk of loss or damage.

The second problem arises where the carrier knows what the freight is but does not know the value, *i.e.*, where there has been no fraudulent misdescription. In such instances some courts have held that the exclusion is void under the Carmack Amendment, which makes any limitation of liability in any contract or tariff void unless there is a reduced rate

32. 30 App. Div. 2d 190, 291 N.Y.S.2d 79 (1st Dep't 1968), aff'd, 24 N.Y.2d 15, 246 N.E.2d 509, 294 N.Y.S.2d 700 (1969).

33. Record at 68, Salon Serv., Inc. v. Pacific & Atl. Shippers, Inc., 24 N.Y.2d 15, 246 N.E.2d 509, 298 N.Y.S.2d 700 (1969).

34. Id. at 73.

35. Carriers can be forced to become artful dodgers of unprofitable freight. Truckers, for example, generally lose money on the transportation of small packages. Transportation Needs a Drastic Overhaul, Bus. Week, Nov. 14, 1970, at 72, col. 2.

order filed with the Interstate Commerce Commission and a choice of rates given to the shipper.[36]

III. The Effect of Air, Sea, and International Intermodal Transportation on the Allocation of Risk of Loss and Damage

The problem of determining who should bear the risk of loss or damage to property during the course of its transportation has been aggravated by the use of containers and international intermodal transportation, and will be rendered more complex by the increasing use of the through bill of lading. The means of transportation may involve one or more of the following: motor carriers, rail carriers, water carriers, air carriers, carriers of goods by sea, and freight forwarders. Each may be involved with the risk of loss. The extent to which the shipper will bear the risk of loss or damage presently is dependent upon the exemption from or limitation of liability applicable to a particular type of carrier. The right of a carrier, who is compelled to compensate a shipper for loss or damage, to recoup the amount paid from another carrier on whose line the loss occurred may be limited by similar factors.

A. *Liability of Air Carriers*

Pursuant to the Federal Aviation Act of 1958, the tariffs of air carriers are subject to the regulation of the Civil Aeronautics Board (CAB),[37] the functions of which have now been transferred to the Department of Transportation.[38] The CAB can properly accept tariffs containing rules exempting the airline from liability for loss or damage to specified property caused by a carrier regardless of fault, or tariffs limiting liability to a specified sum in the absence of a declaration of a higher value by the shipper and the concomitant payment of a higher charge.[39] In *Tishman & Lipp, Inc. v. Delta Air Lines*,[40] a passenger on a flight from New Orleans to New York shipped a sample case of jewelry as air freight rather than excess baggage. The passenger had not declared the

36. E.g., Thomas Electronics, Inc. v. H.W. Taynton Co., 277 F. Supp. 639 (M.D. Pa. 1967); Railway Express Agency v. Hueber, 191 S.W.2d 710 (Tex. Civ. App. 1945). Contra, Hecker Prods. Corp. v. Transamerican Freight Lines, Inc., 296 Mich. 381, 296 N.W. 297 (1941). Where the Carmack Amendment is not applicable, e.g., shipments handled by air carriers or water carriers, a limitation of liability is effective.

37. 49 U.S.C. § 1373 (1964).

38. Id. § 1655(d) (Supp. V, 1970).

39. Vogelsang v. Delta Air Lines, Inc., 302 F.2d 709, 712-13 (2d Cir.), cert. denied, 371 U.S. 826 (1962); Bruce Glen, Inc. v. Emery Air Freight Corp., 24 App. Div. 2d 145, 264 N.Y.S.2d 876 (1st Dep't 1965).

40. 413 F.2d 1401 (2d Cir. 1969).

value on the airbill. Upon arrival in New York, one section of the sample case containing jewelry valued at $50,000 was missing. Delta's tariff provided that its liability would be limited to $50 on jewelry unless the jewelry were specifically described on the airbill and an additional transportation charge paid. The shipper's recovery was limited to $50. The failure of the plaintiff to put the air carrier on notice of the contents of the baggage was found by the court to have deprived the carrier of the opportunity to take extra precautions for its safety, thereby justifying the imposition of the loss upon the shipper who "chose to take the chance."[41]

The liability of air carriers for loss or damage to property involved in international transportation is limited by the Warsaw Convention, to which the United States has been a party since 1934.[42] The Convention, which has been approved by over 90 countries, provides that it is applicable to transportation where the place of departure and the place of destination are situated either within the territories of two contracting parties or within the territory of one contracting party if there is a stopping place subject to the sovereignty of another power, even if such other power is not a party to the convention.[43] The Convention provides that the carrier shall be liable for loss or damage to goods if the occurrence which caused the damage took place during the transportation by air.[44] The period of air transportation includes the period during which the goods are in the care of the carrier whether in an airport, on board a plane, or, in case of a landing other than at an airport, anywhere.[45]

The international air carrier is exempted from liability if it proves that all steps necessary to avoid the damage were taken or that it was impossible to take such measures;[46] if such steps were taken but the damage was occasioned by an error in piloting, handling of the aircraft or navigation;[47] or if it proves that the damage is a result of contributory negligence, provided the doctrine is recognized in the forum in which the action is pending.[48] If the international air carrier is liable at all for damage to goods, its liability is limited to approximately $7.50 per pound

41. Id. at 1407.

42. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876 (effective June 27, 1934) [hereinafter cited as Warsaw Convention]; see Note, Legal and Regulatory Aspects of the Container Revolution, 57 Geo. L.J. 533, 549 (1969); Note, Transporting Goods by Air, 69 Yale L.J. 993 (1960).

43. Warsaw Convention, art. 1(2).

44. Id., art. 18(1).

45. Id., art. 18(2).

46. Id., art. 20(1).

47. Id., art. 20(2).

48. Id., art. 21.

unless the consignor, at the time the package is delivered to the carrier, has made a declaration of value and paid a supplementary sum, if required, in which case the carrier is liable for the actual value or the declared sum, whichever is less.[49] An international air carrier cannot obtain the benefits of the Convention if the damage is caused by the willful misconduct of the carrier or its authorized agent acting within the scope of his employment.[50]

If land or water transportation takes place in the performance of a contract for transportation by air, then for purposes of loading, delivery or transshipment, there is a rebuttable presumption that any damage to the goods took place during the transportation by air.[51] This can be an area of conflict if the land transportation involved is by a carrier subject to the Carmack Amendment. Thus, in *Pick v. Lufthansa German Airlines*,[52] an air waybill bearing the letters "W.C.L." (meaning Warsaw Convention Limitation) had been issued to the shipper prior to the loss of the goods on the ground en route to the airport. The shipper's recovery was held to be limited by the agreement contained in the air waybill to the amount set forth in the Warsaw Convention.

B. *Liability of Carriers of Goods by Sea*

Limitations of carrier liability for property loss are maximized in the case of carriers by sea. Shipowners are exempt from liability for loss or damage to precious cargo unless the true character and description are described in the bill of lading, and even then they are not liable beyond the value declared.[53] They are further exempt from property loss or damage resulting from fire, unless caused by their design or neglect.[54] In any event, a shipowner's liability is limited to the value of his interest in the vessel and its freight then pending.[55] Under the Carriage of Goods by Sea Act (COGSA),[56] neither the carrier nor the ship are responsible for loss or damage resulting from neglect or default of the carrier in navigation or management of the ship; perils, damages and accidents of the sea or navigable waters; acts of God, war, or public enemies; quarantine; acts or omissions of the shipper or owner of goods; strikes or lockouts;

49. The convention states that the liability of the carrier shall not exceed 250 francs per kilogram based on the gold franc described in the convention. Id., art. 22.

50. Id., art. 25.

51. Id., art. 18(3).

52. 48 Misc. 2d 442, 265 N.Y.S.2d 63 (Civ. Ct. 1965). See also Twentieth Century Deliv. Serv., Inc. v. St. Paul Fire & Marine Ins. Co., 242 F.2d 292 (9th Cir. 1957).

53. 46 U.S.C. § 181 (1964).

54. Id. §§ 182, 1304(2)(b).

55. Id. § 183(a).

56. Id. §§ 1300-15.

riots or civil commotions; saving or attempting to save life or property at sea; inherent defect, quality, or vice in the goods; insufficiency of packing or marks; latent defects; and any other cause arising without actual fault and privity of the carrier.[57]

The Carriage of Goods by Sea Act was drawn almost verbatim from the Hague Rules of 1921,[58] as amended by the Brussels Convention of 1924,[59] the purposes of which was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade.[60] COGSA further provides that neither the carrier nor the ship shall in any event be liable for any loss or damage to goods in excess of $500 per package or, if the goods are not shipped in packages, per customary unit.[61] The technological revolution in transportation, including the use of containers and other forms of packaging, has created substantial controversy concerning the definition of a "package" or "customary freight unit."

In *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellshaft*,[62] the shipment consisted of nine "pallets." Each pallet contained six cardboard cartons with 40 television tuners in each carton. The pallets had a wooden base and a wooden deck on top and were bound with metal strips. Seven of the nine pallets were never delivered. The shipper had not declared the value of the shipment or paid an extra charge. The issue was whether the $500 per package limitation in COGSA should be applied to each of the seven missing pallets for a maximum liability of $3,500 or to the 54 missing cartons for a maximum liability of $41,000. The court held that the package was the "pallet" rather than each carton on the pallet and that if the $500 per package limit was inequitable or inadequate because of the passage of time it was the function of Congress to change it, not the courts.[63] The court pointed out that larger container ships were being built to accommodate such special cargo, giving rise to exciting possibilities such as the loading of vessels from inland ports by sky-crane helicopters. The court, referring to the Carriage of Goods by Sea Act, stated:

Few, if any, in 1936 could have foreseen the change in the optimum size of shipping

57. Id. § 1304(2).

58. See A. Knauth, The American Law of Ocean Bills of Lading 125-26, 163 (4th ed. 1953).

59. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233 (1937), T.S. No. 931 (effective May 26, 1937).

60. Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 301 (1959); G. Gilmore & C. Black, Admiralty § 3-24 (1957).

61. 46 U.S.C. § 1304(5) (1964).

62. 375 F.2d 943 (2d Cir.), cert. denied, 389 U.S. 831 (1967).

63. Id. at 946-47.

units that has arisen as the result of technological advances in the transportation industry. As both parties recognize, it is now common for carriers to receive cargo from their shippers in a palletized form or "containerized" form. In some instances an entire trailer may be uncoupled from its tractor-truck on the pier and placed aboard the carrier. With [two exceptions] . . . no court has yet considered how the limitation of liability is to be construed in the light of this technological change.[64]

The variance in liability limitations and exemptions available to the different modes of carriage becomes a cumbersome burden on transportation when carriers subject to different standards of liability are combined for an intermodal shipment. Thus, if a shipment is carried for a portion of its journey by rail or truck, the carrier's liability is relatively strict. If the shipment is transferred to an air carrier or carrier by sea, the liability becomes limited.

C. *The Applicability of the Carmack Amendment to International Shipments*

The Carmack Amendment makes any common carrier or railroad receiving or delivering property liable, to the lawful holder of a receipt or bill of lading or to any party entitled to recover thereon, for the full value of any actual loss, damage or injury to such property caused by that carrier or by any other carrier to whom the property is passed within the United States or an adjacent foreign country when transported on a through bill of lading, notwithstanding any attempted limitation of liability, unless the carrier has obtained a released rate order authorized by the Interstate Commerce Commission and the shipper declares the released value in writing.[65] There is no statutory reference to shipments from the United States to non-adjacent foreign countries or *from* foreign countries, whether or not adjacent to the United States.

Under the Interstate Commerce Act, rail carriers,[66] motor carriers,[67] and water carriers[68] may establish with each other "through routes"—arrangements between connecting carriers for the continuous carriage of goods from an originating point on the line of one carrier to a destination point on the line of another carrier—and "joint rates," the essential feature of which is an agreement between connecting carriers to carry traffic from points on one road to points on another road or line for an aggre-

64. Id. at 945 (citations omitted) (footnote omitted). The two exceptions mentioned were the lower court opinion in the Standard Electrica case, 262 F. Supp. 343 (S.D.N.Y. 1966), aff'd, 375 F.2d 743 (2d Cir. 1967), and United Purveyors, Inc. v. Motor Vessel New Yorker, 250 F. Supp. 102 (S.D. Fla. 1965).

65. 49 U.S.C. § 20(11) (1964). There are other liability limitations which are not within the scope of this article.

66. Id. § 15(4).

67. Id. § 316(c).

68. Id. § 905.

gate charge which is generally less than the sum of their individual local charges between the same points.[69] Where such a joint undertaking to provide through service to a shipper exists, all the carriers who are parties to the through route service may be jointly and severally liable to the shipper.[70]

The case of *Missouri Pacific Railroad v. Porter*[71] involved a shipment of cotton from Arkansas to England. The cotton was delivered to the carrier in Arkansas. The carrier issued an export bill of lading in two parts—the first for the inland haul by the rail carrier to Georgia, the second for the ocean carriage from Georgia to England by steamship. Thereafter, and before the railroad cars were moved from Arkansas, the cotton was destroyed by fire. The bill of lading exempted the carrier from liability for loss by fire, but an Arkansas statute made an agreement by a railroad limiting its common law liability unlawful. The United States Supreme Court, holding that Congress had pre-empted the field, reversed the judgment of the Supreme Court of Arkansas which had ruled in favor of the shipper. Mr. Justice Butler stated that the Carmack Amendment does not apply to a shipment received for transportation over an interstate inland route to a seaport for eventual delivery to a foreign vessel for ocean carriage to a non-adjacent foreign country.[72]

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69. See Chicago, M., St. P. & P.R.R. v. United States, 366 U.S. 745, 747 nn.3-4 (1961). The term "Through Route" was also defined in Thompson v. United States, 343 U.S. 549 (1952). "A through route is a continuous line of [carriage] formed by an arrangement, express or implied, between connecting carriers. . . . Existence of a through route is to be determined by the incidents and circumstances of the shipment, such as the billing, the transfer from one carrier to another, the collection and division of transportation charges, or the use of a proportional rate to or from junction points or basing points. These incidents named are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments." Id. at 557, citing 21 ICC Ann. Rep. 75-76 (1907).

The Federal Maritime Commission has promulgated the following definition for persons and carriers subject to its jurisdiction, including non-vessel operating common carriers by water (NVO's):

"(a) Definitions. The following definitions shall apply for the purposes of this section.

(1) Through route: An arrangement for the continuous carriage of goods between points of origin and destination, either or both of which lie beyond port terminal areas;

(2) Through rate: A rate expressed as a single number representing the charge to the shipper by a carrier or carriers holding out to provide transportation over a through route;

(3) Joint rate: A through rate in which two or more carriers participate by agreement for the offering of through transportation over a through route published in the same tariff . . . ." 46 C.F.R. § 536.16 (1971).

70. Sea-Land Serv., Inc. v. FMC, 404 F.2d 824, 828 (D.C. Cir. 1968). Freight forwarders are not authorized by statute to have through routes with other carriers.

71. 273 U.S. 341 (1927).

72. Id. at 345.

In *Reider v. Thompson*,[73] a shipment had been sent by steamship from Buenos Aires, Argentina, to the United States. The ocean bill of lading designated the consignee and destination as "PORT OF DISCHARGE OF THE SHIP New Orleans . . . destination of the goods: . . . SHIPPER TO THE ORDER OF: The First National Bank of Boston . . . ."[74] At New Orleans the shipment was transferred in allegedly good condition to a railroad for transportation to Boston. On arrival in Boston it was discovered that the shipment was damaged. The railroad, which had issued its own bill of lading in New Orleans designating H.P. Lambert Co. as shipper, and H.P. Lambert Co. of Boston as consignee, claimed that it was not liable under the Carmack Amendment since the shipment was a "through foreign shipment" and the bill of lading issued by the railroad was a mere "supplemental bill of lading."

The Supreme Court held that the liability of the rail carrier was to be determined under the Interstate Commerce Act and that the Carmack Amendment was applicable.[75] Mr. Justice Minton, writing for the Court, stated:

> The issue is whether this transaction is within the Carmack Amendment. But basically, the problem here is one of liability. The contract giving rise to liability—the bill of lading—is our primary aid in solving that problem. So we turn to the contract to ascertain whether it evidences a transaction within the Carmack Amendment.
>
> Does the fact that the shipment in this case originated in a foreign country take it without the Carmack Amendment? We think not. There was no through bill of lading from Buenos Aires to Boston. The record does not show the slightest privity between respondent and the ocean carrier. The contract for ocean transportation terminated at New Orleans. Having terminated, nothing of it remained for the new, separate, and distinct domestic contract of carriage to "supplement." Even the parties to the ocean bill of lading and the domestic bill of lading were different. If the various parties dealing with this shipment separated the carriage into distinct portions by their contracts, it is not for courts judicially to meld the portions into something they are not. The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated. . . . Thus it is not significant that the shipment in this case originated in a foreign country, since the foreign portion of the journey terminated at the border of the United States. The obligation as receiving carrier originated when respondent issued its original through bill of lading at New Orleans. That contract of carriage was squarely within the provisions of the statute.[76]

Mr. Justice Minton also stated that the sole issue in the *Porter* case had been whether federal regulation had covered the field to the exclusion of state regulation. He implied that the reference to the Carmack Amendment was dictum.[77]

73. 339 U.S. 113 (1950).
74. Id. at 116.
75. Id. at 117.
76. Id. (citations omitted).
77. Id. at 116 n.1.

Mr. Justice Frankfurter dissented in the *Reider* case on the ground that the conclusion in *Porter* was that the Carmack Amendment does not apply to an unbroken transaction of commerce with a non-adjacent country. He felt that to decide the precise question in *Porter* the Court had to consider the regulatory liability scheme under the Interstate Commerce Act.[78]

In *United States v. Erie Railroad*,[79] a case not involving the Carmack Amendment, the United States Supreme Court considered a shipment which was imported from a foreign country and then transshipped on new bills of lading by railroad to an inland point. Mr. Justice Brandeis held that the rail transportation was a part of foreign commerce. The emphasis was put upon the continuing intent of the shipper that the shipment should be transported to the inland point within the United States.

To reverse the lower court judgment in *Porter*, it was necessary for the Supreme Court to determine that the Carmack Amendment was not applicable, since the Carmack Amendment declares void any limitation of liability in a bill of lading unless a released rate order has been approved by the Interstate Commerce Commission. Therefore, if the Arkansas statute was void and the Carmack Amendment applicable, the rail carrier could not prevail. *Reider*, however, held the Amendment *was* applicable under similar circumstances. The determination in *Reider* that the Carmack Amendment is applicable to loss or damage sustained by an imported shipment while being transported within the United States was only a partial victory for the shipper, since the Carmack Amendment specifically provides:

> [I]f the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water. . . .[80]

To avoid this limited liability the shipper would be compelled to prove that the shipment was in good order and condition when received by the domestic carrier within the United States and damaged when delivered.[81] Since *Reider* arose on a motion to dismiss the complaint for failure to state a claim,[82] the shipper would still be compelled at the trial to prove the condition of the shipment at the time of delivery to the rail carrier. Unless the containers were opened and inspected after unloading them

78. Id. at 119-20 (dissenting opinion).
79. 280 U.S. 98 (1929).
80. 49 U.S.C. § 20(11) (1964).
81. 339 U.S. at 118.
82. Id. at 115.

from the ship and before loading them on the rail carrier, this burden of proof would be difficult to sustain. It is noteworthy that there is no similar provision granting an overland carrier subject to the Carmack Amendment the benefit of the limited liability of an air carrier or restricting the shipper to the limited liability of an air bill of lading if the loss or damage occurs while the property is in the custody of an air carrier.

D. *The Effect of Single Through Bills of Lading on International Shipments*

1. The Effect of the Carmack Amendment

The advent of containers, new technology, and international intermodal transportation systems requires a reconsideration of the allocation of the risk of loss or damage, and the establishment of uniform liability limitations for all modes of transportation. There are transportation companies today which will transport a container or shipment from places of origin located throughout the United States to places of destination on other continents on a through bill of lading and at a joint rate. This type of intermodal service has required the joint consent of the Interstate Commerce Commission and the Federal Maritime Commission, and the modification of the liability provisions of the bill of lading.

Except for an insured shipper's right to recover from its insurer, a shipper's right to compensation for loss and damage, as well as the amount of compensation the shipper receives, varies with the mode of transportation used and may change for a particular shipment from time to time as the shipment is transferred from one mode to another before delivery at destination. Assuming the initial choice of a transportation company by a shipper is based on the business needs of the shipper in terms of cost of transportation, convenience and requirements for speed in delivery or other special requirements of the shipper, then from the shipper's viewpoint the ability to recover fully for loss or damage is dependent on incidental happenstance. The economic justification for favoring protection of air and sea carriers over railroads, motor carriers and freight forwarders seems doubtful when viewed with regard to the totality of transportation. Air transportation is no longer a new industry requiring greater protection than the troubled railroad and freight forwarder systems, nor is there any justification for subjecting motor carriers to greater risk than sea carriers.

Since the liability of rail and motor carriers, freight forwarders, and express companies can not be modified below the standards established by the Carmack Amendment, the creation of a single bill of lading for an international through route has required that the liability of the carrier for the water or sea portion of the transportation be enlarged. Thus,

at least one of the common international through bills of lading provides that the carrier must waive the immunities and defenses to liability available to it under the Carriage of Goods by Sea Act [83] and the Harter Act,[84] thereby avoiding a conflict with the Carmack Amendment. This includes a waiver by the carrier of the five hundred dollars per package limitation on liability. The waiver of liability exclusion and the agreement by the carrier by sea to a higher amount of liability is authorized by statute.[85] Presumably the competitive advantage in its relation to other U.S. carriers created by the ability to offer such service, and the rates charged, are sufficient to compensate the carrier for its increased liability.

Among the many open questions involved in the use of a single international intermodal through bill of lading would be whether the waiver of liability by the ocean carrier constitutes discrimination between competing shippers.[86] For instance, if a shipper desires to employ an ocean carrier subject to COGSA solely for water transportation, is the shipper entitled to similar waivers of liability?

2. An International Solution—The TCM Convention

The Comité Maritime International (CMI), an organization of maritime law associations from many nations, at a conference in Tokyo in 1969 adopted a Draft Convention on Combined Transportation known as the Tokyo Rules[87] which was amended during 1970 by a new draft known as the "TCM Convention."[88] The delegates and committee members considered the problems of intermodal transportation and the use of containers. The draft proposed rules which would be applicable to a bill of lading if the bill contained the words "Combined Transport Document governed by the TCM Convention."[89] The provisions of such a bill of lading would then be applicable to transportation involving two or more different kinds or modes of transportation, *i.e.*, truck, water, rail or air.[90]

The carrier who issued the bill of lading, known as the Combined Transport Operator (CTO), would be liable for any loss or damage occurring to the goods from the time he received them until the time they are delivered,[91] unless the loss or damage arose from the consignor's handling, act or neglect, the consignee's handling, the carriers compliance

83. 46 U.S.C. §§ 1300-15 (1964).
84. Id. §§ 190-96.
85. Id. §§ 1304(5), 1305.
86. See id. § 1309.
87. 1 J. Maritime L. & Commerce 186 (1969).
88. II/1970 Baltic & Int'l Maritime Conf. Bull. 114.
89. Id.
90. Id.
91. Id. at 115.

with authorized instructions, defective packaging, strikes, or any other unavoidable causes.[92] The liability of the CTO for loss or damage to property would be limited to an amount left open for future determination.[93] The TCM Convention provides for a through intermodal bill of lading substantially different from the one presently being used in the United States since the CTO would not be subject to the prohibitions against limitations of liability contained in the Carmack Amendment. Drafts of the TCM Convention are being circulated through diplomatic channels and are expected to be considered at a later Maritime Diplomatic Conference.

E. *The Problem of Inter-Carrier Liability*

In addition to the problem of liability of the carrier to the shipper, intermodal transportation indirectly involves the problem of the liability of one carrier to another. The Interstate Commerce Act specifically provides for a claim over to a carrier who has paid or becomes obligated to pay for a loss, against a carrier on whose line the loss occurred.[94] It is often difficult to establish which carrier is responsible for the loss after the discovery by the consignee of the damage to the shipment. Furthermore, where overland carriers subject to the Carmack Amendment and carriers not subject to the Amendment are involved in one shipment, there is a substantial risk to the overland carrier of being fully liable to the shipper and having only a limited right of recovery against the non-Carmack carrier.

Consider the problem of establishing liability for damages to a shipment accepted by a freight forwarder in New York in a sealed container which is delivered on a trailer by the forwarder to a motor vehicle common carrier, shipped piggy-back on the lines of three different connecting railroads and then re-delivered to the freight forwarder for delivery to a consignee in Oregon where, upon ultimate delivery, the container is opened by the consignee and the entire shipment is discovered to be damaged. Under the Carmack Amendment the shipper can hold either the initial or the delivering carrier liable for the loss without proving negligence and without proving on which carrier's line the loss occurred.[95] An initial carrier who is compelled to pay the loss may recover from the carrier responsible for the loss,[96] but the initial carrier in such instance may, in trying to pass along the blame and risk of loss to another carrier,

92. Id. at 115-16.
93. Id. at 116.
94. 49 U.S.C. § 20(12) (1964).
95. Id. § 20(11).
96. Id. § 20(12).

face the insurmountable problem of trying to prove who was responsible. A freight forwarder may attempt to impose responsibility for the loss upon a railroad carrier by alleging that improper humping of freight cars or rough handling caused the damage. A railroad may try to pass the responsibility to a connnecting railroad, or to the freight forwarder, by claiming that the cause of the loss was improper bracing by the forwarder. The result is what may be called the circularity of the accusing finger. Liability will often turn on who was the first one not to receive a clean receipt for the goods. Although this seems to be the best available test, it may only indicate who noticed the damage first rather than on whose line or vehicle the damage occurred.

The presumption is that the goods were in the same condition when received by a connecting carrier as they were when delivered to the initial carrier, and the burden is cast upon the connecting carrier to overcome that presumption.[97] The fact remains that whenever there is an attempt to shift liability from one carrier to another there is a duplication of work and a general increase in the cost of investigation, administration, and legal fees created by the necessary complexity of an action involving numerous parties.

Within segments of the transportation industry there have been attempts to simplify the allocation of responsibility for loss. Thus, the American Association of Railroads has established rules for the allocation of loss and damage among its member railroads.[98] The National Freight Claims Council of the American Trucking Associations, Inc., has done the same for its members. However, the effect of these Associations' agreements is limited to their own members. Therefore, these agreements fail to respond to the transportation industry at large or to the commercial community, which is becoming increasingly dependent upon intermodal transportation. There is no established procedure except litigation, either by statute or by agreement, for the allocation of the risk of loss between the separate modes of transportation.

IV. The Role of Insurance in Allocation of the Risk of Loss

Although common carriers subject to the Carmack Amendment of the Interstate Commerce Act are held to a high standard of liability, there are some exceptions and limitations to a carrier's liability.[99] Furthermore, the amount of damages sustained is always a potential issue. If the loss

97. See Chicago & N.W. Ry. v. C.C. Whitnack Produce Co., 258 U.S. 369 (1922); Remington v. Barrett, 196 App. Div. 838, 840, 188 N.Y.S. 174, 175 (4th Dep't 1921), aff'd mem., 235 N.Y. 519, 139 N.E. 717 (1923).

98. Association of American Railroads, Operations and Freight Claim Division, Rules of Order, Principles and Practices, Freight Claim Rules, 1962.

99. See notes 22-25 supra and accompanying text.

or damage is substantial, the carrier will contest the claim, provided it can find a legal basis upon which to do so. Consequently, most commercial shippers are insured against loss or damage to their property during the course of its transportation.

The shipper's insurance company may be considered as a potential third-party upon whom the ultimate economic burden of the risk of loss or damage should be placed, since the insurance company receives its compensation specifically for assuming the risk of loss or damage, whereas the carrier's compensation is based primarily on the cost of transportation. However, equity and economic burden have usually not been determining factors in allocating the risk of loss between the shipper's insurer and the carrier. The judicial resolution of the problem has historically been based upon the law of contracts and the interpretation of the Interstate Commerce Act.

A. *Benefit of Insurance Clauses in Bills of Lading*

For over a century the standard form of carrier bill of lading has provided, in effect, that if a shipper of merchandise has purchased insurance against loss or damage to the shipper's goods during the course of their transportation, and if the shipper's goods are lost or damaged, the carrier shall receive the benefit of such insurance. The intended result of such a clause is that the carrier will not be liable for the loss or damage to the extent that the shipper or owner is compensated by his insurance carrier. Judicial recognition of the validity of such benefit of insurance clauses has been established.[109]

An insurer who pays the loss of a shipper is ordinarily subrogated to the shipper's rights. However, if the insured has contracted with the carrier giving the carrier the benefit of any insurance available to the shipper in case of loss or damage, then it has long been held that the insurer loses its right of subrogation.[101] The shipper who insures his goods against loss or damage during their transportation is involved in at least two separate contracts—the contract between the shipper and the common carrier (the bill of lading), and the contract between the shipper and the insurance company (the policy). To counterbalance the benefit of

100. E.g., cases cited in Annot., 27 A.L.R.3d 984 (1969).

101. E.g., Wager v. Providence Ins. Co., 150 U.S. 99 (1893); Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U.S. 312 (1886); Hartford Fire Ins. Co. v. Payne, 199 Iowa 1008, 203 N.W. 4 (1925); Yazoo & M.V.R. Co. v. Blum, 124 Miss. 318, 86 So. 805 (1921); Mercantile Mut. Ins. Co. v. Calebs, 20 N.Y. 173 (1859); North British & Mer. Ins. Co. v. Central Vt. R.R., 9 App. Div. 4, 40 N.Y.S. 1113 (3d Dep't 1896), aff'd mem., 158 N.Y. 726, 53 N.E. 1128 (1899); Roos v. Philadelphia, W. & B.R.R., 199 Pa. 378, 49 A. 344 (1901); Home Ins. Co. v. Northern Pac. Ry., 18 Wash. 2d 798, 140 P.2d 507 (1943); see Annot., 27 A.L.R.3d 984 (1969); 13 C.J.S. Carriers § 399 (1939).

insurance clause in the bill of lading, the insurance companies changed their policies and added a provision which stated that if an insured shipper entered into an agreement giving a carrier the benefit of the shipper's insurance, then the insurance policy issued to the shipper would be void.

The courts, when faced with both the bill of lading provision giving the carrier the benefit of the shipper's insurance and the insurance policy declaring the policy void upon the shipper's acceptance of such a bill of lading provision, concluded that both agreements were effective, *i.e.*, the shipper could agree with the carrier to give the carrier the benefit of the shipper's insurance, but since the insurance was void the carrier received nothing and the shipper could not receive the insurance proceeds.[102] This, of course, was harmful to the shipper and of no benefit to the carrier. The legal draftsmen of the insurance companies were victorious in their word war with the carriers' scriveners.

The bill of lading was then amended to provide that the carrier was to have the benefit of the insurance effected by the shipper "so far as this shall not avoid the policies or contracts of insurance." Thus, if the insurance policy stated that the policy would be void if the carrier could get the benefit of insurance, the bill of lading provision stated that in such event the carrier would not get the benefit of the shipper's insurance. The draftsmen for both sides had created a state of equilibrium,[103] except in those cases where an insurance company neglected to provide that the policy would be void if the carrier received the benefit of the shipper's insurance. Thus the determination whether the ultimate burden of loss should be borne by the carrier or the shipper's insurer was made on the basis of interpretation of conflicting contracts without consideration of the economic justification of placing the burden either on the carrier or the insurer and without consideration of its effect upon interstate commerce.

China Fire Insurance Co. v. Davis[104] involved the standard bill of lading provision which gave a common carrier by railroad subject to section 2 of the Interstate Commerce Act[105] the benefit of any insurance that may have been effected upon the property so far as this would not void the policies or contracts of insurance. The shipper in this case had been paid for its loss by the carrier after the shipper and carrier had entered into

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102. Fayerweather v. Phenix Ins. Co., 118 N.Y. 324, 23 N.E. 192 (1890).

103. See Richard D. Brew & Co. v. Auclair Transp., Inc., 106 N.H. 370, 211 A.2d 897 (1965); Towmotor Co. v. Frank Cross Trucking Co., 205 Pa. Super. 448, 211 A.2d 38 (1965). Some policies provided that if there were a benefit of insurance clause in the bill of lading the insured could collect from the insurer only what could not be collected from the carrier. See Kalle & Co. v. Morton, 156 App. Div. 522, 141 N.Y.S. 374 (1st Dep't 1913), aff'd mem., 216 N.Y. 655, 110 N.E. 1043 (1915).

104. 50 F.2d 389 (2d Cir.), cert. denied, 284 U.S. 658 (1931).

105. 49 U.S.C. § 2 (1964).

an agreement which required the shipper to make a claim against its insurer, attempt to collect from its insurer, and then remit the amount collected less the cost of collection to the carrier.[106] This shipper subsequently collected from its insurer without disclosing the prior payment from the carrier and a year later remitted a sum equivalent to the net insurance proceeds to the carrier. The policy did not prohibit the carrier from obtaining the benefit of the shipper's insurance but the insurer, after discovering the facts, brought an action to recover the money from the carrier. Judge Learned Hand, writing for the court, held that the insurer was entitled to recover from the carrier the money which was "unlawfully held" by the carrier.[107] The benefit of insurance provision in the bill of lading was held to be void as an unlawful discrimination prohibited by section 2 of the Interstate Commerce Act,[108] which prohibits a carrier from receiving from any person, directly or indirectly, a greater compensation for transportation of property then it receives from any other person for a like and contemporaneous service under similar conditions. Since the shipper was free to insure the carrier or not, as he chose, the court found such insurance to be "compensation" within the meaning of section 2 of the Act, since the right to receive the benefit of insurance had a present value whether or not it cost the shipper anything extra.[109]

The bill of lading provision involved in a subsequent case, *National Garment Co. v. New York Central & St. Louis Railroad*,[110] had been modified by the carrier's attorneys, perhaps in an attempt to overcome the claim of discrimination involved in the *China Fire* case. Here the bill of lading gave the carrier the benefit of the shipper's insurance if the policy was not thereby voided. The bill of lading also required that in the event of loss the carrier must reimburse the shipper for the cost of the shipper's insurance. The court held that this bill of lading provision was also void under section 2 of the Interstate Commerce Act, since the return to the shipper of the cost of the compensation which the carrier was forbidden by the Act to receive in the first place was an avoidance of liability by the carrier, and deprived the insurer of its rights under a valid contract.[111]

There is substantial basis for criticizing the decision in *China Fire* as

106. 50 F.2d at 390.

107. Id. at 393.

108. 49 U.S.C. § 2 (1964).

109. 50 F.2d at 392.

110. 173 F.2d 32 (8th Cir. 1949). See also Beaumont v. Pennsylvania R.R., 127 N.Y.S.2d 216 (Sup. Ct. 1953), modified, 284 App. Div. 354, 131 N.Y.S.2d 652 (1st Dep't 1954), aff'd mem., 308 N.Y. 920, 127 N.E.2d 80, cert. denied, 350 U.S. 838 (1955).

111. 173 F.2d at 37.

being unreasonable.[112] All shippers pay the same shipping rate whether or not the shipment is insured. Consequently, the benefit of insurance clause does not create discrimination in the rates of shipment. Furthermore, it is possible for a shipment to be lost or damaged without liability to the carrier,[113] since the carrier is not absolutely liable for every loss from any and every cause.[114] A shipper may carry its own insurance to avoid the danger that the carrier may not be liable, in which case a carrier receiving the benefit of such insurance is a mere incidental beneficiary. The carrier as a general rule does not know in advance, or at the time it accepts a shipment, whether the shipment has been insured by the shipper or by anyone other than the carrier. Consequently, there can be no knowing discrimination. The carrier cannot make a choice of carrying a shipment insured by a shipper or of refusing to carry a shipment which has not been insured. This, together with the fact that most insurance policies contain a clause rendering the policy void if the bill of lading contains a benefit of insurance clause, renders the danger of deliberate discrimination hypothetical.

If the carrier receives an advantage, it is not as compensation for carriage nor as a result of preferential treatment. Thus, the carrier who receives the benefit of a shipper's insurance may be considered to be in the same position as a carrier who receives a credit for the amount of salvage obtained by a shipper for a damaged shipment upon the carrier making payment to the shipper for his actual loss. When compared with other benefits which a shipper may confer on a carrier, the agreement to give the carrier the benefit of shipper's insurance is clearly not discriminatory.[115] Furthermore, whether the benefit of insurance provision in the bill of lading is discriminatory is a matter which should be determined by the Interstate Commerce Commission.[116]

Although "a common carrier may not provide that it shall not be liable unless the shipper insures the goods for its benefit,"[117] it may take out its own insurance policy to cover itself for loss of a shipper's goods without violating the statute.[118] Modern ideas of the administration of risk

112. 10 S. Williston, Contracts § 1118 (3d ed. W. Jaeger 1967).

113. 26 Ill. L. Rev. 566, 567-69 (1932).

114. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134, 137 (1964); Adams Express Co. v. Croninger, 226 U.S. 491, 506 (1913).

115. For instance, a shipper may elect not to make a claim or bring suit against a carrier or it may elect to settle a claim for less than the full value without violating the Interstate Commerce Act. See generally 26 Ill. L. Rev. 566, 567 (1932).

116. 41 Yale L.J. 303, 305 (1931).

117. 10 S. Williston, Contracts § 1118, at 273 (3d ed. W. Jaeger 1967); see Inman v. South Carolina Ry., 129 U.S. 128 (1889); Annot., 27 A.L.R.3d 984 (1969).

118. See Luckenbach v. W.J. McCahan Sugar Co., 248 U.S. 139, 146 (1918). See also Axton-Fisher Tobacco Co. v. Ziffrin Truck Lines, Inc., 36 F. Supp. 777 (1941), aff'd mem.,

and the true basis of a carrier's liability do not support a theory that the carrier should ultimately bear the loss regardless of its fault. The real issue is not one of discrimination but whether the ultimate liability for loss should fall upon the insurer whose business it is to take such risks for compensation or upon the carrier whose business is transportation. Thus, the Supreme Court of the State of Washington refused to follow the holding of *China Fire* since it did not deem that decision to be logical or sound. Justice Grady, in his excellent analysis of the problem in *Home Insurance Co. v. Northern Pacific Railway*,[119] called attention to the purpose of the statute[120] which is "to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, and under the same circumstances of carriage, are compelled to pay different prices therefor."[121] Justice Grady stated that the provision in the bill of lading giving the carrier the benefit of insurance on the goods is merely a recognition by the shipper that he is not entitled to collect twice—from the carrier and the insurer—for the same loss; that by receiving the benefit of insurance the carrier does not thereby render service to a shipper for a rate less than the published tariff rates charged to all shippers; that the receipt of the benefit of insurance is not compensation; and that the purpose of the statute was not to prohibit the benefit of insurance provision in the bill of lading. The insurance company, having been compensated for the risk it assumed, was determined to be the proper party to bear the ultimate burden of the loss.[122] The court in *Home Insurance*, while recognizing that the construction of a federal statute by a United States court of appeals is entitled to great weight when the same statute is involved in a case before a state court, nonetheless held that they were not bound by *China Fire* because the construction of the federal statute was neither logical nor sound.[123]

The New York courts have held that they are not obligated to follow the construction of a federal statute by a federal court inferior to the Supreme Court.[124] However, when the New York Court of Appeals was

126 F.2d 476 (6th Cir. 1942), where a motor carrier paid the insurance premium for shipper's benefit and the carrier was permitted to claim over against the insurer after the shipper sustained a loss.

119. 18 Wash. 2d 798, 140 P.2d 507 (1943).

120. 49 U.S.C. § 2 (1964).

121. 18 Wash. 2d at 809, 140 P.2d at 512, citing 49 U.S.C.A. § 2 at 194 n.2 (1959).

122. Id.

123. Id. at 808, 140 P.2d at 511.

124. E.g., People ex rel. Ray v. Martin, 294 N.Y. 61, 73, 60 N.E.2d 541, 547 (1945), aff'd, 326 U.S. 496 (1946); Zurich Gen. Accident & Liab. Ins. Co. v. Lackawanna Steel Co., 164 Misc. 498, 299 N.Y.S. 862 (Sup. Ct. 1937), aff'd sub nom. Zurich Gen. Accident & Liab. Ins. Co. v. Bethlehem Steel Co., 254 App. Div. 839, 6 N.Y.S.2d 139 (1st Dep't 1938), rev'd, 279 N.Y. 495, 18 N.E.2d 673, rev'd, 307 U.S. 265 (1939).

faced with the prospect of determining the validity of the "benefit of insurance" clause, it felt compelled to follow the holding in *China Fire* since this was the federal law on a federal question. In *Salon Service, Inc. v. Pacific & Atlantic Shippers, Inc.*[125] the freight forwarder's bill of lading contained the following standard provision:

> Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance. Provided, that the carrier reimburse the claimant for the premium paid thereon.[126]

The shipper's insurance policy provided that the "insurance shall not inure directly or indirectly to the benefit of the carrier or other bailee, by stipulation in bill of lading or otherwise,"[127] but did not provide that the policy would become void if the bill of lading gave the carrier the benefit of insurance. The policy also contained the following provisions:

> *Bill of Lading, Contracts, Etc.:*
>
> 16. Privilege is granted hereunder to accept receipts, contracts, bills of lading or other documents issued by carriers or others limiting their liability or releasing them from all liability and this insurance shall in no wise be prejudiced by such limit or release.[128]

The shipper had delivered 12 cartons of wigs to a freight forwarder in New York City for delivery to a consignee in Illinois. The freight forwarder tendered delivery to the consignee in Illinois who refused to accept the shipment. Before the shipment could be returned to the shipper the shipment disappeared. The shipper's insurance company paid the shipper, who executed a "loan receipt" acknowledging that the insurance company had loaned the insurance proceeds to the shipper. The loan to the shipper was without interest and was to be repaid solely from any recovery the shipper received from the freight forwarder.[129] The shipper's insurance

125. 30 App. Div. 2d 190, 291 N.Y.S.2d 79 (1st Dep't 1968), aff'd, 24 N.Y.2d 15, 246 N.E.2d 509, 298 N.Y.S.2d 700 (1969).

126. 24 N.Y.2d at 18-19, 246 N.E.2d at 510-11, 298 N.Y.S.2d at 702.

127. Id. at 18, 246 N.E.2d at 510, 298 N.Y.S.2d at 701.

128. 30 App. Div. 2d at 191-92, 291 N.Y.S.2d at 80-81.

129. Record at 37, Salon Serv., Inc. v. Pacific & Atl. Shippers, Inc., 24 N.Y.2d 15, 246 N.E.2d 509, 298 N.Y.S.2d 700 (1969). In The J.L. Luckenbach, 65 F.2d 570, 574-75 (2d Cir. 1933), a federal court held that where a bill of lading provided that the carrier should receive the benefit of insurance paid to the shipper, it could not receive the benefit of a loan made by the insurer to the shipper. The loan and loan receipt have long been used to avoid the benefit of insurance clause in bills of lading. Bolton v. Ziegler, 111 F. Supp. 516, 527 (N.D. Iowa 1953). The nature of the transaction, whether it be a payment or a loan, depends on the intent of the parties. Luckenbach v. W.J. McCahan Sugar Co., 248 U.S. 139, 149 (1918). The claim of the insured in China Fire Ins. Co. v. Davis, 50 F.2d 389 (2d Cir.), cert. denied, 284 U.S. 658 (1931), was also paid as a loan by the insurer but the court indicated that the party to sustain the ultimate burden of the loss would be determined by

company then commenced an action in the shipper's name against the freight forwarder for the loss of the shipment. The freight forwarder asserted as an affirmative defense that it was entitled to the benefit of the shipper's insurance.[130]

The appellate division dismissed the affirmative defense. While the court indicated that prior suits on this issue had been decided on the ground that the carrier may not relieve itself of liability for its own fault, or alternatively that public policy required that a carrier should not be able to avoid the restrictions of the Interstate Commerce Act against preferential treatment, it based its decision in *Salon Service* on the need of the commercial community for a uniform standard:

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the validity of the bill of lading provision giving the carrier the benefit of the shipper's insurance.

Loan receipts are usually sham devices employed by the insurance companies as a "facade to permit the third-party action to be prosecuted in the name of the insured." Herbert Rosenthal Jewelry Corp. v. St. Paul Fire & Marine Ins. Co., 21 App. Div. 2d 160, 162, 249 N.Y.S.2d 208, 211 (1st Dep't 1964), aff'd mem., 17 N.Y.2d 857, 218 N.E.2d 327, 271 N.Y.S.2d 287 (1966).

It is no longer necessary for the court in New York to be a party to the sham, since by statute an "insured person who has executed to his insurer either a loan or subrogation receipt, trust agreement, or other similar agreement . . . may sue or be sued without joining with him the person for or against whose interest the action is brought." N.Y. C.P.L.R. § 1004 (McKinney 1963). In the Herbert Rosenthal Jewelry Corp. case, the appellate division determined that payment made by an insurer to its insured was not a loan despite the fact that the insured had executed a "loan receipt." Justice Breitel stated that "modern jurisprudence should not have any difficulty in avoiding 'word talismanship'. The contrary would mean that the fiction of the loan receipt is permitted to behave as a monster, independently of the purpose of its creation, wreaking irrational havoc." 21 App. Div. 2d at 163, 249 N.Y.S.2d at 212. He further stated: "Firstly, whatever the four documents in this transaction purported to express, it is perfectly clear that the purpose and effect of the transaction was for the insurer to pay the loss, the insured receive the proceeds of the insurance promptly, and for the insurer to be subrogated to the third-party claim to be prosecuted at its expense. A reading of the loan receipt alone might not disclose this, but the insurance policy, the proof of claim, and the draft endorsement, taken with the loan receipt, make the substance of the transaction perfectly clear. Thus made clear, the loan receipt transaction is not a banking or financing operation but a device for the payment absolute of an insurance loss, coupled with a fictional implementation to permit the insurer to sue in the name of the insured.

"Indeed, before the applicable statute had been amended it had been held, under documents similar to those in this case, that a loan receipt represented an absolute payment by the insurer, and that the insurer, and not the insured, was the real party in interest . . . ." Id. at 164, 249 N.Y.S.2d at 213. In Salon Serv., Inc. v. Pacific & Atl. Shippers, Inc., supra, the appellate division stated: "In determining whether the provision in the bill of lading shall take precedence over the clauses in the insurance policies or vice versa, we give no weight to the fact that payment was made to plaintiff by means of a loan receipt. The use of this patent device to obscure the fact or effect of payment is unavailing . . . ." 30 App. Div. 2d at 192, 291 N.Y.S.2d at 81. See also Annot., 13 A.L.R.3d 42 (1967).

130. 30 App. Div. 2d at 191, 291 N.Y.S.2d at 80.

Whether either of these approaches appeals or whether the problem be regarded as incapable of satisfactory solution by way of reason, there is substantial merit in adhering to the determinations. The most significant factor in regard to the decisions is that they provide a standard to the commercial community upon which to regulate conduct. The practically uniform determinations in favor of the insurer provide such a standard. For this reason the defense is unavailing and should be stricken.[131]

The appellate division preferred to attack the problem of "circularity of expression"[132] between the bill of lading provision and the insurance policy provision on a broad economic basis by providing a standard against which the court believed the commercial community should regulate its conduct. The court recognized that factors other than statutory or contractual interpretation were relevant considerations.

On appeal, the New York Court of Appeals held that the state of the federal law on the issue was decisive. Since the only federal cases which had considered the question had determined that the provision of the bill of lading was void as discriminatory under the Interstate Commerce Act, the New York court was obligated to follow this determination.[133] In this regard, it adopted a view opposite to that adopted by the Supreme Court of the State of Washington.[134] The result of these conflicting decisions is that the validity of the "benefit of insurance" provision depends on which state court considers the question, at least until the matter is "finally" determined once again by the United States Supreme Court or by Congress. This result is inconsistent with the need for a uniform law of transportation in interstate commerce.

The bills of lading involved in the cases which considered the discriminatory aspect of the "benefit of insurance" clause prior to *Salon Service,* such as *National Garment Co. v. New York Central & St. Louis Railway,*[135] *Home Insurance Co. v. Northern Pacific Railway,*[136] and *Beaumont v. Pennsylvania Railroad,*[137] were those of rail carriers subject to Part I of the Interstate Commerce Act. The statute interpreted in all these cases, and under which the provision in the bill of lading giving the carrier the benefit of shipper's insurance was declared to be discriminatory and void or not, was section 2 of Title 49 of the United States Code,[138] a section included in Part I of the Act. *Richard D.*

131. Id. at 192, 291 N.Y.S.2d at 81.

132. Campbell, Non-Consensual Suretyship, 45 Yale L.J. 69, 85 (1935).

133. 24 N.Y.2d 15, 20, 246 N.E.2d 509, 511, 298 N.Y.S.2d 700, 703 (1969).

134. Home Ins. Co. v. Northern Pac. Ry., 18 Wash. 2d 798, 140 P.2d 507 (1943).

135. 173 F.2d 32 (8th Cir. 1949).

136. 18 Wash. 2d 798, 140 P.2d 507 (1943).

137. 127 N.Y.S.2d 216 (Sup. Ct. 1953), modified, 284 App. Div. 354, 131 N.Y.S.2d 652 (1st Dep't 1954), aff'd, 308 N.Y. 920, 127 N.E.2d 80, cert. denied, 350 U.S. 838 (1955).

138. 49 U.S.C. § 2 (1964).

Brew & Co. v. Auclair Transportation, Inc.[139] and *Towmotor Co. v. Frank Cross Trucking Co.*[140] involved motor carriers subject to Part II of the Interstate Commerce Act and not subject to the provisions of section 2 of the Act which had been interpreted in *China Fire*. This distinction was perhaps not made by the courts in either *Richard D. Brew* or *Towmotor*, because there is a similar non-discrimination clause applicable to motor carriers.[141]

Salon Service involved a determination of the validity of a benefit of insurance clause in the bills of lading of freight forwarders. The forwarder, in its relations with its customers, is subjected by the Interstate Commerce Act to many of the requirements and regulations applicable to other common carriers. In its relation with other carriers, the status of the forwarder is that of a shipper.[142] Freight forwarders in interstate commerce were not subject to the Interstate Commerce Act until 1942 when Part IV of the Act (The Freight Forwarder Act) was passed by Congress.[143] However, freight forwarders are not included within the definition of carriers subject to Part I of the Interstate Commerce Act[144] and are specifically excluded from Part I by the Freight Forwarder Act.[145] The result is that section 2 of the Interstate Commerce Act which was interpreted in *China Fire* to preclude a benefit of insurance clause in a bill of lading is not applicable to forwarders. On the other hand, section 1004(b) of the Act prohibits freight forwarders from giving any unreasonable preference or advantage to any person or to subject such person "to any unjust discrimination or any undue or unreasonable prejudice or disadvantage . . . ."[146] In *Salon Service* the benefit of insurance clause of a bill of lading was held void as discriminatory under section 1004(b) of the Freight Forwarder Act. The court reasoned that if it was discriminatory then the rationale would be the same under either statute.[147]

The separation of powers provided for in the Constitution provides that the determination of a standard for the commercial community is the appropriate function for the legislative branch of government. It is not the function of the courts to legislate under the guise of interpretation.

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139. 106 N.H. 370, 211 A.2d 897 (1965).
140. 205 Pa. Super. 448, 211 A.2d 38 (1965).
141. 49 U.S.C. § 316(d) (1964).
142. Chicago, M., St. P. & P.R.R. v. Acme Fast Freight, Inc., 336 U.S. 465, 468 (1949).
143. 49 U.S.C. §§ 1001-22 (1964).
144. Id. § 1(3)(a).
145. Id. § 1002(a)(5); see United States v. Bethke, 132 F. Supp. 22 (D. Colo. 1955); American Transp. Co. v. Insurance Co. of N. America, 300 Mich. 230, 1 N.W.2d 521 (1942).
146. 49 U.S.C. § 1004(b) (1964).
147. 24 N.Y.2d at 20-21, 246 N.E.2d at 512, 298 N.Y.S.2d at 703-04.

If evils exist, it is for the legislature to correct them.[148] The courts are ill-qualified to make basic judgments about economic policy, a function which properly belongs to Congress.[149] Furthermore, Congress has preempted the field, leaving no room for state regulation whether by a state legislature or by a state court.[150] Clearly, if the courts of the State of New York were allowed to determine a standard for the commercial community involving carriers, then the courts of the other states might make similar determinations leading to diverse regulations in a field which requires uniformity. The liability provisions of an interstate bill of lading may not be increased or diminished by local regulation or local view of public policy. Otherwise, the provisions are less than supreme. Congress intended to adopt a uniform rule and relieve such contracts from diverse regulation.[151]

Congress alone can deal with interstate transportation of property, a subject which requires national uniformity of regulation.[152] Congress has asserted its power over interstate shipments and over the subject of the duty to issue bills of lading and the responsibility of carriers thereunder, thereby excluding state legislation.[153] The construction of bills of lading for interstate shipments presents a federal question and not a state question. Consequently, state courts in their construction are bound by federal law.[154] It should be noted, however, that where Congress had an opportunity to consider a "benefit of insurance" clause in a contract of carriage in relation to carriage of goods by sea, it provided that such a clause shall be deemed to be a clause relieving the carrier of liability and therefore void.[155] Congress did not deem it to be discriminatory.

The litigation concerning the validity of the benefit of insurance clause

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148. Order of R.R. Tel. v. Chicago & N.W. Ry., 362 U.S. 330, 342 (1960); Bright Homes, Inc. v. Wright, 8 N.Y.2d 157, 162, 168 N.E.2d 515, 518, 203 N.Y.S.2d 67, 70 (1960); Metropolitan Life Ins. Co. v. Boland, 281 N.Y. 357, 361, 23 N.E.2d 532, 533 (1939); Hudson Handkerchief Mfg. Corp. v. Porto Rican Exp. Co., 274 App. Div. 509, 514, 85 N.Y.S.2d 294, 299 (1st Dep't 1948).

149. American Commercial Lines, Inc. v. Louisville & N.R.R., 392 U.S. 571, 590 (1968).

150. 49 U.S.C. §§ 1001-22 (1964).

151. Adams Express Co. v. Croninger, 226 U.S. 491, 506 (1913).

152. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 776 (1947); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 204 (1885). See also Barstow v. New York, N.H. & H.R.R., 158 App. Div. 665, 143 N.Y.S. 983 (1st Dep't 1913).

153. Atchison, T. & S.F. Ry. v. Harold, 241 U.S. 371, 378-79 (1916).

154. Illinois Steel Co. v. Baltimore & O.R.R., 320 U.S. 508, 510-11 (1944); Pennsylvania R.R. v. L.N. White & Co., 280 App. Div. 587, 588-89, 116 N.Y.S.2d 361, 363 (1st Dep't 1952), aff'd mem., 305 N.Y. 801, 113 N.E.2d 553 (1953); Dodge & Dent Mfg. Co. v. Pennsylvania R.R., 175 App. Div. 823, 827-28, 162 N.Y.S. 549, 553 (1st Dep't 1916).

155. Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8) (1964).

has predominantly involved overland carriers, but the issue has also affected carriers by water. In *Commercial Molasses Corp. v. New York Tank Barge Corp.*,[156] the contract of affreightment contained an undertaking on the part of the shipper to effect insurance on cargoes for the benefit of the carrier. This the shipper failed to do. The trial court held that although the carrier had breached an express warranty to provide a seaworthy vessel, it was not liable to the shipper due to the shipper's breach of the contract to insure. In *Allied Chemical Corp. v. Gulf Atlantic Towing Corp.*,[157] the contract between the shipper and tower required the shipper to carry insurance for its own account. The shipper by contract waived claims against the tower resulting from torts arising in connection with the agreement. The court found that damages sustained by the shipper were caused by the tower's negligence, but that the tower was entitled to the benefit of the shipper's insurance and was therefore relieved of liability for the insured loss.[158]

B. *A Proposal to Change the Allocation and Burden of Risk*

What the courts have failed to recognize is that litigation concerning who should ultimately pay for cargo losses is today more often carried on between insurers than between carriers and shippers. The Interstate Commerce Act and rules of the Interstate Commerce Commission require that motor carriers and freight forwarders engaged in interstate commerce be insured for cargo losses and that such carriers and forwarders furnish evidence of such insurance or evidence of self-insurance to the Interstate Commerce Commission.[159]

The claimants and plaintiffs in the great majority of cases are insurers either suing in their own name or in the name of the shipper as subrogee of the shipper. The defendants are generally, although sometimes in-

156. 1939 A.M.C. 673 (S.D.N.Y.), aff'd, 114 F.2d 248 (2d Cir. 1940), aff'd, 314 U.S. 104 (1941). On appeal the Court of Appeals for the Second Circuit affirmed on the ground that the petitioner did not sustain its burden of proof, holding that even if the clause in the charter regarding insurance did not cancel the warranty of seaworthiness, it was not necessary for the court to pass upon that question. 114 F.2d at 252. Contra, Nelson Line, Ltd. v. James Nelson & Sons, Ltd., [1908] A.C. 16, aff'g [1907] 1 K.B. 769.

157. 244 F. Supp. 2 (E.D. Va. 1964).

158. In relation to international intermodal shipments on a single through bill of lading covering both the overland transportation and the carriage of goods by sea, a benefit of insurance clause would be void because it is void under the Carriage of Goods by Sea Act. 46 U.S.C. § 1303(8) (1964). The TCM Convention also deals with the "benefits of insurance" but it is not clear whether the insurance referred to is that obtained by the shipper or by the CTO. Article 17, § 2 provides: "In particular, any clause assigning benefit of insurance of the goods in favor of the CTO shall be null and void." II/1970 Baltic & Int'l Maritime Conf. Bull. 114, 117.

159. 49 U.S.C. §§ 315, 1003 (1964).

directly, either insurers defending under the carrier's policy and in the carrier's name or the carrier itself in the role of a self-insured. Realistically, the immediate issue is not whether the shipper or the carrier should bear the risk of loss but which insurance company should bear the burden.

The present system of compensation to shippers for cargo losses is unduly costly to both shippers and carriers because of the overlapping duplication of insurance which essentially covers the risk of loss or damage to the same goods. This becomes immediately obvious from an analysis of any insured intermodal movement of goods. Let us consider, *e.g.*, a shipment of goods from California to New York. The shipper usually insures the goods against loss or damage during its transportation and pays a premium to an insurance company. The shipper may then employ a freight forwarder who is required by law to be insured for liability resulting from loss or damage to the shipper's cargo. The freight forwarder may employ a local pick-up and delivery trucker to pick up the shipper's goods and deliver them to the forwarder. Either by agreement with the forwarder or otherwise the local pick-up and delivery trucker is usually insured for cargo loss and damage. The freight forwarder, who is prohibited from owning his own vehicle for transportation, may then deliver the shipper's cargo to a motor carrier who is also required by the Interstate Commerce Act to be insured for cargo loss. The motor carrier, if it has through routes to New York, may redeliver the trailer to the freight forwarder in New York or, if it has no through route, the motor carrier will deliver the trailer to other motor carriers, who are also required to be insured, for ultimate redelivery to the freight forwarder in New York. During the course of its transportation, the shipment might be carried by rail, T.O.F.C., water or air. Although railroads, air carriers, and carriers of goods by water are not required by law to be insured for cargo loss, most air and water carriers are insured. At New York the freight forwarder will break bulk and may deliver the shipment to a local delivery trucker (who probably will be separately insured for cargo loss) for ultimate delivery of the shipment to the consignee who may also be insured. In the case of the shipper, owner, or consignee, the insurance is to protect against loss or damage to the property. In the case of the carriers, the insurance is in the form of liability insurance. In either event the risk is that the property being shipped will be lost or damaged. This multiplicity of insurance premiums and duplication of coverage substantially increases the cost of the shipment of goods and unduly burdens the free flow of commerce.

A reformation of the system of compensation to shippers for lost and damaged cargo is needed to conform to the improved methods in the

physical handling and movement of freight. Containerized freight and intermodal transportation systems are no boon to a shipper whose cargo is hijacked unless prompt compensation is made for the loss. However, the burden of compensating the shipper for lost and damaged cargo should not be the sole burden of the carrier, particularly when a substantial percentage of the losses incurred are not due to the fault of the carrier held responsible. Furthermore, the carrier's rate structure is established primarily on the basis of the cost of transportation rather than on the risk of loss. The cost of compensation for loss should be considered as an element of the cost of transportation to be added to the cost of the goods sold and ultimately included in the sale price of the goods. It would also appear logical to hold all carriers involved in a through shipment to the same standards of liability. It is therefore suggested that the carrier's liability be limited on every shipment to the value of the goods shipped or an arbitrary maximum sum per package, whichever is lower, without a released rate order from the Interstate Commerce Commission.[160] The risk of loss or damage in excess of the arbitrary maximum is more effectively compensated by insurance purchased by the shipper. If a shipper indicated on the bill of lading that excess insurance was desired on the value of the shipment, the insurance cost could be separately rated similar to the manner in which transportation charges are now rated and included as a separate item on the carrier's freight bill.[161] The obligation of the shipper to declare a value and pay an additional charge for compensation at full value in the event of a loss or damage prevails for shipments by air freight and under the Carriage of Goods by Sea Act and, prior to the Carmack Amendment, prevailed for overland carriers. Insurance has historically been a proven method for spreading risks.

The carriers will continue to have an incentive for prudence since they are not totally free of liability. In this regard there will also remain the competitive advantage of a reputation for safe transport. To the extent that further incentives for prudence are required by particular carriers, this would appear to be more appropriately a function of the Interstate Commerce Commission or other regulatory agency charged with providing for the safety of systems and operations in the transportation of freight. A shipper failing to purchase excess insurance through the carrier should be limited to an arbitrarily established liability on the part of the carrier in the event of loss or damage to the shipment.

160. See Limitation for Carriers under Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) (1964).

161. Air carriers and carriers of goods by sea presently require such a valuation statement as a condition of avoiding limited liability by the carrier.

The premium rates can be fixed with the knowledge that there will be no right or only a limited right of subrogation against the carriers. The right to subrogation, except where the loss is significant in amount, is of limited benefit since the administrative and legal cost of collecting from the carrier substantially reduces the amount recovered by the insurance companies; and the amount received by the insurer from the common carrier is often less than the amount paid by the insurer to the shipper.

The limitation of liability of motor carriers, freight forwarders, rail carriers, and express companies to a fixed sum and the ability of such carriers to offer all-risk insurance coverage at a price would result in making the liability of carriers more uniform and more consistent with that of carriers by air and carriers by sea.

V. CONCLUSION

The transportation industry has made dramatic advances in the technology and systems of freight movement. The trend in the transportation industry is to combine the various modes of transportation to provide a shipper with a unified transportation system from source to destination. This blending of modes of transportation, and the needs created by technological changes, require a basic reconsideration of all the laws concerning transportation of goods and a re-examination of the division of jurisdiction among the regulatory agencies.[162] The patchwork of laws created on an historical basis must be replaced by a single transportation law applicable to all modes of transportation and administered by a single agency.[163]

The liability of carriers for loss or damage to goods should be uniform for all modes of transport. The relatively unlimited liability of motor carriers, rail carriers, express companies, and freight forwarders should be changed to make it consistent with the limited liability of domestic and international air carriers and carriers of goods by sea. If the philosophy limiting liability of air and sea carriers is appropriate there is no justification for separation. Intermodal transportation requires a unitary concept of liability.

162. See Note, Coordination of Intermodal Transportation, 69 Colum. L. Rev. 247, 274 (1969); Note, Legal and Regulatory Aspects of the Container Revolution, 57 Geo. L.J. 533 (1969).

163. See Panel Discussion, Coordinated Transport—Is a Single Federal Regulatory Commission Needed? 36 ICC Prac. J. 1325, 1334-35 (1969); Note, Legal and Regulatory Aspects of the Container Revolution, 57 Geo. L.J. 533, 550-51 (1969). A bill introduced in the United States Senate in April, 1970, by Senator Baker of Tennessee would establish a Commission on Transportation Regulatory Agencies to make a study concerning the advisability of merging the Interstate Commerce Commission and the Civil Aeronautics Board. S. Doc. No. 3760, 91st Cong., 2d Sess. (1970).

The effect of insurance upon loss and damage to shipments must also be re-examined. The arguments concerning the validity of "benefit of insurance provisions" and the long history of litigation concerning this issue is pointless and cries out for a uniform legislative solution by Congress. The duplication of insurance coverage and the attendant increase in the costs of insurance, investigation, and adjustment which vitally affect interstate and foreign commerce also require a uniform legislative remedy.

To the extent that it is necessary to establish intercarrier liability on intermodal shipments, the task of allocating the liability between carriers should be a function of one administrative agency. The present limited industry system of liability allocation established by the rail carriers for themselves, and the motor carriers for themselves, does not answer the problems of modern intermodal transportation. Nor does the present limited statutory right of a carrier held liable for a shipper's loss or damage to claim over in certain instances against the carrier at fault,[164] provide an adequate solution to the problem. Unification of transportation and the needs of the commercial community require unification, consolidation and reform of existing transportation laws.

164. 49 U.S.C. § 20(12) (1964).