U.S. DEPARTMENT OF TRANSPORTATION

DRAFT

CARGO LIABILITY STUDY

MAY 1997

TABLE OF CONTENTS

CHAPTER 1. INTRODUCTION

1.1 HISTORICAL CONTEXT

The concept of common carriage developed in the middle ages. Basic to common carriage is the notion of treating all customers in the same way (see Niagara v. Cordes, 62 U.S. 41, 46 (1858)). Besides the duty to avoid discriminating among customers, the other two elements of common carriage are the duties to provide service and to be subject to strict liability (Basedow 280).

In 1887 Congress adopted the Interstate Commerce Act. The Act originally applied only to railroads. It established the Interstate Commerce Commission (ICC) and gave the ICC the function of ruling on the reasonableness of rates. Statutory guidance for ICC decisions was provided in the 1940 National Transportation Policy Statement (49 U.S.C 10101; for motor carrier policy, see 49 U.S.C. 13301; for statutory policy application to motor carriage, see discussion at section 7.3). Public access to, and readily available information about, rates at the Interstate Commerce Commission was an essential element of ICC rate examination for reasonableness.

Carrier liability became the subject of federal legislation in 1906 in the Carmack Amendment to the Interstate Commerce Act, (49 U.S.C. 10707, now 49 U.S.C. 14706). The Carmack Amendment established a codified strict liability regime with established common carrier defenses to liability. The regime provided for full value compensation, except to the extent that carriers were able to limit liability by filing released rates (see discussion in section 5.1). The 1915 Cummins Amendment, 38 Stat. 1196, abolished the practice of limitations on liability; the second Cummins Amendment, 41 Stat. 475, permitted limitations on liability through filing of released rates, if those rates were just and reasonable. For various reasons, several types of carriage remained outside of this liability regime (for discussion, see Sec. 7.4).

Motor carriage was brought under the ICC's jurisdiction in the 1935 Motor Carrier Act, 49 Stat. 543 (1935), and thus became subject to the Carmack Amendment's liability regime. Subsequently, freight forwarders also were brought under ICC jurisdiction, 56 Stat. 285 (1942) and 64 Stat. 1113 (1950)) and the Carmack liability regime.

In addition to its jurisdiction over released rates, the ICC regulated the processing of claims for loss, damage, injury or delay to property transported in interstate commerce by railroads, express companies, motor carriers, water carriers, and freight forwarders. The ICC established requirements for the filing, acknowledgment, and disposition of claims, and required that a claim be investigated and paid, declined or compromised. However, the ICC did not itself adjudicate claims.

The Motor Carrier Act of 1980, 94 Stat. 798 (1980), partially deregulated motor carriage. Released rates were only required to be reasonable and became easier to obtain. The Staggers Rail Act of 1980, 94 Stat. 1995 (1980), provided substantial deregulation of the railroad industry. In addition, it permitted carriers and shippers to enter freely into contractual agreements on limitation of liability without regard to reasonableness.

Finally the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), P.L. 103-311, eliminated the ICC tariff filing requirement for motor carriers acting independently in setting their rates. When the Interstate Commerce Commission Termination Act of 1995, P.L. 104-88, was adopted, much of the Interstate Commerce Act was eliminated. Without ICC oversight of the reasonableness of released rates, the Carmack Amendment has been significantly changed (see discussion chapter 5). Now the courts are the primary regulators of dispute settlements, unless the parties agree to arbitration or settle disputes themselves. Because shippers and carriers could not fully agree on the new liability regime, Congress directed the Department to perform a study of cargo liability.

1.1.1. CONGRESSIONAL MANDATE

The Department of Transportation (DOT), having accomplished a study of cargo liability in 1975, was the logical agency to undertake the task of studying cargo liability in 1997. In fact, the earlier DOT study had recommended a repeat examination to detect trends in cargo liability. Thus the Congressional mandate coincided with DOT interest in this subject.

1.1.2 SPECIFICS OF THE STUDY

Broadly, DOT is required to consider the following factors:

1. Efficient delivery of transportation services.

2. International harmony.

3. Intermodal harmony.

4. Public interest.

5. Interests of carriers.

6. Interests of shippers.

7. Limitation of liability.

Specifically, Congress asked DOT to study whether the loss and damage provisions of what remains of the Carmack Amendment should be modified or reformed. Although DOT's dominant task is to study the liability of motor carriers and freight forwarders, DOT also is required to consider the liability regimes of other modes of transportation. In particular, DOT is requested to study limitation of liability for the carriers. (Limitation of liability is discussed in Sec. 5.1.4)

1.1.3 SCOPE OF LIABILITY REGIME

The ICC Termination Act required DOT to study "whether any modifications or reforms should be made to the loss and damage provision of this section," that is, to section 14706 of the Act (the remains of the Carmack Amendment). This section of the Act describes the liability regime. Significant aspects of motor carrier transportation are not included within the scope of section 14706. Thus, these forms of motor carriage should not be included within the scope of the study.

Initially, it is important to note that the scope of the Sec. 14706 liability regime was expanded by the elimination of the distinction between common and contract carriers. The ICC Termination Act, Sec. 13102, defines a “carrier“ as a motor carrier, a water carrier and a freight forwarder. A motor carrier is specifically defined as a person providing motor vehicle transportation for compensation. Thus, the distinction between common carriage and contract carriage has been eliminated. This means that contract carriage has been brought under the liability regime (for more extensive discussion see Sec. 7.4. Incidentally, the statistical data on motor carriage that appear in this study do not to distinguish between the two types of carriage and thus are readily applicable to the current definition of motor carriage).

Many motor carriers' activities are exempted from the application of the Sec. 14706 liability regime, or are treated specially by that section. These are as follows.

1. Agricultural Carriage. Carriage of agricultural products is exempt (Sec. 13506). The purpose of this exemption was to enable farmers to transport their products to the market, and supplies to the farm (for more extensive discussion, see Sec. 7.4), without the complications and rigidities of traditional ICC regulations

2. Household Goods. Household goods carriers are treated specially. Under Sec. 14706(f) of the Act, carriers of household goods are subject to the jurisdiction of the Surface Transportation Board (STB) and are permitted to negotiate terms of carriage based on a shippers' acceptance of the carriers' written estimate (offer) to carry. Carriers of household goods

must agree to offer arbitration to shippers as a means of settling disputes concerning damage or loss to the household goods transported. Regulations provide that for household goods, replacement cost must be used as a base for applying a depreciation factor to arrive at the current value of lost or damaged articles. Much of the ICC's compliance work on cargo loss, damage and delay involved failures by carriers to settle shippers' claims in the household goods area. It was the ICC's experience that its authority over household goods' carriage could be used as enforcement leverage when self-insured carriers failed to pay even after liability had been admitted.

The STB's continued oversight of household goods carriage is the result of Congress' belief that consumers continue to need protective regulation (see Sec. 7.4 for extensive discussion of carriers' liability for carriage of household goods).

3. Express and package carriage: Transportation by express carriers such as United Parcel Service and Fedex are subject to a standard liability limitation based on weight or on the package. The shipper who chooses such carriage is put on notice of the limitation by clear language on the bill of lading he or she fills out when tendering this package. The shipper can declare higher value and pay an excess valuation charge (for more extensive discussion see Sec. 7.4).

4. Contract Carriage: Much transportation of goods is under contract and governed by Sec. 14101(b) of the Act,.which provides that a carrier may enter into a contract "to provide specified services under specified rates and conditions." This kind of carriage does not fall under Sec. 14706. The carrier and shipper negotiating for contract carriage may make any reasonable contractual stipulations, except that they may not waive provisions governing the carrier's registration, insurance, or safety fitness.

Generally, large shippers tend to use the authority under Sec. 14101(b) to establish a contractual liability regime; many smaller shippers do the same. A survey of approximately 100 shippers attending the February 1997 meeting of the National Small Shipments Traffic Conference (NASSTRAC) indicated that approximately one half of the shippers present had long term contracts with their carriers. An Ohio State Univesity study indicates that 72% of all motor carriage now moves under contract. Less than the remaining 28% of all shippers by motor carriage constitute those who ship under Sec. 14706 (Carmack Amendment). Contracts of carriage have the advantage of clearly regulating liability according to the bargaining leverage of the parties to the contract. (for more extensive discussion of contract carriage see Sec. 5.7).

5. <u>Incidental to Air</u>: Motor carriage incidental to air carriage, that is, intermodal air-truck freight, is exempt from regulation under the Interstate Commerce Act by Sec. 13506(a)(8) of the Act (for more extensive discussion see Sec. 7.4).

6. <u>Other types of carriage</u>: Many other types of carriage are exempted, for example intrastate carriage (see FAA Authorization Act of 1994, P.L. 103-305); transportation of wood chips; transportation of broken, crushed and powdered glass; transportation in a municipal zone; occasional carriage; and emergency towing, 49 U.S.C. 13506.

1.1.4. VARIETY OF CARRIERS

The preceding discussion illustrates how a great variety of carriers may cause loss, damage or delay. Ways have been found to make allowance for the differences among carriers and to meet the differing needs of shippers for carriage. The variety of carriers and shippers that remain subject to Sec. 14706 has been studied and their common interests and needs observed.

1.2 THE PHILOSOPHY OF THE 1975 STUDY

In 1975, the U.S. Government was involved in formulating a multimodal liability regime. DOT had to study the individual modal liability regimes in order to evaluate and make recommendations for a multimodal regime. The issues studied in 1975 are still relevant today:

1. How can the overall cost of transportation, in particular the cost of loss, damage and delay, be reduced by creating a more efficient liability regime?

2. How can settlement of claims be expedited?

3. How can liability regimes be streamlined and made more uniform, certain, and predictable, thus appearing less formidable to shippers?

4. What is the shippers' cargo liability experience?

5. What is the carriers' cargo liability experience?

6. What is the insurance industry's cargo liability experience?

The 1975 study was widely accepted by industry as reflecting the situation as of the time of writing. Because the ICC Termination Act did not provide funding for the current study, the statistics of the 1975 study are used in several places as markers and as a basis for requests to the shippers, carrier and insurance interests either to produce better statistics or to verify that the loss and damage percentage (component) of the value of cargo remains approximately as before.

1.3 CONCLUSION

Congress required DOT to submit a report on the results of the study, together with any recommendations, including legislative recommendations for implementing modifications or reforms. Chapter 8, Recommendations, will be written after the comments on this draft have been analyzed.

We have previously solicited and received extensive data and comments from shippers, carriers, forwarders, and the insurance industry. DOT held a public meeting on February 23, 1996 and received public comments at that meeting. Written comments were received from approximately 130 participants during the remainder of 1996 and 1997.

DOT has received significant expressions of the view that currently the allocation of risk and costs is unfairly distributed. Consequently, we have examined which liability regimes or characteristics will most fairly apportion costs and risks among the various parties. A list of participants is included as Appendix A.

CHAPTER 2. BASIS FOR CARRIER LIABILITY

2.1 DEVELOPMENT OF THE CONCEPT OF LIABILITY

As common law developed, certain professions, institutions, and enterprises serving the general public, including commercial interests, were found to be of "common calling", a status which imposed certain duties toward the customers or clientele they served. Such persons or firms who engaged in transportation were called "common carriers". The duties imposed on these carriers were: to serve all customers; to deliver goods; not to discriminate, and to charge reasonable rates. Around the duty to deliver goods developed a set of legal principles which defined the conditions under which the carrier was obligated to deliver; the conditions under which the carrier might be excused from this duty were specified. These principles established the liability of common carriers with respect to the loss and damage of cargo.

The common law liability of carriers became ingrained in the American commercial system, and, in due course, the principles of carrier liability were incorporated into American statutory law. The most important statutes in this regard are the Interstate Commerce Act of 1887, the Bill of Lading Act of 1893 (Harter Act), the 1906 Carmack Amendment to the Interstate Commerce Act, the Cummins Act of 1915, the Motor Carrier Act of 1980, of the Negotiated Rates Act of 1993 (NRA), the Trucking Industry Regulatory Reform Act of 1994 (TIRRA) and the ICC Termination Act of 1995 (ICCTA). Currently, under the ICCTA neither DOT nor the Surface Transportation Board (STB) has authority to compel a carrier to pay or settle a claim (see Chapt. 5 for a description of current Government regulation). The function of compensating for loss and damage rests with the courts.

These Acts impose the current liability rules applicable to carriage between any points in the United States and between any point in the U.S. and any point in a foreign country. The Pomerene Bills of Lading Act of 1916 gave further statutory status to the bill of lading and also defined the extent of carriers' liability in relation to the conditions stated in the bill of lading. (However, the uniformity of the bill of lading has become eroded by the freedom of the contracting parties to vary and change the motor carrier bill of lading).

These laws thus established a legal structure of full value recovery for loss and damage, except where lower levels of recovery are established. In current U.S. usage, after the ICCTA, the prevalent surface carriage liability structure appears to be founded primarily on contractual limits rather than full value of the cargo. It is because of the increasing use of the carriers' freedom to lower their liability for transportation of cargo (in particular transportation that used to be called motor common carriage, see discussion in Sec. 7.4) that Congress found a need to ask for a study of equity in contracts of carriage. The question is: What liability regimes or regime characteristics will most fairly apportion the risk or carriage and of transportation costs among the various parties?

2.2 CARRIER LIABILITY

When considering liability it is necessary to distinguish among modal regimes. These regimes differ according to variances in the governing national laws and international conventions. The following paragraphs compare the liability regimes applicable to the various modes.

Rail Carriers

Carriage by rail is <u>not</u> governed by the ICCTA, Sec. 14706. Under Sec. 11706 of the Act the rail carrier is liable to the person entitled to recover for the actual loss or injury to property caused by it. However a rail carrier may establish rates for transportation of cargo under which (i) the liability for carriage is limited to a value established by written declaration of the shipper or by written agreement between the shipper and the carrier; or (ii) specified amounts are deducted, pursuant to written agreement between the shipper and the carrier, from any claim against the carrier with respect to cargo carried.

The Staggers Rail Act of 1980 gave rail carriers freedom to limit liability contractually, without Governmental oversight of the reasonableness of established rates.

Actions may be brought only against the originating rail carrier at the point of origin; against the delivering rail carrier in the judicial district where the claimant has its principal place of business if the delivering carrier also operates in that district; or at the point of destination. Claims also may be brought in the district where the loss or damage is alleged to have occurred. Claimants have a least nine months to bring claim and up to two years to file suit.

The question may be posed whether a liability regime in common for rail and motor should be reestablished in the Interstate Commerce Act. That question is not answered in this study which is focused primarily on the liability regime for motor carriage.

Rail carriers' liability for loss and damage of goods transported between points within a given country is governed by the law of that nation. Carriers' liability for goods moving between European countries is governed by the CIM Convention (Convention Concerning the Carriage of Goods by Rail). This convention grew out of the Bern Convention of 1890. It has been amended a number of times, most recently by the COTIF Convention of 1980.

Motor Carriers

Under Sec. 14706 of the ICCTA, United States motor carriers are liable to the person entitled to recover under the bill of lading or receipt for the goods. The carriers' liability is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported within the United States, or from a place in the United States to a place in an adjacent foreign country, when transported under a through bill of lading.

Secondly, a carrier may limit liability if that limit would be reasonable under the circumstances surrounding the transportation. The statute is not specific as to who should determine reasonableness of a liability limitation. The statute does not assign to either DOT or STB the function of determining reasonableness, and it appears that this issue may be left to the courts to determine in a claim for damages.

The motor carrier need not file tariffs with the STB. However the ICCTA provides that the carrier shall, upon request of the shipper, provide the shipper with a written or electronic copy of the rate, classification, rules, and practices (including limits on liability) upon which any rate applicable to a shipment is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

Third, 49 U.S.C. 14101(b) provides that a carrier and a shipper may enter into a service contract governed by specified rates and conditions. This kind of contract is not governed by the standard liability regime in section 14706. In a service contract the shipper and carrier may waive any rights and privileges relating to motor carriage.

Civil actions may be brought in either Federal or State courts against the delivering carrier in a court in a State where the defendant carrier operates. Action may also be brought against the carrier that caused the loss or damage in the judicial district where the loss or damage is alleged to have happened. Claims shall be filed within nine months and law suits shall be brought within two years.

Household goods carriers may petition the STB to modify, eliminate or establish transportation rates. Consequently the Board may limit liability to a value established by written declaration of the shipper or by written agreement between the parties (see section 7.4.5 discussion of household goods transportation).

With respect to international motor carrier operations in Europe the carriers' liability is governed by the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road) which became effective in 1961. The liability provisions of this Convention are similar to the provisions of the CIM Convention. The Inter-American Convention on international carriage of goods by road would be a counterpart to the CMR Convention for the Americas. Such an Inter-American Convention is being prepared (see Sec. 7.1).

Ocean Carriers

The Harter Act and the 1936 Carriage of Goods by Sea Act (COGSA) are the two primary United States statutes governing water carrier liability. COGSA is the United States enactment of the provisions of the 1924 Brussels Convention (Hague Rules) on the maritime bill of lading. The Harter Act, enacted in 1893, has been superseded by COGSA for shipments between U.S. ports and foreign ports. In order to limit their liability, maritime carriers almost universally stipulate in their bills of lading that the COGSA liability regime shall apply in domestic carriage (Gilmore and Black, Law of Admiralty, 2d ed., at 148). Absent such a stipulation, the unlimited liability of the Harter Act applies. The Harter Act governs prior to the time when the goods are loaded or after the time when they are discharged from the ship. Many maritime contracts of carriage stipulate that road transportation to and from maritime carriage shall be governed by the maritime liability regime.

COGSA holds the carrier responsible for liability from loss or damage arising from the carrier's breach of duty to exercise due diligence to provide a seaworthy vessel at the inception of the voyage and to properly load, stow, carry, care for, discharge and deliver the goods entrusted to him for transportation. However, water carriers operating under the COGSA regime have 17 defenses against loss and damage claims.

When the COGSA limit is less than full value, for an additional charge an ocean carrier will provide the opportunity for the cargo interest to declare a higher value.

Air Carriers

The liability of U.S. air carriers with respect to loss, damage and delay of air cargo moving in U.S. domestic carriage has been deregulated. The federal government no longer regulates carrier tariffs for carriage of domestic air cargo. The air carriers are subject to liability regimes based on the air common carrier liability regime, American Airlines v. Wolens, 115 S. Ct. 817, 824 (1995). Thus in domestic air carriage, air carriers are liable for loss and damage if caused by the negligence of the carrier or its agents. The terms of liability, including limitation, are presented by the carrier to the shipper in the air waybill, and are contractually accepted when shipment is made on that air waybill.

Internationally, the Warsaw Convention of 1929, applicable to international air commerce, became effective for the United States in 1934. The Hague Protocol was adopted in 1955 as an amendment to the Warsaw Convention, but it has not been ratified by the United States. Most other nations have adopted this revision of the Warsaw Convention.

Under the Warsaw Convention, the air carrier is liable when loss or damage is caused by negligence. Here, the burden is on the carrier to prove that it was not negligent, tending to create a de facto strict liability regime. Liability is limited to $20 per kilogram (approximately $9.00 per U.S. pound). When the limitation is less than full value, for an additional charge, air carriers will provide the opportunity for the shipper to declare higher value. Furthermore, the liability limit is not applicable if the damage is caused by the willful misconduct of the carrier, or if the air waybill fails to contain essential information, Marine Insurance v. Emery Air Freight, 24 Avi. 17,381.

Indirect Common Carriers

Under the ICCTA domestic surface freight forwarders assume the same liability for loss and damage to cargo as do U.S. rail and motor common carriers. A freight forwarder is considered to both the receiving and the delivering carrier. Domestic air freight forwarders,also called indirect air carriers, are subject to Federal Aviation Act, but exempted from DOT regulations. They tend to publish the same liability as the underlying air carriers. International air freight forwarders subject to DOT jurisdiction almost universally adopt the rules of liability of the Warsaw convention in their tariffs. The Non-Vessel Operating Common Carrier by Water (NVOCC) is treated as an indirect common carrier by water in the foreign commerce of the United States. The NVOCC is generally subject to the same liability applicable to ocean carriers but assumes greater liability for movements between foreign ocean ports and foreign inland points.

2.3 LIABILITY FOR CARGO TRANSPORTED BY MORE THAN ONE MODE

Although it may appear that the transportation of cargo constitutes a continuous process, the fact remains that much U.S. domestic and most international cargo shipments utilize two or more transport modes. Legally, however, each of these modes in fact constitutes a distinct segment insofar as the contractual relationship with the cargo interest is concerned.

Intermodal transport is characterized as "through carriage", or "through transport." One of the participating modal carriers or freight forwarders often arranges for all transportation and related services from origin to destination. The parties to a contract of carriage may stipulate that the originating carrier's liability regime shall apply to the entire journey; otherwise the liability for such transport usually is governed by the liability regime applicable to the mode of carriage at the time of loss or damage. Thus, the shipper often is exposed to differences in liability regimes, even though the goods may be in through transport and governed by a through bill of lading. Concealed damage is a particular problem in intermodal carriage. These variations in modal liability regimes raise the issue of lack of uniformity.

When a U.S. domestic shipment is moved by different modes, the liability regime will vary as above. A typical international shipment is assuredly subject to diverse modes of carriage. For example, it might move from an inland U.S. point to a U.S. port by rail, then by ocean carrier to a European port of entry, and then by rail or motor carrier to an inland point located either in the country of entry or in another nation. This intermodal handling process presents widely varying combinations of carrier liabilities for individual shipments. Thus, carrier liability while in the custody of U.S. rail carriers comprises the full value of the cargo, unless the parties contract for lesser value; liability of the connecting water carrier (assuming operations under COGSA) is keyed to the carrier's fault, and the European motor or rail movement is governed by the CMR or CIM Convention, which is more strict than the COGSA regime of liability.

2.4 UNIFORMITY IN LIABILITY REGIMES

The preceding discussion emphasizes the many differences in the liability provisions of the modal laws and conventions applicable to the movement of cargo. Although these laws vary considerably in their strictness of application and in their limitation on liability, they all provide protection in intermodal shipments from non-concealed loss or damage for which a particular mode can be shown to be responsible.

A multimodal convention would create a liability regime governing the liability of the multimodal carrier or multimodal transport operator (MTO). The multimodal convention would create a bill of lading. Multimodal cargo would be governed by a liability regime that would fill the gaps among the existing modal transportation conventions and would apply when, for any reason, the law controlling liability in transportation is unknown, for example in case of concealed damage (see Sec. 7.2 for detailed discussion). The primary effect of such a multimodal convention would be that existing transportation regimes and insurance arrangements would be left undisturbed.

2.5 LIMITATION ON LIABILITY

Table 1 gives an overview of the current monetary limits of various U.S. domestic and international liability regimes. If, for example, the freight is shipped via motor carrier to a U.S. port, then by water to a European port, and finally by rail carrier to the destination, the liability limit in case of loss or damage is for full value or a lower contracted value while moving by United States motor carrier, $500 per package while in the custody of the water carrier, and 8.33 SDRs per kilogram while carried by a CIM rail carrier. In alternative intermodal channels, the shipment is subject to equally wide variations in the monetary liability limits of carriers.

Table 1
CARRIER LIABILITY VIA ALL MODES

REGIME	HARTER ACT	C.O.G.S.A.	WARSAW	AIR CARGO	STAGGERS RAIL ACT	ICC TERMINATION ACT
MODE	WATER	WATER	INT'L AIR	DOMESTIC AIR	RAIL	MOTOR
DATE	1893	1936	1929 (U.S. 1934)	1977	1980	1995
SCOPE OF APPLICATION	To or from U.S. ports	To or from U.S. ports in foreign trade	International	Domestic	Interstate & Foreign Commerce	Interstate & Foreign Commerce
PERIOD OF APPLICATION	From acceptance through delivery	From acceptance through delivery	From acceptance through delivery	From acceptance through delivery	From acceptance through delivery	From acceptance through delivery
CONTRACT OF CARRIAGE	Requires bill of lading	Requires bill of lading or common carrier relationship	Air waybil required if requested	No uniform contract	Uniform Straight bill of lading	Straight bill of lading (several versions)
CARRIER OBLIGATIONS	Must use due diligence to render vessel seaworthy; Proper loading, stowage, custody, care & proper delivery; Reasonable, non-discriminatory service to public	Due diligence to render vessel seaworthy before and at beginning of voyage; Reasonable care & custody of cargo; Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public
BASIS OF LIABILITY	Where unseaworthiness present - presumed fault of carrier	On proof of fault of carrier	Presumed fault of carrier, but court may exonerate wholly or partly on finding claimant negligent	"Strict Accountability" (Presumed Fault Of Carrier)	(Presumed Fault Of Carrier)	(Presumed Fault Of Carrier)
BURDEN OF PROOF	On carrier to disprove unseaworthiness; Otherwise on shipper	Shipper to prove fault unless seaworthiness in issue; Clean bill of lading is evidence of receipt; Carrier burden of proving seaworthiness	On carrier to prove that it took all necessary measures or that it was impossible to take such measures	On carrier	Carrier to prove that it was free from negligence and sole cause was one of bill of lading or common law exceptions	Carrier to prove that it was free from negligence and sole cause was one of bill of lading or common law exceptions
LIMITATIONS OF LIABILITY	NONE STATED "Reasonable" limitations upheld in courts	($500US) per "package"or "customary freight unit" unless a higher value is declared; "customary freight unit" is used in U.S. only for goods not shipped in packages	$20.00 per kilo ($9.07/lb.); Willful misconduct voids all limitations of liability	None by law, but see tariffs and air waybill of individual carriers; Common law standard of "reasonableness" will apply	None, except released rates (including deductibles) and contract rates	Released rates and contract rates.
EXEMPTIONS	Live animals	Live animals, and on-deck cargo except when deviation	None	None	Fresh produce, TOFC/COFC, Intrastate traffic	Agricultural commodities, cooperatives, commercial zone, air freight & intrastate traffic
DEFENSES	Upon proof of seaworthiness, errors of navigation or management, perils of the sea, act of God, act of public enemy, act of public authority, inherent vice of goods, imptoper packing, act or omission of shipper, deviation to save life or property at sea	17 Defenses: Negligent navigation or management; Fire, unless carrier fault or privity; Perils of the sea; Seizures under legal process Quarantine restrictions Act or omission of the shipper Inherent vice of goods Strikes & civil commotions Latent defects not discoverable by due diligence Any cause arising without fault of carrier, but burden of proof on carrier	Negligent piloting or navigation; Common law defenses	Common law defenses and defenses in air waybill	(a) Common law defenses: Act of God; Act of public authority; ⇒Act of public enemy; ⇒Inherent vice of goods; ⇒Act or fault of shipper; (b) Bill of lading exceptions: Strikes, riots, etc.;	(a) Common law defenses: Act of God; Act of public authority; ⇒Act of public enemy; ⇒Inherent vice of goods; ⇒Act or fault of shipper; (b) Bill of lading exceptions: Strikes, riots, impossible highways & bridges, etc.;
CARGO INSURANCE	None	Bill of lading must offer opportunity to insure at full value	None	Mandatory for air freight forwarders only; Must show limits on airbill; Airlines must also show limits on airbill if cargo insurance carried	None	Minimum prescribed by DOT ($5,000 per vehicle, $10.000 per occurrence)

CHAPTER 3. INSURANCE AND ITS USE

3.1 GENERAL

Three types of insurance are discussed in this study: cargo (shippers) insurance, carrier liability insurance, and self-insurance.

Cargo insurance is purchased by shippers and receivers for a number of reasons which are discussed in detail below. Although the shipper may obtain insurance policies tailored to his specific needs, the type of transportation insurance most commonly purchased is an "all-risk" policy. Coverage begins when transportation commences at the point of origin and continues until the goods are delivered at the destination.

Carrier liability insurance is purchased by motor carriers to protect against a number of risks including their liability for loss and damage to cargo.

Self-insurance is a term to describe a shipper’s or carrier’s own assumption of the risk of loss and damage in an attempt to lower its costs.

3.2 DOMESTIC SHIPMENTS

When U.S. surface carriers assume responsibility for the full value of the goods, they are subject to a very high degree of responsibility for loss and damage to cargo because there are few defenses. In such cases the shipper perceives little need for the purchase of cargo insurance protection and looks to the carrier instead for indemnification. However, under the ICCTA the carriers may establish a lower limitation on liability by contract, or even by their unilateral decision. If a lower limitation on liability is established, the shipper can purchase extra protection through cargo insurance or choose to self-insure.

Motor carriers must show proof of minimum financial responsibility, for bodily injury and property damage, as a condition of registration under Sec. 13902 of the ICCTA. Under Sec. 13906, the Secretary of Transportation may register a motor carrier only if it files a bond, insurance policy or other type of approved security. The statute also specifically provides that: "The Secretary may require a registered motor carrier to file with the Secretary a type of security sufficient to pay a shipper or consignee for damage to property of the shipper or consignee placed in the possession of the motor carrier...." Brokers and freight forwarders may likewise be required to obtain insurance, bond or other type of security. DOT requires motor carriers to have insurance coverage for bodily injury and property damage liability for at least $750,000. Motor carriers must also have cargo loss and damage liability coverage in the amount of $5,000 per vehicle and $10,000 per occurrence. Freight forwarders' insurance requirements are, of course, related to the scope of their operations (see further discussion of freight forwarders in Section 7.4.2).

DOT requires notice of insurance cancellation, including cargo liability insurance, at least 30 days in advance of actual cancellation so that DOT may revoke the carrier's registration after the effective date of the insurance cancellation. (see 49 CFR1043)

Motor carriers may apply to DOT for permission to self-insure to satisfy the statutory requirements.

3.3 INTERNATIONAL SHIPMENTS

Shippers

To the extent that goods are covered by ocean or air cargo insurance the shipper, bank (if the bank holds title to the goods) and consignee are relieved of risk of loss or damage. Additionally, cargo insurance relieves the shipper of much concern over such things as exact cause or location of the loss, and the consequences of the shipper's inability to control movement of cargo in the event of strike, war or natural catastrophe. Cargo insurance can be obtained to protect the shipper's interest in the goods if the consignee agreed to, but failed to, place insurance, or refused to accept the goods.

Many other highly specialized arrangements are also possible. For example, if a loss occurs under an all-risk policy, the claimant, who might be a holder in due course of title documentation, need only prove that the loss occurred in transit and the amount of the loss. In this event the insurer controls the disposition of any claims for loss and damage.

Carriers

Carrier liability insurance coverage is adaptable to the needs and financial capabilities of the carrier. Smaller or less financially flexible carriers tend to have low deductibles and to rely on the loss adjustment facilities of the insurance company. As carriers grow in size, increasingly large deductibles are used.

Mexican carriers may apply for certificates of registration authorizing operations within the commercial zones of the U.S. border communities. These operations may be conducted under trip insurance, as opposed to continuous insurance coverage. NAFTA contemplates further phased easing of many restrictions on operations of Mexican carriers in the United States and by U.S. carriers in Mexico. The North American Free Trade Agreement (NAFTA) provides for the gradual removal of restrictions on the provisions of transportation services among the three NAFTA countries for carriage of international cargo. All foreign motor carriers operating in the United States must comply with the same Federal and State regulations that apply to U.S. carriers. Carriers applying for DOT authority to operate beyond the commercial zones along the U.S. - Mexico border, will be required to show proof of continuous insurance coverage.

3.4 CONSIDERATIONS INFLUENCING THE PURCHASE OF INSURANCE

Shippers' Transportation and Ocean Cargo Insurance

Under the various legal regimes carriers are not always responsible for non-delivery or damage to the goods. Even if the carrier is fully liable, the shipper may not be able to recover his entire claim. Furthermore, the financial ability of the carrier may remain a risk.

Transportation and ocean cargo insurance not only transfers risk but also provides the convenience of payments to the insured upon proof of loss to the insurer. For some shippers it may also obviate or reduce the necessity for maintaining a claims recovery capability. Some shippers prefer to seek recovery from the carrier and to insure only the amount of loss and damage they choose not to absorb.

Carriers' Liability Insurance

The carrier may consider the following factors in determining how to choose to manage its risk:

- the size of the carrier, as measured by such factors as gross revenues, net current asset position, or net worth to total assets ratio;

- the loss experience of the carrier, as determined by the distribution and frequency of cargo claims by size, their predictability, and any identifiable trends;

- other issues relating to insurance and risk management, for example, the cash management policy of the carrier, the overall long term total costs of claims and insurance, the current quotations for insurance at different deductibles, and the costs of providing claims services in-house; and

- the legal regime under which it must operate, including the defenses to, and limitations on liability.

There is no direct link between the carrier's liability insurer and the shipper unless one is established by statute or regulation. For instance, the carriers' liability insurance contract requires (see 49 CFR 1043) that in the event of a motor carrier's bankruptcy, the liability insurer must pay all valid claims, including the deductible. In this case the claimant would clearly have the direct benefit of the carrier's liability policy.

3.5 SELF-INSURANCE

The term self-insurance applies to any of the following situations:

- The full assumption of the risk of loss, for any number of reasons. For example, when a shipper's favorable loss experience makes transportation insurance seem an unnecessary luxury;

- Internal funding earmarked to pay for expected losses;

- The partial assumption of the risk of loss through the use of insurance deductibles;

- The treatment of certain losses in retrospectively-rated plans of insurance;

- The assumption of those risks for which indemnity is available from sources other than insurance policies;

- The transfer of risks to a subsidiary corporation such as a captive insurance company; and

- The assumption of the risk of accidental failure to insure.

In conclusion, shippers may freely decide to self-insure. Carriers' qualifications as self-insurers are subject to the scrutiny of the Federal Highway Administration (FHWA). FHWA will approve a self-insurance program only "if the carrier furnishes a true and accurate statement of its financial condition and other evidence that establishes to the satisfaction of the [FHWA] the ability of the motor carrier to satisfy its obligations for bodily injury liability, property damage liability, or cargo liability.” [see 49 CFR 1043.5, in Appendix ---] Any credible self-insurance program requires solid funding, as illustrated by the FHWA qualifications.

CHAPTER 4. ANALYSIS OF LOSS AND DAMAGE COSTS

This chapter discusses costs of insurance administration and other costs to cover loss and damage to cargo. It also describes the value of cargo being transported and the cost of subrogation.

4.1 THE ISSUE OF INSURANCE COSTS

How much do shippers and carriers spend on insurance? From the discussion in the preceding chapter on insurance it appears to be in the interest of both shippers and carriers to reduce their exposure by spreading the risks of carriage through insurance. By purchase of insurance, or by self-insurance, the parties avoid the risk of catastrophic loss because the loss falls on the insurer or is spread by self-insurance (see Sec. 3.5 for discussion of a credible self-insurance program); it does not fall directly on the shipper or the carrier. The insurer "steps into the shoes" of the insured and assumes the insured's rights and liabilities. The insured is freed of the burden of a loss, that is, to the extent that the loss is covered by insurance. The question is: when shippers and carriers do insure, how much does such coverage cost?

4.1.1 SHIPPERS' INSURANCE COSTS

The 1975 DOT Cargo Liability Study (Table 8, at page 43) ascertained that U.S. domestic shippers generally do not insure their cargo. Only 1.5 percent of cargo, measured by value, in domestic carriage was covered by cargo insurance. The cost of insurance for domestic shippers' cargo loss and damage was determined to be 0.098 percent of the value of the goods (Table 17 at page 54). In contrast, shippers covered 50 percent of international cargo by cargo insurance. The cost of insurance for international shippers' loss and damage was determined to be almost 0.108 percent of value for exports and 0.348 percent of value for imports (Tables 14 and 15 at pages 51-52)

In practice there are reasons why insurance coverage of domestic cargo differs from international cargo. One reason is that some domestic shippers contract for carriage and are sufficiently large to assume the risk of carriage as a business cost. Another reason for shippers not purchasing insurance for carriage under the Carmack Amendment to the Interstate Commerce Act was that under the Carmack Amendment, before its recent changes, cargo was either subject to the carriers' assumption of full value responsibility; or alternatively ICC could approve limited liability or "released" rates, reflecting a reasonable relationship to the value of goods. The ICC's supervision over loss and damage liability disappeared in 1994-95 with TIRRA and the ICCTA.

Under the new regime, carriers can continue to offer full value responsibility. However, they also can reduce their responsibility. Carriers are now essentially free to limit their liability to any level they choose. Consequently, carriers now tend to offer low levels of liability, leaving most of the responsibility for loss and damage of the cargo on the shipper (TCPC statements). Shippers may, in response, bargain for increased carrier liability to the extent that they have bargaining leverage. Carriers must provide shippers with the rates and terms of carriage, including any reduced liability for limits, but only if the shipper requests this information. Some shippers (TCPC statements) claim that they often receive inadequate notice of such a contractual shift of liability to them. They complain that the carriers are imposing contractual terms without their knowledge, that they are receiving insufficient notice of low contractual liability limits.

Under the new regime the shippers either cover themselves with all-risk cargo insurance, purchase excess value insurance, or cover the risk by self-insurance. Some complain that they are surprised by the magnitude of the risk when loss, damage, or delay occurs. Judging from their complaints it appears that the new liability regime has not yet significantly changed shipper's past cargo insurance coverage practices, by causing them to buy more cargo insurance.

It is apparent from transportation literature and from materials submitted in this proceeding that shippers, in particular some small and occasional shippers, are experiencing difficulty in adjusting to the new environment of loss and damage. They would like to revert to the regime in which carriers assumed the full risk of carriage.

Because of the statutory termination of the ICC and its supervision of cargo loss, damage and delay, the focus now is on the alternative of a significant statutory reallocation of the risk of carriage. Short of such a reallocation, or possibly in conjunction with such a reallocation of risk, the shippers' way out of their dilemma may be to purchase cargo insurance on a much larger scale, possibly on the same scale that they currently purchase cargo insurance for international cargo.

4.1.2 SHIPPERS' ADMINISTRATIVE COST OF LOSS AND DAMAGE

Shippers' administrative costs are the costs associated with claims processing. They include costs associated with direct and indirect personnel, overhead, communication, litigation costs, outside legal consultation, and any other items that contribute to total loss and damage costs. The 1975 DOT study showed that administrative costs for shippers ranged from 0.006% of value of goods for manufacturers to 0.011% of the value of goods for retailers and wholesalers (Table 26 at page 81, see Appendix 3).

4.1.3 SHIPPERS' NET LOSS AND DAMAGE COSTS

Additionally shippers experience costs relating to loss and damage claims that are either filed with the carrier but are not paid, or which the shippers decide, for whatever reasons, not to file. These costs are referred to as "net loss and damage." The DOT study (Table 24 at page 63) showed that domestic shippers' net loss and damage costs constituted 0.013 percent of the value of manufacturers' goods, and constituted 0.040 percent of the value of retailers-wholesalers' goods.

4.1.4 SUMMARY OF SHIPPERS' LOSS AND DAMAGE COSTS

The DOT study (Table 26 at page 81, see Appendix 3) reported that domestic manufacturers' loss and damage cost experience was a total of 0.028 percent of the value of goods. Domestic retailers-wholesalers' loss and damages were a total of 0.17 percent of the value of goods. In summary, it appears that the loss and damage costs for shipper interests are a very small percentage of to the value of the goods.

4.1.5 CARRIERS' COST OF INSURANCE

Carriers’ insurance costs include liability insurance premiums, payments made directly to shippers for loss and damage, and associated legal and administrative costs. These amounts are included as part of the cost base used to establish freight rates.

To a limited extent, as described in Chapter 3.2 above, motor carriers are required to protect against loss and damage to the cargo. 49 USC 13906 requires a motor carrier to demonstrate insurance coverage or other type of financial security in order to obtain a registration certificate from DOT. However, from a business point of view, DOT-required insurance limits often constitute insufficient protection for the carriers. Carriers need, and most obtain, more than the Government required insurance to spread the risk of carriage, thus avoiding overexposure to catastrophic losses.

The 1975 DOT cargo liability study (Table 35 at page 65) reported that the net claims paid by motor carriers constituted 1.12 percent of the carriers' operating revenue. Efforts to obtain comparable 1996 or other recent data were unsuccessful. However, the 1975 report is in line with 1992 National Freight Claims & Security Council (NFC&SC) motor carrier data (submitted by TSI) stating that claims paid constituted about 1.1 percent of carriers' operating revenue in that year. If loss and damage costs are that low, the benefits of any changes in risk allocation and thus in insurance coverage may therefore be in areas other than cost savings. For example, it may be in the area of safety because increased allocation of transportation risk causes the party responsible for that risk to be more careful; or the benefit may be in the area of trade facilitation because greater certainty about the allocation of transportation risk may encourage (small) manufacturers to ship their goods to remote markets. Other benfits are accurate determination of risk of carriage for insurers, predictability, certainty of the law, and greater ease of legal practice.

In 1975 the net costs of the insurance system constituted 0.20% of the motor carriers' operating revenues. Thus, the total liability costs of U.S. motor carriers constituted, on average, 1.32 percent of operating revenues (DOT Study, Table 35 at page 80). Because the 1975 claims ratio is in line with the aforementioned 1992 claims ratio, it may be estimated that the current costs of the insurance system are also comparable; that is, approximately 0.20 percent of the motor carriers' operating revenue. This estimate is further supported by the fact that carriers' risk exposure has declined somewhat since 1975 because carriers are now legally able to limit liability to any level they choose; it is likely that insurance cost as a share of revenues has decreased, rather than increased. It is also relevant to note that, according to 1995 data, from *Financial and Operating Statistics* published by ATA, carriers costs of property loss and damage insurance approximated one percent of operating revenues for all carriers, except household goods carriers.

Our conclusion is that the cost of cargo liability insurance is a very small percentage of operating revenues. From that it follows that a small change in the costs of carriers' insurance would constitute a very small percentage of operating revenue. Thus, increasing or decreasing a carrier's insurance coverage to assume a greater or lesser share of the risk would have a negligible impact on costs.

4.1.6 CARRIERS' ADMINISTRATIVE COSTS OF LOSS AND DAMAGE

Carriers' administrative costs for cargo loss and damage liability include costs of management, supervisory personnel, staff claim representatives and overhead for cargo claims control, payment and handling. The 1975 DOT study estimated that motor carriers' costs for administration were 0.48 percent of operating revenues for all common and contract motor carriers (DOT study at page 79). However, this figure reflects administration of all types of loss management, not only liability for loss and damage to cargo, but also bodily injury and property damage, and fire and workmen's compensation. Here too, we have received no current data from carriers, but believe that this ratio has probably not changed significantly.

4.1.7 SUMMARY OF CARRIERS' LOSS AND DAMAGE COSTS

There is no indication that the available evidence cited from 1975 is outdated in 1997. One reason may be that the loss and damage cost estimates are expressed in percentage of total value and that costs may have increased commensurate with increases in value of goods. The percentage of total value of goods spent on loss and damage generally is very small and generally has changed so little that conclusions may not have changed. The 1975 DOT study concluded that U.S. motor carriers' liability costs constituted 1.32 percent of the motor carriers operating revenue (Table 35 at page 82, see appendix 4; the cost of claims was 1.12 percent of cargo value and net cost of insurance was 0.20 percent of cargo value). This percentage approximates the 1992 NFC&SC--submitted by TSI--claim survey which found that the total claims constituted 1.1 percent of total revenues. Loss and damage claims are not a significant percentage either of the value of the goods or of operating costs. On the other hand some carriers operate on thin margins and a small increase in operating costs could have a significant impact on profits. This leads to consideration of how much attention to give to this issue if it is a small cost factor.

Finally, from a cost efficiency point of view, it is important to note the insurance loss ratio in motor carriage. Appendix -- illustrates that the current loss ratio (earned premium over incurred losses) was 62 percent in 1994; it averaged approximately 55 percent during 1990-91. Theft of cargo waw the number one problem. Thieves were most attracted to high value cargo such as electronics, liquor and tobacco.

4.2 LIMITATION OF LIABILITY

The ICCTA specifically required DOT to study whether any reform should be made in those loss and damage provisions related to limitation of liability by carriers. Several commenters have raised the issue of reallocating the risk of motor carriage by establishing a monetary limit. There is considerable practical experience with a liability regime based on such a division. Under this approach claimants can still recover the full value of their lost or damaged goods, up to a predetermined limitation. However, above a stated monetary limitation the shipper assumes the risk of carriage. Without here evaluating their validity, commenters have mentioned several bases for a liability regime *with a limitation on recovery.*

4.2.1 JUSTIFICATIONS FOR LIMITATION OF LIABILITY

The initial basis is a quid pro quo, that is, a limitation on liability enables a carrier to save money in purchasing insurance by not being exposed to unlimited risk of damages. To the extent that the market for motor carrier transportation is competitive, carriers could pass some of that savings on to customers in the form of reduced freight rates.

DOT interviews with insurers indicate that they like to know the extent of their risk exposure and would reduce insurance premiums because they would have a clearer definition of the risk that they insure. When uncertain about the size of the risk being insured, insurers have no other remedy except to charge higher premiums in order to cover themselves against unpleasant surprises. It is also easier for lawyers to advise their clients about claims when the law is certain and predictable. Presumably that would also be reflected in lower legal costs.

Uniformity of law facilitates continued expansion of commerce (Uniform Commercial Code, Section 1-102), and thus the argument can be made that a uniform limited liability regime facilitates trade; shippers may feel more secure in shipping goods to distant locations when the law is known, and thus the recovery for loss and damages is more certain.

Another basis is that a limitation on the actual value of goods shipped assures placement of a share of the risk of carriage on both the shipper and the carrier, enough so that they will be careful in packing and transporting the goods. This may be based on a view of the law of torts as being concerned with fair allocation of the losses arising out of human activities and to achieve a balance between the person causing damage and the person to whom damage is caused (Prosser, Law of Torts, 4th ed. at 6, 14-15).

A single statutory limitation, in the situations other than contractual rates, would take the place of the many “released” rate limitations authorized by the ICC when it was in existence. The sunset of the ICC has undermined the entire practice of released rates because a regulatory agency no longer functions to ensure that released rate limitations are “reasonable” and does not maintain a public file. Carriers are now essentially free to limit their liability to any level they choose.

A single statutory limitation would bring domestic motor carriage closer into line with the motor carriage of the rest of the world and with certain other modes of transportation.

If a U.S. limitation were to be considered its effects would have to be analyzed. Certainly it would have to have some relevance to the value of the goods being transported and to how high a percentage of value should be compensated. For example, in Canadian motor carriage, liability is generally limited to 2.00 Canadian dollars per pound (about U.S. $1.50 per pound). The amount of this limitation has not been revised in recent years. Liability in Mexican motor carriage is limited to approximately $0.03 a pound. While these two countries are examples of countries which limit liability for motor carriage, the size of their limitation is too low for consideration by the United States. The higher value of U.S. goods makes the Mexican limitation irrelevant; the Canadian limitation may likewise be outdated.

Historically, common carriage was based on recovery of the full value of goods lost or damaged. That principle was codified in the Carmack amendment, albeit with the qualification that lower limits could be established through ICC approved “released” rates. A U.S. limitation enabling shippers to receive full compensation for the vast majority of goods shipped would be consonant with the law of common carriage and Carmack, as discussed below.

4.2.2. SPECIAL CATEGORY OF RISK: CARGO OF EXTRAORDINARILY HIGH VALUE

Cargo of extraordinarily high value falls into a special category of risk which carriers do not carry routinely, and which both the carriers and shippers would normally expect to be handled with extraordinary care. Another aspect is that all costs of transportation are reflected in the price charged. It is not fair to shippers of ordinary cargo to be charged for the cost of the lost or damaged cargo of extraordinarily high value of other shippers.

Consequently, it is relevant to study the value of shipments carried by motor carriage. DOT received information from two sources regarding the value of motor carrier shipments. They are sufficiently similar to illustrate the concept of a limitation which would still cover the vast majority of cargo at virtually full value for loss and damage.

According to comments submitted by Transportation Solutions, Inc. (TSI), the National Freight Claims and Security Council of the American Trucking Associations (ATA) conducted a survey (1986) of the value per pound of freight carried. The purpose of the survey was to ascertain the monetary level at which various percentages of freight would automatically move under full value liability coverage. The stated objective was a liability system like the European CMR liability regime which would set a monetary limitation for automatic liability coverage.

Two versions of this survey are relevant. The 1986 survey indicated that if the limited liability dollar figure had been set at $2.00 per pound, 55 percent of the cargo would have been transported at full value. If the figure had been set at $3.00, 71 percent would have been carried at full value; and if the limitation had been set at $5.00, 85 percent would have been carried at full value.

The same survey was adjusted for the Producer Price Index for Finished Goods (PPI) and brought up to 1996; 42 percent of cargo would be carried at full value if the limitation were $2.00 per pound, 59 percent would be carried a full value if the limitation were $3.00 per pound, 77 percent of the cargo would be carried at full value if the limitation were $5.00; 93 percent of the cargo would be carried at full value if the limitation were set at $10.00 per pound. The insurance cost to carriers would be very small, as described above in Sec. 4.1.7.

A similar value of freight survey submitted directly by ATA in 1996 comes to a similar conclusion. This survey is more limited than the 1986 survey and differently formulated. However, it indicates that if the limitation were $5.00 per pound, 74 percent of goods carried as less-than-truckload (LTL) would be transported at full value; regarding truckload (TL) shipments, 87 percent would be subject to full value. If the limitation were $10.00 per pound, 89 percent of the goods carried in LTL would be transported at full value; and 96 percent carried as TL would be carried at full value.

In addition, DOT generated a comparison of traffic based upon the 1993 Commodity Flow Survey of the Census of Transportation. This does not provide number of shipments, but does provide weight in tons and value in millions of dollars. The result is generally comparable to the other data submitted in that the preponderance of traffic is valued at less than $5 per pound. See comparison of the three surveys summarized in *Value of Shipments,* Table 2.

Several consequences of a statutory limitation on liability need to be pointed out. In regard to the current use of value classification of cargo for the purpose of limiting liability by released rates the value rating or classification of individual categories of cargo could be eliminated (see discussion in Sec. 5.1.4). Because freight rates are established more and more on a unilateral basis by individual carriers, shippers may benefit from the openness and predictability of one uniform limitation. Furthermore, if the limitation is close to full value of all cargos, it will function as full value compensation for virtually all shippers.

The insurance consequences of a uniform limitation would be favorable to carriers and shippers. Both would be able to purchase insurance at lower rates, because both would benefit by removal of the extraordinarily high value cargo from the transportation cost of ordinary carriage. It may safely be expected that such valuable cargo will be handled differently, anyway. Finally, the carriers' pressure on shippers to disclose the value of cargo would significantly decrease if not disappear, because there would be no need for that kind of information on ordinary cargo. There would be great economic pressure on both shippers and carriers to carefully package and handle the goods (see description of subrogation of claims under the CMR Convention below).

4.3 SUBROGATION OF CLAIMS

Carriers normally acquire insurance in the form of liability insurance or they qualify for self insurance (see discussion in Sec.3.5) Some shippers in truck transportation obtain cargo insurance, although not as often as in other modes of transportation. A significant amount of cargo risk is not covered by cargo insurance. When both carriers and shippers are insured, cargo claims tend to be settled among their insurers. If claims are litigated, the litigation will be among insurance companies that have become subrogated to the losses of their customers. Subrogation is the act of substituting one creditor for another, that is, the cargo insurer succeeds to the rights of the shipper in the authority to collect from the carrier on loss and damage claims, after having indemnified the shipper pursuant to the cargo insurance coverage.

In subrogation of claims the 1975 DOT cargo liability study ascertained (at page 87, based on information from the American Institute of Marine Underwriters), and DOT staff has more recently verified (meeting with insurers in 1996), that cargo insurers in maritime claims recover from carriers' liability insurers approximately 20 percent of the claims paid to insured shippers. (Half of the subrogation recovery was consumed by the legal fees involved in subrogation recovery, DOT Cargo Liability Study id.)

No information is available regarding subrogation recovery in U.S. motor carrier liability. One reason for the scarcity of information is that, as noted earlier, shippers often do not purchase cargo insurance. Thus, insurance companies do not have significant statistical information.

The European subrogation experience with motor carriage claims under the CMR liability regime shows that both shippers and carriers tend to buy insurance coverage. Shippers buy full coverage and the carrier buys full liability insurance. Claims are settled between the carriers' and shippers' insurers in accordance with the terms of the CMR liability regime. In these settlements the cargo insurers recover, in their recourse actions, about 25 percent of their loss, that is, 25 percent of what they paid out in compensation to the shippers. Consequently the cargo insurers assume responsibility for 75 percent of the risk of loss, damage and delay, the cost of which they pass on their customers, the shippers (see discussion of motor carriage in Sec. 5.4.).

Table 2
VALUE OF SHIPMENTS
FREQUENCY OF SHIPMENTS BY VALUE RANGE
TRUCKLOAD AND LESS-THAN-TRUCKLOAD

VALUE RANGE	**<$2.50**	**$2.50-$5.00**	**$5.01-$7.50**	**$7.51-$10.00**	**$10.01-$15.00**	**$15.01-$20.00**	**$20.01-$25.00**	**>$25.00**
ATA PROPOSAL								
No. of LTL Shipments	3,312	1,944	701	386	310	139	72	258
% of LTL Shipments	46.50	27.30	9.84	5.42	4.35	1.95	1.01	3.62
LTL Cum. Percent	46.50	73.80	83.64	89.06	93.41	95.37	96.38	100.00
No. of TL Shipments	204	36	16	8	5	3	0	3
% of TL Shipments	74.18	13.09	5.82	2.91	1.82	1.09	0.00	1.09
TL Cum. Percent	74.18	87.27	93.09	96.00	97.82	98.91	98.91	100.00
TSI, Inc.								
No. of TL/LTL Shipments	6,395		1,169		670			
% of TL/LTL Shipments	77.0		16.0		8.0			
TL/LTL Cum. Percent	77.0		93.0		100.0*			
USDOT (1993 CENSUS)								
Tons (OOO)	927,012		15,466		15,183			
Total Tons Cum. Percent	96.7		98.3		99.9			
Value $(Millions)	1,550,363		216,259		413,381			
Total Value Cum. Percent	69.2		78.9		96.9			

CHAPTER 5. CURRENT ISSUES IN CARGO LIABILITY

5. INTRODUCTION

The law of common carriage is based on three principles; (1) the common carrier's duty to provide service (that is, to serve everyone who requests transportation services); (2) the common carrier's duty not to discriminate (that is not to charge discriminatory rates); and (3) the common carrier's strict liability for carriage of goods (for further discussion, see Basedow, Common Carriers Continuity and Disintegration in U.S. Transportation Law, 18 ETL, 251, 280). Conceptually, motor carrier liability for loss, damage, or delay to cargo is governed by the law of torts rather than by the law of contract (id.. at 281). At common law the legal difference between tort and contract is reflected in the damages (Prosser, Law of Torts, 4th ed., ch. 16). The reason for application of the law of torts is the common carrier's duty to serve everybody, (however, the liability regime may be superseded by regulatory or contractual provisions). Over time, the law of common carriage became regulated by statute, in particular the Interstate Commerce Act. As discussed previously the latest changes to the Act are TIRRA and the ICC's demise through the ICCTA of 1995. (All citations are to the Interstate Commerce Act, as amended most recently by the ICCTA of 1995, unless otherwise stated.)

The primary framework for discussion of issues in this chapter will be the factors and criteria which the ICCTA requires the Secretary of Transportation to consider for this study of cargo liability. They are:

a. Efficient delivery of transportation services
b. International harmony
c. Intermodal harmony
d. The public interest
e. The interests of carriers, and
f. The interests of shippers.
g. Limitation of liability (Particular emphasis was given to this criterion, which will be discussed in the context of the liability regime).

Basically, a cargo liability regime is a method for allocating the risk of carriage. In theory, the entire risk of carriage could exclusively be allocated either to the carrier or the shipper. In practice, such a unilateral risk allocation would remove the incentive for the shipper or carrier to be careful in handling the goods. Such unilateral risk allocation is neither good torts law nor is it in the public interest. Consequently, it is the view of DOT that both shippers and carriers should bear a burden of responsibility that is in accord with their self interest in careful transportation and successful completion of the carriage, without loss, damage, or delay.

We begin by assuming that the risk will be substantially shared by identifying individual parts within the total bundle of elements constituting cost, to determine how those elements can be divided up. It is important to understand how each part within the bundle affects the other parts. For example, the carrier could be made liable, with few defenses to liability; but if there were a very low limit of liability, the consequence would be to allocate almost the entire risk of carriage to the shipper. The same result would occur if the liability were high but accompanied by many defenses to liability. Thus, there are several 'levers' which can be moved up or down to effect a strict, weak, or medium liability regime (see chart below).

VARIABLES IN A LIABILITY REGIME

NUMBER OF DEFENSES	LIABILITY LIMIT	INTENTIONAL TORTS ESCAPE VALVE	LIABILITY LIMIT PER PACKAGE OR SHIPMENT	SHIPPER/CARRIER COMPARATIVE LIABILITY
	HIGH	NO	SHIPMENT	YES
MEDIUM	MEDIUM	WEAK	OTHER FORMULA	OTHER FORMULA
MANY	LOW	YES	PACKAGE	NO

For example, a greater share of the risk of carriage could be allocated to shippers by adopting a comparative liability regime (described below). Likewise, a greater share of the risk could be allocated to carriers if they gave up their virtual freedom to limit their liability to any level they choose, and instead accepted a fixed liability limitation (for instance $9.00 per pound). There are many ways that carriers and shippers can modify the impact of any policy. For example there could be an escape valve allowing shippers to exceed the fixed limit in case of loss, damage or delay caused intentionally by the carriers. If a liability limit is adopted, that limit could be linked to the weight of the entire shipment or to the individual package within the entire shipment (the weight of the individual package would tend to be less and therefore compensation would be lower). Finally the carriers' defenses to liability (described below) could be reduced, thereby shifting a greater percentage of the risk from the shipper to the carrier; or the defenses could be enlarged, thereby shifting more of the risk to the shipper (note that there are 17 defenses to liability in maritime carriage). As a baseline, however, a fair allocation of the risk of carriage requires placing a significant burden of responsibility on both shippers and carriers.

5.1. EFFICIENT DELIVERY OF TRANSPORTATION SERVICES

The Act, 49 USC 14706(g), requires the Secretary of Transportation, in conducting the cargo liability study, to consider the efficient delivery of transportation services.

An efficient legal regime would be a regime in which the costs of loss and damage, and indeed of transportation, are as low as possible. The preceding chapter discussed the costs of loss and damage. While efficiency also means a regime in which cargo is transported safely and expeditiously to its destination, this discussion will primarily focus on an efficient liability regime.

5.1.1 EFFICIENT LIABILITY REGIME

This section will discuss efficiency of the liability regime, defenses to liability, limitation of liability, time limits on “stale” claims, and administration of the liability regime, including notice to shippers of the applicable liability regime. Secondly, the section will focus on efficiency of the bill of lading (which may control the liability regime); the contents of the bill of lading (including notice to shippers of the contractual terms of carriage); the need for uniformity; speedy and efficient transmission of bills of lading by electronic data processing; and the need for the parties to add to the bill of lading any particulars which are unique to each individual shipment, such as origin and destination and handling instructions.

5.1.2. LIABILITY REGIME

The risks of motor carriage are allocated to carriers and shippers through the liability regime, as stated in the Act, 49 USC 14705(a)(1). The Act currently provides that "the liability... is for the actual loss or injury to the property caused..." In other words the standard of liability is strict liability of carriers to the shipper for motor carriage. It is qualified by defenses as discussed below.

5.1.3. FIVE DEFENSES TO LIABILITY

The U.S. Supreme Court case of Missouri Pacific RR Co. v. Elmore & Stahl, 377 U.S. 134 (1964), held that the Act codifies the common law that a motor carrier is liable for the cargo transported, unless the carrier can prove that the loss or damage was caused by any of the following five defenses:

(a) Act of God: This defense is defined as an event which occurred without intervention of a human being or one that could not be prevented by exercise of human care. Lightning would be an example of a Act of God. The carrier would remain liable if its negligence mingled with the Act of God (see 13 CJS Carriers § 80, at page 159). Because an Act of God is outside the influence of either the carrier or the shipper, any change in this defense would not affect safety or efficiency of carriage. Thus this study does not recommend a change to the defense.

b) Act of the Public Enemy: The defense known as "act of public enemy" involves an event which is outside the influence of either the carrier or the shipper. This defense may be invoked if loss, damage or delay is caused by an enemy military force. No change in safety or efficiency would occur by a change in this defense. Consequently no change is recommended.

(c) Act of the Shipper Himself: This defense may be invoked by the carrier if the shipper fails to pack or load the freight properly. The carrier must prove that the shipper's act was the sole cause of the loss or damage and that the carrier was not contributorily negligent. The test is: what is the cause of the loss or damage? Only if the shipper's negligence was the sole cause of the loss and damage does the carrier escape liability; (see Elmore & Stahl, supra, at 141).

Comparative negligence, that is, apportioning damages to the parties in proportion to their degree of negligence, currently is not applied by U.S. courts to motor carriage. However, comparative negligence is applied in the law of maritime transportation and is increasingly being applied in U.S. law of torts (see Prosser, Law of Torts, 4th ed. 433-439). Modern international transportation liability regimes also have tended to adopt comparative negligence. For examples, see the CMR Convention on European motor carriage, Article 17(5), and the Hamburg Rules on Carriage of Goods by Sea, Article 5.

The current motor carrier liability regime of contributory negligence causes a hardship because it places on the carrier the entire burden of loss in those cases where both the carrier and shipper are at fault. For example, the carrier’s deviation from an agreed route might be slight, and the shipper’s bad packaging may be by far the more significant cause of the damage; however, the shipper goes free of all liability. This is neither fair nor efficient. Consequently, in view of the wide experience with comparative negligence in transportation, it is recommended that comparative negligence be considered for U.S. motor carriage.

(d) Act of a Public Authority: This defense may be used, for example, if public authorities, such as the police, seize the cargo as evidence in a criminal prosecution. This defense is rarely invoked.

(e) Loss or Damage by Inherent Vice or Nature of the Goods: Missouri Pacific RR Co. v. Elmore and Stahl, 377 U.S. 134, 136, explains the defense of inherent vice as being based on "existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." The U.S. Supreme Court found in Elmore & Stahl that the deterioration of melons being transported was caused by a combination of inherent vice and negligence. The Supreme Court found that because the carrier was not able to prove the absence of carrier negligence, the carrier was liable. If comparative negligence had been applicable, the compensation would have been shared according to the extent of the carrier's and shipper's negligence or inherent vice. But under the present interpretation of liability, the carrier was held wholly responsible. (see discussion of comparative negligence in paragraph 6.1.3(c) above).

In sum, for a prima facie case of carrier liability, the shipper merely needs to show that it delivered the goods to the carrier in good condition, that the goods arrived at their destination in damaged condition, and the amount of the damages. Then the burden is on the carrier to prove it carrier was not negligent, in that one of the five defenses to liability indicated above can be invoked (Elmore & Stahl, supra, at 137, 138).

The Supreme Court explained in Elmore & Stahl that the law of liability is based on the premise that the carrier is in possession of the goods during transportation and thus has peculiar knowledge of the facts and circumstances concerning the loss or damage. For that reason the law places on the carrier the burden of responsibility for that loss and damage which the carrier cannot explain as being encompassed by one of the five defenses to liability. (See Sec. 7.1)

5.1.4 LIABILITY LIMITATION, INCLUDING PERIODIC ADJUSTMENT

Limitation of Liability

Sec.14706 specifically requires examination of liability limitation for loss, damage and delay. It was considered contrary to public policy to permit the carrier to contract out of liability. That changed with the Motor Carrier Act of 1935, which codified motor carriage liability in the Interstate

Commerce Act. In that codification, carriers were given the legal right to seek release from unlimited liability and were permitted to file released rates with ICC. Released rates in effect provided the possibility of a limitation on liability. In approving a released rate, the Interstate Commerce Act required that the ICC determine whether the proposed released rate was reasonable under the circumstances surrounding the transportation. Further, ICC required (1) that the carrier file the rate, and keep it on file; (2) that the shipper be presented a choice between two or more levels of liability; and (3) that the carrier issue a receipt or bill of lading agreeing to full value or the lower-than-full-value limitation in the released rate. The reason for keeping the released rate on file with ICC was to give shippers at least constructive notice of the applicable released rate. The reasoning is that through the filing the shipper would either know, or should know, the rate. Shippers' knowledge of the liability limit would be presumed from ICC filing.

Conceptually, the released rate filing regime changed with adoption of TIRRA, because TIRRA eliminated the requirement for filing individually made rates. After adoption of TIRRA, these released rates were not accessible at the ICC because they were no longer kept on file. Further change occurred when the ICC itself was eliminated by the ICCTA, ending ICC oversight of the reasonableness of lower-than-full-value released rates. Congress did not specifically transfer this function to either STB or DOT, and thus the administrative review of rate reasonableness lapsed.

As a result of TIRRA and ICCTA, shippers often do not now know the level of limitation established by the carriers. Sec. 10706 of the ICC Termination Act provides that, "upon request of the shipper," the carrier shall provide written or electronic notice of the rate, classification, rules, and practices on which the applicable price for the carriage is based. The nature of notice was altered so that shippers can no longer be presumed to know the rate which the carriers maintain in their own filing systems, even when that system is open to the shippers upon request. The legal significance is that shippers can no longer be charged with constructive notice of the limitation (constructive notice means that they can be legally presumed to know the required filing regardless of whether they actually know). The shippers' ability to participate in establishing a <u>reasonable</u> limitation was weakened when rate filing with the ICC disappeared. Moreover, the independent arbitration of reasonableness which had been available through the ICC disappeared. The carriers are now more or less free to limit their liability to any level they choose.

At the present time, shippers are able to receive full value recovery for cargo loss, damage, or delay, but at a higher price than the rate charged under the liability limitation established by the carriers for a particular kind of cargo. If shippers do not pay for the higher cost of full value recovery, they are subject to (sometimes very) low limits on liability established by carriers. Furthermore, information about the new rate filing system on liability limits now originates with the carriers, not with a regulatory agency, further undermining the legal presumption of knowledge. It is noteworthy that the courts have determined in a series of cases (some contracts are embodied in a bill of lading; see Chapter 6.2) that contracts on liability limitation are not in fact consensual agreements, because such contracts tend to be “adhesion contracts” in which "the shipper has little choice but to accept carriers' terms." (See U.S. v. Atlantic Mutual, 343 U.S. 236,244 (1951); Fine Foliage of Florida v. Bowman Transport, 698 F. Supp 1566, affirmed 901 F. 2d 1034 (11th Cir. 1990). However this legal assumption does not apply to all cases. For example, large shippers, as opposed to small shippers, tend to produce their own bills of lading, which the carriers then accept. That is the reason why contract carriage is not governed by section 14706 (see discussion in Sec. 7.4 on contract carriage.) In fact, according to an Ohio State University Study, 72% of all traffic now moves under contract, and by the year of 2000, 84% will move under contract. In other words, Section 14706 liability affects a relatively small portion of traffic.

The new system in effect after enactment of TIRRA and the ICC Termination Act is conducive to disputes and to litigation. The presumption of notice of the limitation (by "constructive notice") had its basis in the statutory requirement of filing with ICC. However, in the absence of constructive notice of the information on file in the public file of a regulatory agency, the shipper does not have a significant choice between the full value recovery and a lower liability based on a cheaper rate than which provides for full value recovery.

Comparison could be made to railroad carriage where there is no filing of released rates and liability is regulated by contract whether the freight is moving under contract or a tariff. However, rail carriage is for many reasons different from motor carriage. Congress accepted this difference in the Staggers Rail Act of 1980, which provided freedom from ICC oversight of reasonableness in ratemaking for a substantial portion of rail transportation; but Congress retained ICC oversight of reasonableness over motor carrier released rates in the Motor Carrier Deregulation Act of 1980.

For Sec. 14706 type carriage (that is, carriage other than contract carriage) the current situation creates uncertainty regarding liability limitations because neither the shipper nor carrier (much less carrier's truck driver or shipper's clerk on the loading platform) focuses on the limitation at the time of shipment. Ambiguity about liability can be caused by the shipper failing to read or even to notice small print on the back of the bill of lading warning of a low limitation. The shipper often insists on indicating full value coverage on the front of the bill of lading, while the carrier's preprinted bill of lading states on the backside that regardless of any shipper statements to the contrary, the carrier will only pay up to a limitation described directly or incorporated by reference on the backside of the bill of lading. This situation is illustrated by Bio-Lab v. Pony Express, 911 F.2d 1580 (11 Cir. 1990) in which the court found that the shipper had stated full value coverage of the cargo on the front side of the bill of lading and did not have actual knowledge of the carrier's statement on the back side limiting liability. The Federal Court of Appeals held in favor of the shipper.

Operation of a Limitation on Liability

Liability regimes which operate with a limitation on liability have as their objective not only to allocate the risk of carriage but also to establish more uniformity of the terms of carriage. For example, COGSA provides a limitation of $500 per package; the Warsaw air waybill provides a limitation of $20 per kilogram (about $9.00 per U.S. pound); the European CMR Convention on road carriage establishes a limit of 8.33 SDRs (approximately $5 per U.S. pound). The European CIM convention on liability for rail carriage establishes a similar limitation. All these limits are fixed only on the downside, in the sense that the parties to a contract of carriage cannot enter into a valid agreement on limits lower than the treaty's specified amount. They can only enter into agreements on higher limits.

There are other reasons for this rule. One reason is that the carrier-shipper contract of carriage in U.S. common carriage is considered to be a contract of adhesion, in which shippers typically do not have much choice or knowledge of limits of liability except to adhere to the contract presented to them by the carrier. Thus the law provides a reasonable limitation. Secondly, a fixed limitation establishes a known amount on which shippers and carriers can rely when purchasing insurance and which the insurance companies can readily use to evaluate the risks against which they are insuring. Trade depends much on business usage; customary business relationships can be established and be relied on when limits are stable. In fact, only a stable and uniform limitation on liability may have value.

A uniform fixed limitation would have further effects. The parties would not have to classify the goods strictly to establish released rate limits on liability because the uniform fixed limitation itself would divide the risk of carriage. Carriers and shippers might wish to classify cargo for other reasons, for example to establish different prices for different kinds of cargo to establish their different propensities for loss, theft, and for all other factors in pricing of transportation; classification could also have valuable use in contracts carriage.

Neither air cargo nor maritime cargoes are classified as to value and they are illustrative for how motor cargo liability could be limited. These also differentiate cargoes for the purpose of pricing transportation. For example maritime shipments of coal are priced differently from shipments of automobiles or computers. Thus, by eliminating the need to classify cargo by value for the purpose of establishing released rate limits, the motor carrier transportation would be freed of a regulatory burden which is a relic of the ICC. Moreover, the shippers' complaint, that the carriers have been using classification--which is in carrier control--against them, would disappear.

Finally, a fixed statutory liability limitation removes the need for government oversight because the courts would administer the liability limitation as they do now in maritime transportation, air carriage, and European rail and road carriage. The courts have considerable experience in deciding on liability limits, having dealt with such limits in other modes of transportation, and through other formal limitations (for example, statutes of limitation and court deadlines).

High Value Commodity Exception

In principle, full value compensation is a desirable objective. (See discussion in Section 4.2). However, actual full value compensation would have to cover loss of unusually high cost cargo such as gold, expensive computers, etc. Full value recovery for these exceptionally high value goods is cross-subsidized by the charges for freight of more moderate value, for which restitution is less expensive. Carriers purchase long term liability insurance, the cost of which is spread generally on all freight, regardless of value. The cost of self-insurance would be spread the same way.

In liability regimes with limitation on compensation, such cross-subsidy is an unfair economic subsidy between classes of shippers. In the deregulation debate DOT has consistently opposed cross subsidy of one economic activity by another activity; for example, a successful air route should not be unduly used to cross subsidize a poor air route; instead, the passenger or the lucrative route should benefit directly in the form of reduced fares. Likewise in carriage of cargo, the very highest value goods constitute an exceptional risk and it is reasonable to require owners of such exceptional risks to buy special insurance. A uniform liability limitation can be established which provides full value recovery for virtually all cargo, except for a relatively small volume of exceptionally high value cargo.

Statistics (see Sec. 4.1.5, including Table 2, on page) on the value of cargo carried indicate that the limitation currently in effect on international air freight, $9.00 per pound, would cover about 90 percent of all truck traffic carried for full value. Only the most costly goods would require supplemental insurance for full value recovery. Such a limit, while providing most shippers full value recovery, would also provide carriers with a fixed limitation against which they could insure. It would protect carriers from their greatest threat, the catastrophic loss. It would not cost shippers very much (see Chapter 4, Analysis of loss and damage costs). It would also establish a limit which is close to internationally established limits (air and road). A liability limit at this level is worth considering.

Periodic Adjustment of Limitations

During its existence ICC was expected to oversee, on a continuing basis, the reasonableness of released rates. That function could be construed to include an obligation to adjust the limitation of liability if the level of that limitation were to become eroded by inflation. It is very important that a liability limitation be updated. The only problem with placing a limitation on liability has been that the limitation becomes too low over time when it is not updated for inflation. The best example is the U.S. experience with the limitation of liability for air passenger carriage under the Warsaw Convention: participating countries were unable to agree on updating the limits established in 1929, therefore the limits remained static. An automatic inflation clause would have avoided the problem.

Because ICC oversight of reasonableness of released rates is no longer available to update rates, another way of updating liability limitation for inflation is needed. The most direct way of updating the limitation would be simply to adjust the limitation periodically in accordance with a prominent index of inflation such as the consumer price index (CPI). Many economic factors such as wages and benefits are regularly and automatically updated by the CPI for inflation. The same could be done with limitation of liability.

Other possible ways of updating limits would involve some regulatory activity by the government. For example, adjustment of the limitation could be based on general increases in value of goods, costs of transportation, insurance, and factors closely related to transportation. However, any governmental involvement is inefficient in comparison with automatic CPI adjustment; furthermore, from a public policy point of view, any government involvement in adjustment of liability limitation is undesirable.

5.1.5. CARRIERS' INTENTIONAL DAMAGE TO CARGO

It may appear improbable that a carrier would ever deliberately cause harm to a customer's cargo. That would be bad business practice and a sure way to lose customers. However, what appears to be improbable, is not so. Cargo transportation has had considerable case law experience (see 49 U.S.C.A. 1502 for extensive case law on this subject) with the principle that the carrier should not be permitted to limit liability in cases of intentional torts, that is, when the carrier intentionally causes loss, damage or delay to the goods. In air carriage, the Warsaw Convention, Article 25, states that air carriers shall not be permitted to limit liability if loss, damage or delay is caused by the carriers' willful misconduct. Maritime carriers may jettison cargo deliberately to save the ship. Furthermore they also have case law experience with willful misconduct. The so-called "Visby Rules" (maritime bill of lading) include a provision on intentional damage to cargo. When a maritime bill of lading is issued in a country which has adopted the Visby Rules, the carriage becomes subject to this law. Visby Rules, Article 4(5), provide that:

> Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability ... if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that the damage would probably result.

In the Matter of Tecomar, 765 F Supp. 1150 (USDC N.Y., 1991) a U.S. District court denied limited liability to a maritime carrier. The Court used the extensive case law defining and interpreting willful misconduct in air carriage under the Warsaw Convention. The court determined that the carrier's actual knowledge of the willful misconduct was required. The Tecomar case fit that analysis in that the maritime operator deliberately concealed that the ship was unseaworthy. Thus, the court did not permit the operator to limit liability for cargo lost when the ship sank due to its unseaworthiness.

Forfeiture of limitation on liability in the event of willful misconduct is a well-recognized escape valve to limited liability. Whether such an escape valve should be established greatly depends on whether the limitation on liability is high or low (see chart showing various levers). When a limitation is high enough to cover virtually all cargo carried, the escape valve would not come into use very often. If it is low there would be much pressure to break the limit. Finally, such an escape valve serves to deter intentional torts.

Punitive damages may be demanded by shippers in cases of intentional loss, damage, or delay. However, U.S. courts have determined (Floyd v. Eastern, 113 L. Ed. 2d 569 (1991)) that the willful misconduct provision of the Warsaw Convention precludes punitive damages. Only actual damages are permitted to be recovered in situations where the limitation is broken through proof of willful misconduct.

The utility of the intentional tort escape valve depends much on the way it is worded. If it is defined as requiring the carrier's actual knowledge of the intentional tort (for example, the court found that the operator deliberately concealed the unseaworthiness of the ship in Tecomar), then carriers should have little cause for objection to adoption of this legal principle, because intentional torts are just not good business practice.

5.1.6. TIME LIMITS ON BRINGING CLAIMS AND ACTIONS

The Interstate Commerce Act, Sec. 14706(e), provides that carriers must allow claimants no less than nine months to file claims and no less that two years to file civil (court) action. The time period for bringing civil action runs from the date when the carrier gives a claimant written notice that the carrier declines any part of a claim. These time limits are not out of line with time limits of other transportation liability regimes. For example, the Warsaw Convention, Article 29; the Athens Convention, Article 16; and the Hamburg Rules, Article 20, all provide for a two year statute of limitations.

Consideration of efficiency and international harmony, as well as the ease of keeping the familiar time limitation, are arguments in favor of continuing the existing time limits. There are no strong arguments for changing the time limits.

5.1.7. NOTICE TO SHIPPERS OF APPLICABLE LIABILITY REGIME

The discussion of released rates in Sec. 5.1.4 above described the notice problems caused by TIRRA and the 1995 ICCTA. As described in Sec. 5.1.4, the section 14706 shippers (that is motor carriage other than contract carriage) claim that they are now left in legal uncertainty. Uncertainty is conducive to litigation. That is an inefficient way of transacting transportation agreements. Shippers require notice of the applicable liability regime and limits to the carrier's liability; only actual notice will suffice. It is neither efficient nor a good business practice to incorporate by reference in the bill of lading a limitation to liability, the terms of which are located only in the carrier's file.

Actual notice may necessitate sufficient large type on the front of the bill of lading, with space for acknowledgment by the shipper. Additional notices in the area where the transaction takes place may also be required. A statutory notice solution, such as that provided by COGSA, or in international air carriage may be necessary. Such a solution would not require Government regulation. It could be regulated privately by uniform conditions of carriage (for example the conditions of carriage of the International Air Transport Association). A regulatory solution is not recommended because that would require regulatory involvement by either the Surface Transportation Board or by DOT. The clear Congressional intent in the ICCTA was to do away with government involvement in regulation.

5.1.8 CONCLUSION

This chapter has described the allocation of the risks of transportation and ways in which the risks could be reallocated. It also describes how the risk allocation of the law of common carriage became codified in the Carmack Amendment but how that regime changed with the Motor Carrier Act of 1980, TIRRA and ICCTA. Section 14706 requires examination of liability limitation for loss, damage and delay. The chapter fulfills this assignment by examining the bases for liability limitation and ways in which lmitation might be established, but also in which a limitation might be broken in the case of intentional torts.

CHAPTER 6. BILL OF LADING ISSUES

Essentially the bill of lading is a contract of carriage. It may be subject to a master contract of carriage between the shipper and the carrier; otherwise, it is the only contract. Motor carriage is subject to the Bills of Lading Act, 49 USC 80101. The Bills of Lading Act defines two kinds of bills of lading: negotiable or nonnegotiable. Negotiable bills of lading are made out to the order of a consignee and the carrier may only deliver the cargo to the person in possession of the original bill of lading. When a negotiable bill of lading is negotiated, the person to whom it is negotiated receives title to the goods, 49 USC 80105.

In actual practice, negotiable bills of lading are virtually never used in U.S. motor carriage because the transportation occurs too quickly to make negotiability feasible. Non-negotiable bills of lading are customarily used. They are commonly known as straight bills of lading; that is, they are not made out to the order of a person. They are consigned to a specific person. "A common carrier issuing a nonnegotiable bill of lading must put 'nonnegotiable 'or' not negotiable' on the bill" (49 USC 80103).

A straight bill of lading does not convey title to the shipment. The straight bill of lading is merely a receipt for the goods, stating the terms and conditions of carriage; it serves as evidence of the transaction. The U.S. Supreme Court has held that "a bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers;" see Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982). Use of straight bills of lading in motor carriage is solidly established (see 49 CFR Part 1051 and 61 Fed. Reg. 54,706 discussed in section 5.1.3.2.)

More and more goods move by several modes, and most shippers and carriers would benefit from a multimodal bill of lading. The need for a multimodal bill of lading is caused by the legal differences between the bills of lading of the various modes of carriage. The international air waybill is governed by the Warsaw Convention; Articles 8 and 9 state the requirements. Failure to state essential documentary requirements in the air waybill results in forfeiture of the carrier's right to limit liability. The maritime bill of lading is governed by COGSA, which is specifically made subject to the Bill of Lading Act.

Bills of lading for rail and motor are subject to the Interstate Commerce Act, as amended by the ICCTA. Section 14706 of the Act provides that a motor carrier subject to the Act, "shall issue a receipt or bill of lading for property it receives for transportation," and further provides that "failure to issue a receipt or bill of lading does not affect the liability of a carrier."

6.1. NEED FOR BILL OF LADING UNIFORMITY

Uniformity facilitates commerce, provides efficient delivery of transportation services, establishes harmony, and is in the public interest. These are the policy reasons for the Bill of Lading Act, the maritime bill of lading, the Warsaw air waybill, and the European (CMR) bill of lading.

The sunset of ICC adversely impacted uniformity. When ICC regulatory oversight ended, both shippers and carriers began to change the bill of lading to their advantage. Currently, three different so-called “uniform” bills of lading are being offered; each is favorable to its authors. Carriers offer a bill of lading which they have prepared. The TCPC has prepared a “uniform” bill of lading for its members. NASSTRAC has also prepared a “uniform” bill of lading. These competing bills have promoted a lack of uniformity and legal confusion. Other groups, such as freight forwarders, are especially concerned, and urge a single uniform bill be established. The freight forwarders, TCPC, and others strongly urged DOT to study the possibility of one uniform bill of lading that would be impartial and uniform.

6.2 CONTENTS OF THE BILL OF LADING

ICC exercised its jurisdiction and approved (see 49 CFR 1051 and 61 Fed. Reg. 54706) the motor carrier bill of lading formulated by the National Motor Freight Classification Committee. The front side of this bill of lading contains many of the required documentary details describing freight and transportation. The back side contains the terms and conditions of carriage.

When TIRRA eliminated tariff filing for individually-determined rates, and when ICC itself was sunsetted by the ICCTA, not only the filing requirement but also the place of filing disappeared; ICC oversight also disappeared. These changes drastically reduced shippers' notice of the requirements, terms, and conditions of the motor carrier bill of lading. Even more significantly, it reduced the shipper's ability to influence the bill of lading requirements, terms, and conditions.

In a limited fashion, the Federal Highway Administration (FHWA) has begun to exercise jurisdiction over motor carrier bills of lading. On October 21, 1996, in 61 Fed Reg, 54706, at 54708, FHWA redesignated ICC regulations on Receipts and Bills of Lading in 49 CFR Part 1051 as 49 CFR Part 373, Subpart A. This part (Sec. 1051.1 now 273.101) states that the motor carrier shall issue receipts or bills of lading containing (a) names of consignor and consignee,(b) origin and destination points, (c) number of packages, (d) description of freight, and (e) weight, volume or measurement of freight (if applicable to the rating of that freight). This regulation (49 CFR 1051.2 now 373.103) incorporates a long list of required documentation, including the rate assessed and charges due. All documentation required are details that the parties normally would record. FHWA activity raised the issue of whether the Government, in an era of deregulation, should exercise this kind of oversight.

6.3 WHICH DOCUMENTATION DETAILS NEED TO BE UNIFORM?

Some fundamental issues are raised by the above situation. All parties (shippers, carriers, insurers, freight forwarders etc.) strongly wish to establish a uniform bill of lading within which all the terms are fairly stated.

With one exception, documentation details of the bill of lading are not in contention. Almost all of the details in a bill of lading are details that both carriers and shippers would normally expect to provide, because these details establish more certainty about the transportation. However, shippers have objected to providing information about the exact value of the cargo being shipped. Shippers argue that thieves may learn about valuable cargo if value is stated in the bill of lading: it is an invitation to steal. On the other hand, carriers have said that they need to know the value of the cargo in order to determine how much to charge and the degree of care which the cargo requires.

The real issue is how to achieve uniformity. It is useful to look at how other modes of transportation achieve uniformity. In maritime transportation, basic uniformity is established by COGSA. No regulatory oversight exists or is required. A similar legal basis for a bill of lading exists for air carriage. The Warsaw Convention, a treaty (equal to Federal law), established the international air waybill. Many countries have adopted that treaty, and therefore its air waybill, as domestic legislation. The seventeen required documentary details are those which customarily are required for transportation (origin and destination, place of issue etc. Note that the number of Warsaw air waybill requirements are in the process of being reduced). The IATA conditions of carriage supplement the Warsaw air waybill. The treaty-based requirements also are supplemented by the parties as necessary.

As stated to DOT in a comment by freight forwarders, uniformity of the bill of lading means very limited uniformity of essential documentary details. A uniform bill of lading should not be "loaded up" with anything other than what the participants need. A uniform motor carrier bill of lading should be fashioned to the special needs of motor carriage.

DOT is of the view that no other government regulatory oversight of bills of lading is desirable. If a uniform bill of lading is to be effectively established, it will have to follow the useful precedent established in the maritime and the air modes. Congress could provide a statutory list of minimum documentary requirements. The parties to the contract of motor carriage could then supplement the statutory requirements by additional details that are unique to the particular shipment; carriers and shippers could also adopt standard supplements like those adopted privately in the IATA conditions of carriage.

Uniform bills of lading usually are of long duration. The motor carrier uniform straight bill of lading was not changed for many years. Thus, it is quite feasible to use a Federal statute to recognize those minimum documentary requirements which are customary in the industry to establish a uniform bill of lading.

As shown by the three competing "uniform" bills of lading currently being offered, shippers and carriers have difficulty coming to agreement on uniform bills of lading. This conclusion is also evidenced in the submitted comments. In the past, when domestic shippers and carriers could not agree on a bill of lading, the ICC had to step in and formulate the rail and motor carrier documentation. In maritime and air carriage, the same situation existed and led to COGSA and the Warsaw air waybill. This experience indicates a possible direction to take and a practice from which to learn.

6.4. ELECTRONIC BILLS OF LADING

A bill of lading is a receipt for the goods and constitutes evidence that a contract of carriage has been entered into by the shipper and the carrier. The receipt is an acknowledgement that the carrier has taken possesion of the cargo and that the carrier is legally bound by the contract of carriage. Thus a receipt is necessary.

Efficiency of transportation has become linked to electronic adaptability of bills of lading. Modern bills of lading regimes define and permit electronic bills of lading. The objective is to expedite documentation so that it does not delay transportation.

The special legal significance of signatures makes it important that electronic signatures be acceptable legally. The concern is that the electronic signature be authentic. This could be solved through adoption of statutory language that signature "means a handwritten signature, its facsimile or an equivalent authentication effected by any other means." (This definition is drawn from the international finance market, the 1988 U.N. Convention on International Bills of Exchange and International Promissory Notes, which is intended to facilitate international trade to the greatest possible extent).

The bill of lading itself should also be adaptable to electronic processing. The main concern is that an electronic recording of the information in the bill of lading be readily and permanently available for all purposes, both during the transportation and afterwards, in case of claims caused by loss, damage or delay. Therefore, adoption of statutory language that the receipt or bill of lading "may be issued in any form that generates a permanent record," would be satisfactory. Furthermore, electronic data interchange (EDI), a computer-to-computer communication system based on prearranged and agreed terms of reference, should be acceptable.

Notices (for example, carriers' notices to shippers, or shippers' notices to carriers of claims) and requests (for example, shippers' requests for information) should likewise be issuable to other parties to the transaction in any form that generates a permanent record, so that the parties respond to the notices and requests during the transportation, and permanent records are available afterwards in case of claims. Computer storage could be designed to satisfy the requirement for establishing a permanent record.

6.5. SUPPLEMENTARY UNIFORM TERMS (CONDITIONS) OF CARRIAGE

Uniformity of a bill of lading merely means that the most essential terms are uniform. It does not mean a statutory bill of lading. A particular trade may add terms that pertain just to it and are necessary to facilitate its trade. Furthermore, individual parties may add information that is peculiar to that particular shipment, for example the destination, or the nature of the particular cargo.

The bill of lading for international air transport is a good example of additional terms of carriage. The Warsaw treaty establishes seventeen documentary requirements. The international air carriers have incorporated these seventeen details into the air waybill used by IATA. The IATA air waybill is not sanctioned by the Warsaw Convention; but it complies with the Warsaw requirements. Furthermore, the air waybill for each shipment contains additional information which is peculiar to the transportation of that shipment.

In keeping with the philosophy of deregulation, any documentary details required by statute or treaty should be as few as possible. They should only be sufficient to indicate the applicable, uniform legal regime, leaving the parties free to formulate their own contract of carriage.

CHAPTER 7. PUBLIC INTERESTS

7.1. INTERNATIONAL HARMONY

Sec. 14706 of the Act states that the cargo liability study shall consider international harmony. International harmony is increasingly important to U.S. truck transport, because it often is one unit of a longer multimodal journey that includes a foreign point of origin or destination. The discussion above has referred extensively to international bills of lading, each of which has a liability regime. These international regimes will be described chronologically because the older regimes have significantly influenced the later regimes

Maritime

The international maritime bill of lading regime, commonly known as the "Hague Rules," was adopted in 1924. It is very significant in the U.S. because it became the COGSA in 1936, and was also adopted as a treaty in 1937. Consequently, the Hague Rules apply both internationally and as U.S. national law. Many maritime bills of lading are issued for motor transportation inland from the port and thus may be applicable to U.S. motor freight. COGSA requires the carrier, on demand of the shipper, to issue a bill of lading. Thus, the carrier is not required to issue a bill of lading unless demanded by the shipper (however, the carrier customarily issues a bill of lading for its own protection). COGSA specifies the essential contents of the bill of lading, including the identification and weight of the cargo. The statutory liability limitation is $500 per package. A lower limitation is not permitted, but the parties may negotiate a higher limit. There are seventeen carrier defense to liability, including error in navigation by the carrier. In order to limit their liability, maritime carriers stipulate in their bills of lading that the COGSA liability regime shall apply in domestic carriage (Gilmore and Black, Law of Admiralty, 2d ed., at 148). Such contractual extensions of the maritime bill of lading will govern surface transportation, to the extent permitted by the law governing surface transportation. A number of countries have adopted updated versions of the Hague Rules (the Visby or the Hamburg Rules). The United States has not updated the Hague Rules.

Air Carriage

Virtually all countries are parties to the 1929 Warsaw Convention, 49 Stat. 3000, T.S. 876, which establishes the international air waybill. The air waybill requires seventeen documentation details. Absence of some of these details from the air waybill will cause forfeiture of the limitation on liability provided cargo carriers under Warsaw. The air carriers' liability is limited to $20 per kilogram (about $9 per U.S. pound). A lower limitation may not be negotiated, but the shipper and the carrier may negotiate a higher limit. A carrier is presumed liable for loss, damage or delay, unless it proves that it has taken all necessary measures; in other words, the carrier is presumed liable. Like maritime carriers, air carriers also use contractual extensions of the air regime to related surface transportation. Such contractual extension is permitted to the extent allowed by applicable surface transportation law. Most countries have adopted an updated version of the Warsaw air waybill (the 1955 Hague Protocol). The United States has not updated the Warsaw air waybill.

Motor Carriage

All motor carriage in Europe and into Asia is subject to the Convention on the Contract for International Carriage of Goods by Road (CMR). The CMR Convention, much like the Hague Rules and the Warsaw Convention, establishes documentation requirements for the motor carrier bill of lading. All carriage under the CMR is subject to the Convention's liability regime which presumes the carrier's liability unless the carrier proves that it was not at fault. Liability is limited to 8.33 SDRs per kilogram (about $5 per U.S. pound). The parties may not negotiate a lower limit, but the shipper may declare excess value and pay for excess value insurance and thus increase compensation for loss.

Shippers and carriers who are subject to the CMR are very satisfied with this regime. A recent European analysis of the forty year experience with the CMR Convention described it as the most successful unification of law ever (Prof. Roland Loewe, La CMR a 40 ans, Uniform Law Review, 1996, at 429). Many member countries also use the CMR for domestic carriage and thus the law is uniform for all motor carriage (id.).

There is virtually no motor carriage between the United States and Europe (except for a minor amount of ro-ro traffic). It would be possible for the United States and for other North and South American countries to adopt an updated CMR-type convention.

The experience with the CMR Convention is an interesting precedent as a model for U.S. motor carriage. Both shippers and carriers tend to buy insurance coverage. The shipper buys full coverage for freight of all kinds and the carrier buys liability insurance (carriers' insurance covers not only liability up to the $5.00 per pound limit but also the possibility of unlimited liability for intentional torts). Claims are settled among the carriers' liability insurers and the shippers' cargo insurers. In these settlements the cargo insurers recover (in their recourse actions) approximately 25 percent of their losses, that is 25 percent of what they paid out in compensation to their clients, the shippers. This is an interesting view of the division of the risk of carriage between the two interest groups. The particular risk division is caused by and governed by the CMR Convention's liability regime.

NAFTA Considerations (National Laws of Mexico and Canada)

Given the Act's requirement for this study to consider international harmony, and given the greatly increasing traffic between the United States and Mexico, the possibility of working with Mexican limits on liability must be reviewed. The liability limitation in Mexico is reported to be about 3 cents per U.S. pound. This limit is so far below that which is realistic for the United States that it must be eliminated from our consideration.

The Canadian limitation is $2 Canadian per pound (depending on the exchange rate, approximately $1.50 per pound in U.S. dollars). The Canadian limitation has remained at this level for a number of years. It is difficult to update because it is based on Canadian provincial law, and it is difficult to get all the provinces to act in unison. According to surveys of coverage it would only cover between 50 and 70 percent of the value of goods currently being transported by truck. This percentage would be so far below the standard of coverage for the vast majority of U.S. cargo that the Canadian limitation should be eliminated from consideration.

International harmony in the Americas could be established in the form of an Inter-American Convention on Carriage of Goods by Road. The members of the Organization of American States (OAS) are now considering using the CMR Convention as the model for an Inter-American liability regime with a uniform bill of lading. The CMR approach is like that of other liability conventions with which the U.S., Canada and Mexico are familiar (because they are all members of these treaties) such as the Hague Rules and the Warsaw Convention. Such an approach would be more likely to find acceptance. Most export and import in the Americas is by motor carriage and this approach would have the further advantage of uniformity with the improving economies of Central and South America. (For comprehensive study, see Larsen, the 1989 Inter-American Convention on International Carriage of Goods by Road, 39 Amer. J. Comp. L. 121 (1991)).

7.2. INTERMODAL HARMONY

Intermodal carriage is described more extensively in Section 2.3. The originating modal liability regime is often extended by contract to successive modes of transportation used to deliver the goods. The parties to the first contract of carriage stipulate that the originating carrier's liability regime shall apply to the entire journey. In the absence of such a stipulation, the modal liability regimes will apply.

Compensation for loss, damage, and delay should be in harmony among other modes of carriage so that the shipper is not surprised by significant disparities in compensation systems, and so that insurance companies can better assess the risk of carriage and are not surprised by extraordinary claims. Such harmony also would benefit those carriers that engage in multimodal carriage and would aid the courts in applying established case law to other modes of carriage.

Instructive is the Multimodal Liability Convention of 1980. It is useful conceptually, even though the U.S. is not a party. However, some of our significant trading partners, for example Mexico, are members.

The multimodal convention seeks to establish a harmonious liability regime among all the modes. However, on the issue of liability limitation it distinguishes between maritime and surface transportation. The reason is that when a maritime leg exists in multimodal transportation, it is the dominant leg and only harmony with the maritime liability limitation is necessary. However, if there is no maritime leg, then the limitation prevalent in other (surface) transportation is the guide to harmony. The multimodal convention adopted the limitation of the CMR Convention (8.33 SDR, approximately $5.00 per U.S. pound) for surface carriage when there is no maritime leg. When there is a maritime leg the limitation is 2.75 SDRs per kilogram, approximately $1.80 per U.S. pound).

Harmony with other modes of transportation has also been previously discussed. The limitation under COGSA is $500 per package. The per package limitation appears to be unique for maritime transportation and does not have direct relevance for other modes (except for specialized express and package carriage, see Sec. 7.4.5.). International aviation operates with a limitation of $20 per kilogram (approximately $9 per U.S. pound). Domestic air freight is not subject to any limitation and air carriers have established varying limits, as low as $.50 per pound. Domestic rail carriage is similar to motor carriage in that carriers tend to contract unilaterally for low liability limits.

The importance of intermodal harmony is primarily related to ease of transportation under predictable terms. The multimodal convention carefully preserves to the individual shipper the option of shipping exclusively under a modal liability regime. Likewise, the Interstate Commerce Act preserves the options of shippers either to enter into a contract of carriage suitable for particular goods (coal, computers or contact lenses); or to ship under the Sec. 14706 regime that is most suitable for the particular goods.

7.3. PUBLIC INTEREST

Policy Objectives

The interest of the public concerning the liability regime governing motor carriers, freight forwarders, brokers, shippers, and insurers was basically formulated in 1940 by the National Transportation Policy and is restated in the ICCTA, Sec. 13101(a)(2).

1. To encourage fair competition, and reasonable rates for transportation by motor carriers of property

2. To promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required

3. To provide and maintain service to small communities and small shippers

4. To improve and maintain a sound, safe, and competitive privately owned motor carrier system

5. To enable efficient and well-managed carriers to earn adequate profits, attract capital, maintain fair wages and working conditions

6. To promote intermodal transportation

A liability regime which fairly allocates the risk of carriage to both carriers and shippers, would tend to improve safety of carriage, and would free carriers to concentrate on price and service competition.

A more predictable high standard of care, and certainty of compensation for failure to provide that high standard of care, will not only stabilize the transportation system, but will also make it more efficient. On the other hand, some current practices, such as lack of adequate notice of liability limitations, have adverse impacts on the motor transportation industry. These practices are unfair to the extent that they fall more heavily on small and occasional shippers than on large shippers.

The uniform liability regime would strengthen the bargaining position of the small and occasional shipper who would not be pressured into accepting a carrier's adhesion contract of carriage with very low levels of carriers liability. The small shipper would gain bargaining leverage. Small communities would likewise gain bargaining leverage.

Cargo safety would be advanced by creating strong incentives for both shippers and carriers to handle cargo carefully. Shippers would be more inclined to ship by motor carrier if they had confidence the transportation system would provide adequate compensation for loss, damage, and delay. The cost of transportation would decrease with application of a more efficient claims compensation system.

A uniform liability system would create predictability and certainty of the legal regime. It would improve the relationship between carriers and shippers, reduce litigation and provide incentives for safe transportation because the risk of carriage would be more fairly distributed between carriers and shippers.

The uniform liability regime would bring motor carriage more into line with other modes and with the multimodal convention.

Finally, the public interest favors establishment of the very factors which Sec. 14706(g) of the Act requires to be considered by the cargo liability study. These include: (1) efficient delivery of transportation services; (2) harmony with international transportation; (3) harmony with the liability regimes of other modes of transportation; (4) a liability regime that is in the interest of a public that relies on motor carriage for transportation of goods to and from the market place; (5) a liability regime operates in the interest of carriers; and (6) a liability regime that operates in the interest of shippers.

Dispute Settlement

Public interest includes dispute resolution. Congress, having eliminated the ICC as a facilitator and a dispute-settlement regulator, clearly determined to eliminate much administrative decision making. Congress did not give the Surface Transportation Board decision-making authority in this area. Furthermore, the ICCTA did not give DOT authority over cargo liability, other than to perform this study, and the Department did not express interest in acquiring such decision-making authority. To the contrary, DOT's report to Congress on the Functions of the Interstate Commerce Commission, July, 1995, at page 33, strongly recommends to "eliminate all Federal dispute settlement functions." DOT's wish is to remove determination of loss, damage and delay disputes to the contracting parties and, if necessary, to the courts. The experience with settlement of liability issues in COGSA and under the Warsaw Convention demonstrates that the shippers, carriers, insurers and the public in general would be better served by private and judicial decision making to the exclusion of administrative decision making.

Regarding decision-making by the Judiciary, Sec. 14706(d) of the Act provides that civil actions may be brought under the Act in a U.S. District Court or a State Court. Action for loss, damage or delay may be brought against the delivering carrier in the jurisdiction where the delivering carrier operates. Action against the carrier responsible for the loss, damage or delay may be brought in the judicial district where loss, damage or delay occurred.

Alternative dispute settlement now is available in most courts.

Experience with judicial decision-making in other modes of transportation, (maritime and aviation described above) indicates that the judiciary is adequately able, qualified and experienced to handle claims from loss, damage and delay of cargo in motor carriage. However, the parties to the dispute are always subject to the local priorities on the judicial calendar.

Private dispute settlement in motor carriage is well illustrated by the legislated, uniform liability regime of the CMR Convention. Both shippers and carriers tend to buy insurance. The carriers buy liability insurance and the shippers buy cargo insurance coverage for freight of all kinds. Claims are then settled among the carriers' liability and the shippers' cargo insurers. In rare cases, when an issue of interpretation of the law needs to be settled, or if the facts are in dispute, claims are submitted for judicial decisionmaking.

In conclusion, it is preferable that the parties themselves directly or through their insurance companies settle claims privately. When private or insurance company settlements are not possible then the courts should intervene to settle claim issues. Congress made it clear in the ICCTA that a government regulatory agency should not adjudicate loss and damage issues in the current deregulated environment.

7.4. SCOPE OF SEC. 14706 (CARMACK) LIABILITY REGIME

The ICCTA required DOT to "conduct a study to determine whether any modifications or reforms should be made to the loss and damage provision" of Sec. 14706 (the existing Carmack liability regime). This instruction is important in determining the scope of the study. Several kinds of carriage are either exempt from the Sec. 14706 liability regime or are specially regulated. For example rail carriage is now removed from Sec. 14706. Consequently, the Act specifically requested that the study focus on motor carriage. Thus, the scope of the study is delimited by the statute. Congress intended DOT to focus on the kinds of carriage regulated by Sec. 14706.

7.4.1. EXPANDED DEFINITION OF MOTOR CARRIER.

The scope of the DOT study became enlarged because the ICCTA, Sec. 14706, applies to “motor carriers.” The Interstate Commerce Act no longer distinguishes between motor common carriers and motor contract carriers. Sec. 10102(15), before adoption of the ICCTA, defined a “motor common carrier” as a person holding itself out to the public as ready to provide motor carriage for compensation over regular or irregular routes. A “motor contract carrier” was defined as a person, other than a motor common carrier, providing motor carriage for compensation under continuing agreements with one or more persons (i) by assigning motor vehicles for a continuing period of time for their exclusive use, or (ii) intended for the distinct needs of such person or persons.

Motor contract carriage did not involve 'holding out' to accept all business. Thus the motor contract carriers could discriminate among customers and were not bound by the Carmack liability rules. In practice the two kinds of carriage gradually became indistinguishable and the need to distinguish between them became obsolete. 49 USC 13102 now defines a motor carrier as “a person providing motor vehicle transportation for compensation." That is the motor carrier is the subject of Sec. 14706.

Although contract carriers are now part of motor carriage and come under Sec. 14706, all carriers, especially contract carriers, continue in their ability to control all aspects of their liability by separate contracts of carriage (see discussion of contract carriage in Sec. 7.4.6 below).

7.4.2. FREIGHT FORWARDERS

Fifty years ago freight forwarders were brought under ICC jurisdiction and made subject to the Carmack Amendment (56 Stat. 285 (1942), 64 Stat. 1113 (1950)). 49 U.S.C 14706 specifically includes freight forwarders and they are made subject to the liability regime.

Sec. 13102(8) defines “freight forwarders” as persons holding themselves out to the public (other than as a motor carrier) to provide transportation of property for compensation and who in the ordinary course of business (i) assemble and consolidate shipments and perform or provide for break-bulk and distribution operations of the shipments, (ii) assume responsibility for the transportation from the place of receipt to the place of destination; and (iii) use for any part of the transportation a carrier subject to the Interstate Commerce Act, Part B (limited to motor carriers and water carriers). The term “freight forwarder,” as used in the Interstate Commerce Act, does not include transportation by air carrier.

Freight forwarders are so closely associated with the stream of carriage that they became part of the carriage. Freight forwarders may sometimes issue their own house bill of lading to individual shippers whose goods the forwarder is consolidating. Thus, freight forwarders may act as agents or as principals, depending on the facts of each case. Freight forwarders could become the multimodal transport operators (MTOs) envisaged by the multimodal liability regime, discussed in Sec. 7.2, who would contract with shippers for carriage under the multimodal regime, and then subcontract the actual carriage to individual modal operators under their respective modal liability regimes (see Tetley, Responsibility of Freight Forwarders, 22 ETL 79 (1987); also see Driscoll and Larsen, The Convention on International Multimodal Transport of Goods, 57 Tul. L. Rev. 193 (1982)).

49 USC 14706(a)(2) provides that a freight forwarder is both the receiving and the delivering carrier. When a freight forwarder provides service and uses a motor carrier to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with the latter’s consent. Furthermore, the motor carrier, with the consent of the freight forwarder, may deliver property for the freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

ICC regulated freight forwarders' liability for loss, damage and delay of cargo (49 CFR 1084) including liability, surety bonds and certificates of insurance, and qualifications as self-insurer (also see 61 Fed. Reg. 54706 (1996)). Thus freight forwarder are so much part of the transportation network that shippers view them as carriers. There appears to be no reason to change the application of Sec. 14706 to them.

7.4.3. AGRICULTURAL CARRIAGE

Motor carriage of agricultural products like that of private carriage has always been exempt from Carmack liability requirements.

7.4.4. HOUSEHOLD GOODS

ICC regulated transportation of household goods very actively. Under section 14706(f) of the Act carriers of household goods are currently subject to the jurisdiction of the Surface Transportation Board and are permitted to negotiate terms of carriage based on a shippers' acceptance of the carrier's written estimate (offer) to carry. Carriers of household goods must agree to offer arbitration as a means of settling disputes with shippers concerning damage or loss to the household goods transported. 49 CFR 1056.1 defines household goods as personal effects or property to be used in a dwelling but does not include goods moving from a factory or store.

49 CFR 1056.2 requires detailed information for shippers about their rights and responsibilities when they move household goods. Household goods carriers must provide shippers with written estimates of charges which must be clearly marked binding or non-binding (Sec. 1056.3). Household goods carriers are required to issue a detailed receipt or bill of lading to the shipper including a released rate valuation statement and evidence of insurance (Sec. 1056.6). Household goods are to be transported with reasonable dispatch, and the shipper must be notified of any delays (Sec. 1056.8). The liability of the household goods carrier is restricted. The carrier is liable up to the released rate limitation of liability.

Special Government bills of lading are used for transportation of household goods belonging to persons moved by the Government. Special military agents are designated to handle Government bills of lading (Sec. 1056.14). Finally, when settling a claim for loss or damage to household goods, the carrier "shall use the replacement costs of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item" (Sec. 1005.5(b))

The Board's continued oversight of household goods is the result of Congressional feeling that consumers continue to need protective regulation. Apparently the intent of Congress was to keep household goods separate from the general liability regime in 49 USC 14706 (Carmack) and from any future liability regime that may be established for other transportation under section 14706. The current liability regime for household goods transportation should be considered as an option for Sec. 14706 motor carriage.

Whether a future separation should be maintained that keeps shippers and carriers of household goods from stipulating to use of any future liability regime established for transportation of other goods under Sec. 14706 would depend on how attractive and effective such a liability regime would be to both parties. At the present time the special nature of household goods carriage indicates that it should continue to be treated specially.

7.4.5. PACKAGE EXPRESS CARRIAGE

Transportation by package express carriers such as United Parcel Service and Federal Express is subject to a standard liability limitation based on weight or on the package. The shipper who chooses such carriage is put on notice of the limitation; that does not mean actual notice because a particular shipper's employee may not be able to read or may not take time to read the notice. The shipper can increase the carrier-set liability limit by purchasing additional insurance or by purchasing insurance elsewhere. Package express carriage is well defined and serves the specific area well. While other kinds of carriage do not appear to fit well within this special area of carriage, the liability regime of package express carriage seems to serve its niche well, including the unsophisticated or occasional shipper, and does not appear to be in need of change.

The special status of express and package carriage was established very early by the ICC, see Express Rates, Practices, Accounts and Revenues, 24 ICC 381 (1912) and Express Rates, Practices, Accounts, and Revenues, 43 ICC 510 (1917).

7.4.6. CONTRACT CARRIAGE

Much transportation is “contract carriage,” which is governed by Sec. 14101(b) of the Act. This statute provides that a carrier may enter into a contract "to provide specified services under specified rates and conditions." This kind of carriage is not governed by Sec. 14706 (Carmack Amendment). The carrier and shipper negotiating for contract carriage may make any reasonable contractual stipulations, except that they may not waive provisions governing registration, insurance, or safety fitness.

Large shippers tend to use the authority under Sec. 14101(b) to establish a contractual liability regime. A survey of approximately 100 shippers attending the February 1997 meeting of NASSTRAC indicated that approximately half of the shippers present had contracts with carriers. According to an Ohio State University study 72 percent of all motor carriage now moves under contract. The study predicts that in the year 2000, 84 percent of all traffic will move under contract. Contracts have the advantage of clearly and unambiguously regulating liability according to relative bargaining power of the parties to each individual contract.

7.4.7. MOTOR CARRIAGE INCIDENTAL TO AIR CARRIAGE

Under exemption in Sec. 13506(a)(8) of the Act, air carriers often transport cargo by motor carriage as part of a continuous movement, under an exemption Sec. 13506(a)(8) of the Act. In particular, an air carrier may pick up and deliver air cargo, the assumption being that the pick up and delivery are incidental to carriage by air. As described previously, air carriers will contractually extend to the surface legs the liability regime for carriage by air.

Foreign air carriers are not entitled to this privilege in the United States unless the Secretary of Transportation is satisfied that their governments accord U. S. carriers the right to pick up and deliver goods in <u>their</u> countries. This privilege has been extended on a case by case basis.

7.4.8. OTHER TYPES OF MOTOR CARRIAGE

Many other types of carriage are excluded from the Interstate Commerce Act or from the Sec. 14706 liability regime. Purely intrastate carriage is excluded (see FAA Authorization Act of 1994, P.L. 103-305). Also exempted are transportation of wood chips; transportation of broken, crushed and powdered glass; transportation in a municipal zone; occasional carriage; and emergency towing, and other types of carriage (see 49 U.S.C. 13506).

7.4.9. CONCLUSION

In conclusion less than one fourth of all motor carriage is transported under the Sec. 14706 liability regime (see discussion Sec. 1.1.3.) Significant sections of motor cargo transportation are not included within the scope of the existing Carmack liability regime. Thus, these forms of motor carriage should not be included in the consideration and formation of the liability regime, because they are not governed by it. The scope of a uniform liability regime should only be motor carriage to the extent it is currently subject to Sec. 14706.

7.5 INTERESTS OF THE CARRIERS

Carriers are primarily interested in a liability regime that promotes the efficiency of carriage, minimizes their expenses to the extent possible, and will satisfy their customers and promote repeat business.

Carriers want shippers to act responsibly, to pack their cargo well, comply with hazardous materials regulations, and do what they can to avoid damages.

The extraordinary satisfaction of the European carriers with the CMR Convention on motor carriage (see discussion Sec. 5.4) indicates that U.S. carriers might be well-served by a strong, uniform liability regime along the lines of the CMR Convention. The CMR regime provides certainty, stability, insurability and yet places fair pressure on shippers to act responsibly. Significantly, under the CMR convention, cargo insurers are able to recover, in recourse actions against carrier liability insurers, approximately 25 percent of their losses which they have paid out to shippers who insured against risks of all kinds (based on correspondence with large European cargo insurer). This indicates that the CMR Convention places a very significant share of the risk of carriage on the shippers, but also leaves a significant share of the risk of carriage on the carrier (see discussion of subrogation in Sec. 4.6).

A particular carrier problem deserves attention. Carriers are stymied in providing continuous or even subcontracted service into Mexico and Latin America. (See Disparities in the Law and Practice of Surface Transportation of Goods Between the United States and Mexico, Study performed for FHWA by the National Law Center for Inter-American Free Trade. The Center is involved in research on Inter-American legal issues; NLCIFT/WD4/7.93). Carriers could benefit from U.S. adoption of an Inter-American Convention on carriage of goods by road. The right Inter-American convention would establish a uniform liability regime making the liability law the same on both the North and the South sides of the border. It could also establish the basis for a uniform bill of lading. In consequence, there would be no need to issue new documentation at the border. Because the legal regime would be stable and the risk known, the transportation would be insurable from origin to destination regardless of the location of the goods.

All the public interest discussion above relating to the carriers' interest in efficiency, international harmony and multimodal harmony, is incorporated by reference.

7.6. INTERESTS OF THE SHIPPERS

There are many different kinds of shippers using different approaches for motor carriage of goods. The variety is stated in the scope discussion, Chapter 1, and in the discussion (see discussion sec. 7.4) of the area of the law on which the ICCTA, Sec. 14706, required DOT to focus. Other areas of the law are described; however, the study is focused on Sec. 14706 carriage. In particular that leaves open to shippers the option of entering into contracts of carriage according to contractual terms for which they have leverage to bargain. Therefore, this statement of shipper interests is focused on the Sec. 14706 shippers. These shippers are primarily interested in a liability regime which will promote efficiency of carriage, get the cargo safely to its destination, and make the shipper whole when the cargo is lost or damaged.

Considering that the cost of liability is such a small percentage of the value of the goods being carried, the greater interest of the shipper is in a stable uniform liability regime linked to a uniform bill of lading that fairly informs the shippers of the conditions of carriage. Shippers are interested in a self-policing regime which they do not have to monitor endlessly. That regime must be so stable that it is readily insurable.

Shippers are interested in placing a significant share of the risk of carriage on carriers to provide a strong incentive to be careful. They are interested in preserving the option of receiving full value for loss, damage or delay. Thus they may also be interested in a strong uniform liability regime, which provides the option of receiving full value compensation. Furthermore, shippers may also share the carriers' interest in a uniform Inter-American liability regime linked to a uniform bill of lading regime.

All the public interest discussion above relating to efficiency, international harmony and multimodal harmony, relates to the shippers' interest and is incorporated by reference.

7.7. FREIGHT FORWARDERS

Freight forwarders are specifically covered by Sec. 14706. They are not only interested in a uniform liability system, they have also expressed concern with the fragmentation of the uniform bill of lading that has occurred after ICC sunset. They favor a uniform bill of lading. "With the removal of tariff filing requirements, transaction documentation has become a primary issue." (TIA statement). As discussed in Sec. 5.1.3, the bill of lading is usually not to be equated with the contract of carriage. Thus uniformity of the bill of lading means very limited uniformity of essential documentary details. A uniform bill of lading would not be "loaded up" with anything other than what the participants need. The statutory maritime bill of lading and Warsaw air way bill are examples. A uniform motor carrier bill of lading would be fashioned to the special needs of motor carriage.

7.8. INSURANCE INTERESTS

Certainty and predictability of the liability regime is very much of interest to insurers because they need to quantify the risks for which they assume responsibility. If they cannot gauge these risks then they must charge more in order to be on the safe side when loss occurs. If the uncertainty becomes too great, then insurance becomes unavailable. A good example of that is motor carriage into Mexico. The liability risks south of the border are too uncertain and thus too great, so cargo insurance is unavailable for purchase north of the border. (See NLCIFT study supra; also see Menon, Container Crooks, Containerization International, March, 1997.) Representatives of the insurance trade associations in the NAFTA countries have begun to address the problems, such as the availability of adequate insurance. They met for the first time on Feb. 26, 1997, at a meeting co-sponsored by DOT, and are planning to meet again in Canada in May, 1997. Certainty and predictability of the law will not only make insurance available, but the more precisely the exact risk can be ascertained, the lower the price of insurance would become, because insurers would then not have to insure against unpredictable events.

Insurers also are interested in a regime which fairly allocates the risk of carriage to both shippers and carriers. That is, they are interested in placing a fair amount of the risk of carriage, and thus insurance business, on the cargo side, and likewise a fair allocation of risk of carriage, the liability insurance business, on the carrier side.

CHAPTER 8. RECOMMENDATIONS

(RECOMMENDATIONS ARE NOT INCLUDED IN THIS DRAFT VERSION.)

LIST OF PARTICIPANTS

.
ABC
.
ADP Lemco, Inc.
.
Air Filter Service Co., Inc.
.
Allegheny Ludlum Steel
.
Allied Tube & Conduit
.
Aloe Vera of America, Inc.
.
American Italian Pasta Co.
.
American Movers Conference
.
American Trucking Assns. Inc. RCCC, TLP&SC, NMFTA, Litigation Center, ITCC, R&DCC.
.
Amoco Petroleum Products
.
Astro Business Cards, Inc.
.
ATD-American Co.
.
Athearn Trans. Consultants
.
Bando American Inc.
.
BellSouth Telecommunications
.
Blodgett Corporation
.
Bose Corporation
.
Brass Smith, Inc.

.
Bridgestone/Firestone Tire Sales
.
Browning
.
Calico Cottage Candies, Inc.
.
Canton Sales & Storage Co.
.
City Business Machines, Inc.
.
Clausing Industrial Inc.
.
Comfort Products Distributing
.
Comstock Michigan Fruit
.
Control Products Inc.
.
Cook Bros. Insulation, Inc.
.
Dawn Food Products, Inc.
.
Dempster Industries, Inc.
.
DeWitt Company
.
Dial Industries, Inc.
.
Digital Graphix, Inc.
.
Durham Manufacturing Co.
.
Elkay Manufacturing Company
.
EMI Manufacturing (USA)
.
Erdle Perforating Company
.
Excel Importing Company
.
Exercise Essentials & Spas

.
Fabricated Glass Specialties, Inc.
.
Family Dollar Stores, Inc.
.
Federal Express Corporation
.
First Moments, Inc.
.
Foodmaker Distribution System
.
Gardner/Rossi Company
.
Gemini Incorporated
.
GoLightly Candy Co.
.
Gooding & Shields Rubber Co.
.
Gornell & Sons, Inc.
.
Greeley & Associates, Inc.
.
Groth Corporation
.
Hanna Rubber Company
.
Health and Personal Care Distribution Conference
.
Hubbard Milling Company
.
HY-C Company, Inc.
.
Hydraulic Controls, Inc.
.
Hydro Engineering, Inc.
.
Illinois Manufacturers' Transportation Association
.
Industrial Traffic Consultants

.
International Packaging Corp.
.
Interstate Lift, Inc.
.
Inwood Office Furniture
.
Ney Company
.
Joseph E. Podgor Co., Inc.
.
Ken-Marc Sales Corp.
.
Koret of California
.
La Paz Products, Inc.
.
Leeco Industries
.
Lever Brothers Company
.
Lorillard Tobacco Company
.
Madix Store Fixtures
.
Magic Products, Inc.
.
Michigan Trading/Merrick Screw & Supply
.
National Freight Claim & Security Council
.
National Home Products
.
National Industrial Transportation League
.
National Presto Industries, Inc.
.
National Small Shipments Traffic Conference, Inc.
.
New Ultrasonics, Inc.
.
Niles Expanded Metals

.
North American Drager
.
North American Parts Distr.
.
North American Parts Distributors, Inc.
.
Owner-Operator Independent Drivers’ Association, Inc.
.
Pallet Pallet, Inc.
.
Paramount Pool & Spa Products
.
Paschal Distributing Company
.
Pellets, Inc.
.
Phenix Label Company, Inc.
.
Plastics Industry, Society of the
.
Polyvinyl Films, Inc.
.
Presto Products Manuf. Co.
.
Price Costco
.
Prof. Diana Twede
.
Pumptech, Inc.
.
Reebok International, Ltd.
.
Rimtec Corporation
.
Roaring Spring Blank Book Co.

.
Santa Barbara Creative Foods
.
Santiam Midwest Lumber Co.
.
Sarret Office Supply Co.
.
Schweppe & Sons, Inc.
.
Seco Construction Equip., Inc.
.
Sedlak Interiors, Inc.
.
Small Tube Products
.
Solex Corp.
.
Spencer Furniture, Inc.
.
SSI Mobley Company, Inc.
.
Swiss Army Brands, Inc.
.
Tamaqua Cable Products Corp.
.
Ten Hoeve Bros., Inc.
.
Teton West Lumber, Inc.
.
The Ellis Company
.
Tomkins Industries, Inc.
.
Transportation Consumer Protection Council, Inc.
.
Transportation Intermediaries Association
.
Transportation Solutions, Inc.
.
TUTCO
.
Ulrich Chemical, Inc.

.
United Industries
.
United Parcel Service,
Inc.
.
U.S. Coast Guard
.
Vigoro Industries, Inc.
.
Western Extrusions Corp.
.
Western States Forest
Products
.
Willert Home Products
.
Williamson Printing Corp.
.
Wire Crafters, Inc.
.
Wixon Fontarome, Inc.
.
Wooster Brush Company
.
X-cel Plastics Corp.

GLOSSARY

ATA	American Trucking Associations, Inc.
BTS	Bureau of Transportation Statistics
CFR	Code of Federal Regulations
CIM	Convention on the Carriage of Goods by Rail
CMR	Convention on the Contract for International Carriage of Goods by Road
COGSA	Carriage of Goods by Sea Act
DOT	Department of Transportation
EDI	Electronic Data Interchange
FHWA	Federal Highway Administration
IATA	International Air Transport Association
ICCTA	Interstate Commerce Commission Termination Act of 1995
ICC	Interstate Commerce Commission
LTL	Less than Truckload
MTO	Multimodal Transport Operator
NAFTA	North American Free Trade Agreement
NASSTRAC	National Small Shipments Traffic Conference
NLCIFT	National Law Center for Inter-American Free Trade
NRA	Negotiated Rates Act
RO-RO	Roll-on Roll-off
SDR	Special Drawing Right
STB	Surface Transportation Board
TCPC	Transportation Consumer Protection Council
TIA	Transportation Intermediates Association
TIRRA	Trucking Industry Regulatory Reform Act
TSI	Transportation Solutions, Inc.

APPENDIX 1: QUALIFICATIONS FOR A SELF-INSURER

APPENDIX 2: SECTION 14706, LIABILIY OF CARRIERS

APPENDIX 3: SUMMARY OF LOSS AND DAMAGE COST FACTORS

Summarized in Table 26 of the 1975 DOT Cargo Liability Study are the cost factors developed from the foregoing statistic relating to export, import and domestic trade. They are expressed as a percentage of the value of goods.

SUMMARY OF LOSS AND DAMAGE COST FACTORS
AS PERCENT OF VALUE OF GOODS
1975 DOT CARGO LIABILITY STUDY

	MANUFACTURERS			RETAILERS-WHOLESALERS	
ITEM	**EXPORT**	**IMPORT**	**DOMESTIC**	**IMPORT**	**DOMESTIC**
Insurance Premiums	.108%	.179%	.009%	.348%	.120%
Net Loss and Damage	.012%	.050%	.013%	.082%	.040%
Administration	.020%	.006%	.006%	.018%	.011%
TOTALS	.140%	.235%	.028%	.448%	.171%

APPENDIX 4: CARGO LIABILITY COST FACTORS

Table 35 of the 1975 DOT Cargo Liability Study contains a summary of the identifiable modal cargo liability cost factors. As reflected in this table, these cost factors fall in the range of one to two percent of freight revenue for all modes. It is reemphasized that these factors are reflective only of industry-wide costs.

Table 35
SUMMARY OF
CARGO LIABILITY COST FACTORS
1975 CARGO LIABILITY STUDY

MODE	CLAIMS PAID	NET COST OF INSURANCE SYSTEM	TOTALS
MOTOR CARRIER	1.12%	0.20%	1.2%
RAILROAD	1.75%	NR	1.75%
DOMESTIC AIR	1.08%	0.25%	1.33%
INTERNATIONAL AIR	1.91%	0.14%	2..05%

APPENDIX 5: TRENDS IN MOTOR TRUCK CARGO