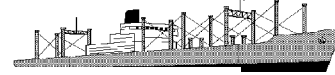




# Rollin' On



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## SAY IT ISN'T SO:

Or if it is, it is not what it seems

**H**ere's the deal: It is late November and *Rollin' On* is in danger of missing its first month since its inception in January 1995. It has been a busy month, and I get to work on a brief this weekend that is due in the Federal Court of Appeals in San Francisco on Tuesday. After that I am off to see the in-laws for Thanksgiving. So *Rollin' On* either gets out on this civil war Saturday or not at all this month.

So the plan is: **punt**. When it's 4th down, 35 yards to go and you're on your own 2 yard line, you don't get too creative. Just hold the line, get the ball in the air and hope for better field position next month. After all, there are no referees to blame, unless you include family calling foul for your being at work instead of at home.

With those prefatory remarks, you are about to enter the scintillating world of . . . **legislative intent**. That's right, you heard it here first. I am sure you are already on the edge of your chairs. These opportunities just don't come around that often.

Ever since memory of man runneth naught to the contrary, cave-dwellers, tribal elders and now 20th Century legislators have written laws which sometimes have had the clarity of black tar. The ambiguities evolve into disputes, and then, *voila*, lawsuits get filed (although we have had trouble finding the case law from the cavedwellers and tribal elders; could it be that there were no lawyers? Imaginable but nevertheless unthink-

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able). This means that the courts scramble around to try to figure out what message the written word is meant to convey. In some cases the intent can be ascertained by references to other parts of the same law, or by reference to some other law.

However, there are instances in which the mystery does not unfold

### Happy Thanksgiving!

easily, and that is when the courts look elsewhere for guidance. Certain references are automatically excluded, such as the neighborhood adult bookstore (although a judge that may be seen in such a store is obviously trying to increase his/her judicial knowledge). This endeavor thus sometimes leads to resort to the congressional record, committee reports, etc. The theory is that comments by our esteemed elected leaders and which are contained in these records may shed some light on the subject. But there are dangers in this approach, and Justice Scalia of the United States Supreme Court has left no doubt how he feels about the topic:

"As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and

the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

"I decline to participate in this process. It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind."

In an earlier reference to a case, Judge Scalia's comments appealed to the cynic in many of us:

"I am confident that only a small proportion of the Members of Congress read either one of the . . . Reports . . ., even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest library to check out what was actually said . . . and that *no* member (reached a certain legal conclusion). "(From a U.S. Supreme Court Case that relied upon legislative intent in its decision).

That's all for now. To shippers, carriers, agents and other third parties, keep the cargo rollin'!!

#### The Obligatory Disclaimer

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

#### Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 20 years and emphasizing transportation law, business law and related litigation.