

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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## SON OF THE *SOMPO JAPAN* SLIP-UP: SECOND CIRCUIT HOLDS COGSA GOVERNS OCEAN CARRIER AND NVOCC LIABILITY FOR INLAND LOSS.

By Steve Block

Here's an example of the complicating and counterproductive ripple effects of the Second Circuit's erroneous 2006 decision in *Sompo Japan Ins. Co. of America v. Union Pacific R. Co.* ("*Sompo Japan*").

You'll recall that in *Sompo Japan*, the Second Circuit issued a decision that is completely at odds with the U.S. Supreme Court's pronouncement in *Norfolk Southern Railway Co. v. Kirby* ("*Kirby*"). *Kirby* had found enforceable extension of the U.S. Carriage of Goods by Sea Act ("*COGSA*") - by way of standard Himalaya Clauses found in most ocean and through bills of lading - to losses occurring during the inland leg of through transit. The decision considered that the subject bill of lading "required a substantial carriage of goods by sea" in concluding that admiralty jurisdiction, and therefore COGSA, applied to the whole deal. *Kirby* specified numerous industry and public policy rationales as to why that approach was most equitable and sound, hailing what many transportation service providers and attorneys thought was the end of at least one headache in law governing intermodal transportation.

Not so fast, said the Second Circuit in *Sompo Japan*. The *Kirby* parties forgot to brief the Carmack Amendment in addressing jurisdictional issues at the High Court's sua sponte request. Because rail (and by inference motor) carriers aren't statutorily subject to COGSA, and Carmack is designed to spell out their rights and liabilities for cargo loss/damage, Carmack still applies to them even if they're the subject of a through bill of lading (at least in the Second Circuit's northeastern states).

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While *Sompo Japan* soon should be up for appeal to (and, presumably, correction by) the Big Nine, we're left in a bit of a quandary meanwhile.

Why? Several reasons, but a big one is that the incongruity between *Sompo Japan* and *Kirby* is giving rise to new law founded on principles that don't hold up to scrutiny under one or the other precedent. A case in point is the Second Circuit's November 2008 decision in *Rexroth Hydraudyne B.V. v. Ocean World Lines, et al* ("*Rexroth*"), wherein the court struggled to rationalize why COGSA governed an ocean carrier's and NVOCC's liability for an inland loss.

In *Rexroth*, a Dutch shipper booked transit of cargo to consignee TDI in Englewood, Colorado with NVOCC Ocean World Lines ("*OWL*"). OWL placed the transit with ocean carrier Cosco which, in turn, booked inland carriage from the U.S. point of entry at the Port of Houston to Englewood with the Union Pacific Railroad (the "*UP*"). Before delivery, the shipper learned of TDI's financial woes, and directed OWL and Cosco not to deliver the freight. The UP did so nonetheless, TDI went belly up without paying, and the shipper was out some 297 grand.

So what controls OWL's and Cosco's liability, COGSA or Carmack? By the *Sompo Japan*

## SON OF THE ... Continued

reasoning, one might think Carmack does, as the loss occurred inland. OWL and Cosco essentially provided inland carriage by booking with the UP, didn't they? Does the fact there also was an ocean leg of this haul spell the difference?

Apparently so. Affirming the Southern District of New York, the Second Circuit concluded that the COGSA-sanctioned \$500/package limitation of liability provided by OWL's and Cosco's bills of lading applied, because rail carrier liability wasn't at issue here. The court distinguished *Sompo Japan* on the ground it only "establishes that Carmack trumps a conflict between itself and a contractual extension of COGSA inland for transports covered under Carmack." After analyzing a few precedents, the parameters of Carmack's applicability, and points made in *Sompo Japan* itself (i.e., finding that some element of cargo handling is necessary for an entity to be an inland carrier), the court concluded that OWL and Cosco were not rail carriers. The analysis is sound, but one subject to counterarguments and possibly different conclusions. In any event, OWL and Cosco, being ocean transportation service providers, can shield themselves from full liability vis-à-vis COGSA.

The UP wasn't named in the suit. If it had been (as it easily could've), would we have two separate liability regimes applied to the same loss? Of course, the UP would qualify as a rail carrier. What if OWL had booked the rail transit separately with the UP, and no through bill of lading existed? What if there had been no ocean component at all? Under *Kirby*, Carmack clearly would apply in those circumstances, as there would be no question about whether the contract was primarily one of ocean carriage. With *Sompo Japan*, however, we're forced to wonder when and under what circumstances the Second Circuit's determination of mandatory Carmack applicability to surface carrier liability can be "trumped" by the roles of various players. In other words, absent *Sompo Japan*, the *Rexroth* fact pattern would obviously be governed by COGSA. With *Sompo Japan*, we're doomed to continue with struggles *Kirby* was designed to avoid.

Ref: *Rexroth Hydraudyne B.V. v. Ocean World Lines, et al*, 2008 WL 4810069 (2nd Cir. 2008); *Sompo Japan Ins. Co. of America v. Union Pacific R. Co.*, 456 F.3d 54, 56 (2nd Cir. 2006); and *Norfolk Southern Railway Co. v. Kirby* 543 U.S. 14, 125 S.Ct., 385 (2004).

## COMPARATIVE FAULT: HOW U.S. MARITIME LAW CARVES OUT LIABILITY APPORTIONMENTS

by Steve Block

Water carriage is a dangerous business, one fraught with potential accidents at almost every stage of the game. Given the interplay of operational responsibilities undertaken by various service providers, maritime losses frequently result from the wrongdoing of more than one entity. That interplay also typically causes property or business damage of more than one company.

So how does the law sort out who gets to pay what to whom when multiple shipping-industry parties sue each other after an accident? The short answer is: with difficulty and some degree of arbitrary assignment of fault. But there's a nifty system in place we work with which is derived from a common law principle called "comparative fault."

Consider this example: a shipper books a container loaded with heavy equipment on vessel A. The container isn't blocked and braced properly - the shipper's fault - allowing it to slide back and forth within the container. As a result of defective equipment, the container is not properly secured on Vessel A's deck - the vessel operator's fault. Vessel B comes along and maneuvers too closely to Vessel A - Vessel B's fault - while the two boats are approaching a port facility. The unstable container tips over, causing Vessel A to veer into Vessel B's path. A collisions ensues, Vessel A is damaged to the tune of \$500,000, and Vessel B for \$300,000. The shipper's cargo also gets banged up, causing a \$100,000 repair bill.

Everyone points the finger at everyone else, and the three sue each other. Let's say everyone is indeed at fault and liable to some degree. Now what?

Under U.S. maritime law, percentages of fault must be determined for each participant, which will total 100%. Of course, allocation of fault in a case like this is far from an exact science, and the parties typically rate their own culpability far lower than that of the other culprits (often denying any fault at all). Thus, courts do their

## COMPARATIVE FAULT. . . Continued

best to come up with percentage allocations for each player's naughty act. If you tried the same case ten times, you might get ten different results even if the factual conclusions are identical. But determinations must be made for the system to work.

So let's say a court concludes that the shipper is 20% at fault for not properly securing its cargo; Vessel A is 30% at fault for not securing the container; and Vessel B is 50% at fault for bad maneuvers. No one is happy with those numbers, but they will govern the outcome.

Next step: we determine the aggregate damages, which is the total of all parties' losses. \$500,000 + \$300,000 + \$100,000 = \$900,000. Thus, everyone will pay their allocated share of \$900,000, which is \$180,000 from the shipper, \$270,000 from Vessel A and \$450,000 from Vessel B.

The shipper is already out \$100,000 from the cargo repair bill it paid, so it would pony up \$80,000. Vessel A is out \$500,000 from its hull damage, but is liable for \$270,000 of the loss, and so would collect \$230,000 from the pot. Vessel B's liability reduced by its own damages is 150 grand (\$450,000 - \$300,000), which it will fork over to Vessel A. All of this is subject to other various points of maritime law regarding liability, but you get the picture.

You can imagine that the fault allocation program gets tricky and controversial. That's only natural when everyone is both a victim and a culprit. The Fifth Circuit Court of Appeals recently took a look at a district court decision in which a trial judge had allocated 50-50 responsibility to two operators involved in a collision. The accident occurred while the two boats were attempting to pass each other within a channel.

Apparently, one vessel swerved in front of the other without warning. Expert and fact witnesses disagreed on whether the channel was wide and deep enough for the two vessels to pass safely without running aground in the first place. The trial judge concluded that both operators were mistaken about the other's cargo weight,

which forced both vessels to move toward the channel's center. "Each of them believed the other one could give it more room, when in fact, given the load carried by the two vessels, neither could."

The Court of Appeals reviewed the trial judge's reasoning, and refused to disturb it. To convince an appellate court to reverse a trial court's allocation of fault determination, an appealing party must demonstrate that the lower court's findings were "clearly erroneous," a rather high standard. To challenge the lower court's application of evidence, "abuse of discretion" must be shown. That's even stricter. In other words, getting a trial court's rulings on fault allocations reversed is one tough chore.

Not a perfect system by any means, but it's the best we can do when more than one entity causes a loss. Happily, insurance usually is available to take the sting out.

Ref: *In re Cardinal Services, Inc., et al*, 2008 WL 5272519 (5TH Cir. 2008).

## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

**Carriers' insurers may not be named as defendants in cargo lawsuit based on state direct action statute.**

*Land O'Lakes v. Joslin Trucking, Inc., et al*, 2008 WL 5205910 (W.D. Wisc 2008)

Shipper Land O'Lakes filed suit in the Western District of Wisconsin against a couple of motor carriers seeking recovery of the value of a shipment of butter lost in interstate transit. The shipper named as defendants a couple of Lloyd's underwriters and Great West Casualty Company - who insured the motor carriers - based on Wisconsin's direct action statute. The insurers moved to dismiss the claims against them, and the court obliged.

## Hot Recent Cases ...Continued

Wisconsin's direct action statute, like many others around the country, authorizes direct action against insurers when claims are based on state-law negligence theories. However, this matter was governed by a preemptive federal statute – Carmack – such that any state law theories would be inapplicable (even if they'd been pleaded, which they hadn't). Land O'Lakes urged that the court had "supplemental jurisdiction" over the insurers, but a court can't supplement jurisdiction based on a preempted cause of action. The shipper also argued that 49 USC § 13906(a)(4), which authorizes the Secretary of Transportation to require motor carriers to carry insurance for property lost in interstate transit, produced "federal question jurisdiction." That argument failed, as shippers aren't empowered to sue under that statute, and there was no question about whether either carrier actually had insurance.

The only way insurers can be joined in a case like this is by way of a third-party action brought by the insured carriers. The court gave the carriers ten days to implead their insurers as third-party defendants. Otherwise, the insurers can sit this one out until the results come in.

### Carrier's parent company may be liable for freight damage outside of Carmack!

*Taylor, et al v. Allied Van Lines, et al*, 2008 WL 5225809 (D. Ariz. 2008)

A household goods shipper hired Allied Van Lines to haul his stuff from Texas to Arizona. Something went wrong (the opinion doesn't tell us what), and the shipper sued Allied and the carrier's parent company SIRVA, Inc., alleging a host of negligence, fraud, unjust enrichment and other common law theories against both. The defendants removed the action from state court to the District of Arizona, then brought an FRCP 12(b)(6) motion to dismiss.

Carmack clearly governed the claim against Allied. The court ruled that the complaint didn't state a prima facie cause of action because it never asserted that the freight was tendered in good order and condition (an essential element of a Carmack claim). The complaint did allege

delivery in damaged condition, as well as the amount of the loss, but this didn't paint the full picture. The shipper urged that it had requested "experienced movers," but that statement doesn't equate to an allegation of good order and condition. Allied is out, but it seems like the complaint's defects could easily be cured. Note: other courts have gone the other way with this, finding good order and condition at time of tender to be implicit.

But what about an interstate motor carrier's parent company? SIRVA argued that it wasn't a carrier in this transaction, and Carmack doesn't impose liability for freight damage on non-carriers. End of story, right?

Wrong. The plaintiff shipper's allegations included such things as consumer fraud, misrepresentation of the "nature of the transaction," and that defendants – including SIRVA – had lost plaintiff's property. Interpreting various other precedents (although none were particularly analogous), the District of Arizona ruled that Carmack's preemptive effect applied only to carriers, and was not meant to preempt state and common law claims against non-carriers. It also did not preclude actions against non-carriers for cargo loss. As the court ruled, "[t]o hold that suit can be maintained against carriers only would impose absolute liability on carriers while granting non-carrier entities de facto immunity for all torts they commit in effecting interstate shipping agreements."

But the allegations against SIRVA, while the opinion does not present them in detail, likely could only apply to it in a capacity as a "carrier." Motor carriers and other transportation entities frequently are part of complex corporate holding structures. By this court's analysis, aggrieved shippers easily could circumvent Carmack's primary goal of a uniform, national liability regime simply by naming as defendants carriers' parent companies. This decision could wreak havoc in the motor carrier industry.



## Hot Recent Cases...Continued

**Limited liability results from shipper-issued bill of lading with carrier's tariff-incorporating sticker.**

*AIM Controls, LLC v. USF Reddaway, Inc.*, 2008 WL 4925028 (S.D. Tex 2008)

AIM Controls ordered a few electronic motor controllers from Minnesota-based Control Techniques America ("CT") for delivery to AIM's customer in Texas. CT engaged USF Reddaway to make the haul. CT prepared the bill of lading, but USF Reddaway affixed to it one of those handy-dandy stickers that incorporated the carrier's NMF 100 tariff. That tariff, of course, includes a proviso that cargo value must be declared, and may not exceed \$25.00/pound, lest the carrier's liability be limited to peanuts.

The freight arrived damaged, AIM's customer refused it, and the mess went to the Southern District of Texas. On USF Reddaway's motion for summary judgment seeking limitation of liability, the court analyzed whether a shipper could inadvertently incorporate terms in its own bill of lading if it has no actual knowledge about. Citing cases from various circuits, the court found the answer to be yes.

CT obviously knew its own bill of lading didn't incorporate a tariff. The court observed that CT therefore negotiated whether or not a tariff would be incorporated, and had the choice to refuse Reddaway's sticker. This amounted to CT's agreement to the carrier's tariff, which shippers are held to have constructive knowledge about.

**Claim against carrier for stolen cargo is subject to Carmack.**

*Advantage Transportation, Inc. v. Freeways Express, LLC*, 2008 WL 5062672 (N.D. Tex 2008)

Here's a short but sweet opinion confirming that freight stolen by a third party in interstate transit is still subject to Carmack. Shipper MTD Products hired freight forwarder Advantage to arrange shipment from Ohio to Texas of a cargo of lawn mowers. Advantage placed the load

with carrier Freeways Express, whose driver parked the trailer in a repair yard en route. The load disappeared. Advantage paid off MTD and sued Freeways Express in the Northern District of Texas.

Advantage moved for summary judgment, and Freeways Express apparently didn't bother to oppose the motion. Noting that even an unopposed motion for summary judgment must be considered and cannot be granted automatically, the court went through a standard Carmack analysis. Advantage had demonstrated its burden of proof (without rebuttal) that the cargo was tendered in good order and condition, and was not delivered at all. Citing authority from 1948 and 1850 (that's right!), the court ruled that the loss' occurrence through theft while on Freeways Express' watch did not alter the Carmack analysis. Damages also being established and uncontested, summary judgment was granted.

**Placards on a bobtail tractor produce irrebuttable presumption that motor carrier lessor's insurance provides accident coverage.**  
*Cincinnati Insurance Co., et al v. Stacey, et al*, 2008 WL 5329989 (Ohio App. 12 Dist. 2008)

Motor carrier Sewell Motor Express operates largely through leases with owner operators, including one with Mr. Stacey. Sewell carries bodily injury and property damage coverage with insurer Cincinnati Insurance Co. ("CIC"), which covers the leased vehicles. Stacey has his own insurance from certain Lloyd's underwriters to cover times when he operates his tractor outside of the Sewell lease.

On his way to work one morning (bobtail), Sewell struck a motorcyclist. Sewell and CIC filed a declaratory judgment action seeking determinations they had no duty to defend or indemnify Stacey against the motorcyclist's claims because, hey, he wasn't on Sewell's clock at the time of the accident. Sewell and his insurer fired the reciprocal position back at CIC and Sewell, and all parties filed motions for summary judgment before the Clinton County Court of Common Pleas in Ohio.

## Hot Recent Cases...Continued

Affirming most of that court's ruling, the Ohio Court of Appeals ruled in favor of Stacey and his insurer. CIC and Sewell are liable for any damages in the motorcyclist's forthcoming lawsuit. Under an Ohio decision which (per this court's observation) represents the nation's "majority view," the fact that Stacey's rig bore Sewell's placards creates an "irrebuttable presumption" that he's operating for Sewell, even if he's trailerless. This approach is designed to protect the public at large, avoiding a potentially lengthy struggle between multiple parties about who's on for what.

CIC urged that other case law has produced the opposite conclusion when an innocent player's rights are not at issue. Here, the injured motorcyclist wasn't a party to the lawsuit. We just had a couple insurers jockeying for position regarding coverage. The court rejected that contention, finding that the insurers filed this suit in contemplation of underlying liability litigation. The court also spurned CIC's contention that rewrites of federal regulations suggested primary motor carrier coverage wasn't needed for this kind of circumstance.

But what about indemnification? Even though CIC is on the hook for primary coverage and would have to pay the claimant, shouldn't it be able to recover from Lloyd's sums that it pays out to a claimant? Here again, the court sided with Stacey and his insurer, and said no. Stacey was an insured under the CIC policy even for non-business uses, and the Stacey-Sewell lease agreement provided that Sewell is responsible for the costs of liability "for the protection of the public as required by applicable laws and regulations." The court noted there may be some overlap in coverage, but "applicable law" requires the motor carrier to have coverage for these circumstances. Stacey and Lloyd's walk.

While there is support for this conclusion, it at least appears to be at odds with the intentions

and understandings of all involved players. It also has little or nothing to do with the protection of the public at large.

### **Shipper who participates in freight loading may be liable for accidents.**

*Hensley v. National Freight Transportation, Inc.*, et al, 668 S.E.2d 349 (NC Ct.Apps. 2008)

Shipper Allvac engaged motor carrier National Freight to haul a load of palletized zirconium coils within the Tar Heel State. A National Freight driver backed his flatbed up to Allvac's dock, and directed Allvac as to the pallets' positioning on the flatbed. While on the road, a pallet fell from the trailer, killing a motorcycle passenger.

The deceased's estate sued all involved, including Allvac, in North Carolina state court. The trial court summarily dismissed the claim against the shipper. The court of appeals reversed, finding issues of fact about who was responsible for the cargo loading.

This case reviews and summarizes federal regulations and precedents regarding liability for improper cargo stowage. Basically, the motor carrier is liable if it loads the freight, or if the shipper loads the freight improperly in a way discernible to the carrier. If the shipper loads the freight with "concealed" or "latent defects," then the shipper is liable. In this instance, the court ruled it was not clear from evidence who did the loading, such that this analysis could not be undertaken on summary judgment. A compelling dissent pointed out that the carrier bears an obligation under state and federal law to secure the load, and the carrier's undisputed activity in directing how the cargo should be situated on the flatbed was sufficient to warrant summary judgment.

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