

SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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EXCLUSIVELY ECONOMIC DAMAGES ARE NOT RECOVERABLE IN MARITIME TORT, BUT THEY MAY BE UNDER STATE LAW.

By Steve Block

Imagine you're the owner of freight critical to an ongoing project somewhere overseas. You book ocean transportation of that freight with a steamship line, which assures you timely delivery. Now imagine the vessel hauling your precious load collides with another boat as a result of the latter's inadequate equipment, operation or other fault. Your project freight isn't damaged, but its delivery is delayed, costing you the entire project and expected hefty profits. You'd be pretty ticked at the inept vessel owner, right? Wouldn't you feel entitled to collect your losses from him?

But could you?

Here's an example of an often severe rule of maritime law that courts sometimes reject in favor of what they deem to be more appropriate state law. Of course, doing so means they have to dismiss concerns about the uniformity of federal maritime law.

The general rule is that federal maritime law precludes recovery of damages incurred as a result of a "tort" (generally, someone's negligent or intentional act or omission in breach of a legal or assumed duty that causes a loss) unless the claimant has a proprietary interest in damaged property. Of course, business partners are free to agree to economic liability in their contracts, but industry players rarely are interested in being on the hook for extensive losses. In the example stated above you'd probably be out of luck.

The fact that you had a contract with your own steamship line to deliver the freight by a designated deadline doesn't change the equation. As the U.S.

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Supreme Court in its seminal 1927 decision in *Robins Drydock & Repair Co. v. Flint* put it: "[A]s a general rule ... a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far."

Why? One purpose of a uniform body of maritime law is to provide industry reliable foreseeability about the consequences of their actions. As the U.S. Court of Appeals for the Fifth Circuit ruled in *IMTT-Gretna v. Robert E. Lee SS*: "This bright line rule serves as notice to non owners that they cannot claim damages in maritime collisions. 'Denying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability, a limitation we find to be both workable and useful.'"

In fact, those principles aren't unique to maritime law, which in many cases is just re-packaged common law applied the same way in other contexts. Many states have and apply "economic loss rules" through statute or judge-made law that apply similarly. If your property or person isn't damaged, or if you have a contract with the tortfeasor, you can't recover purely economic damages in tort. Accidents in those states'

EXCLUSIVELY ... Continued

waters don't really implicate uniform admiralty law principles, as the result is the same under either state or maritime law.

But what about states that do allow economic damages without damaged property or despite a contractual relationship (at least in some instances)? Their state and federal courts have applied the law divergently and with different rationales. Another admiralty law precept is that a state may indeed make law without regard to admiralty uniformity federal maritime law, in the Ninth Circuit's words, "'as it sees fit' so long as the state remedy does not (1) 'contravene the essential purpose expressed by an act of Congress;' (2) 'work material prejudice to the characteristic features of the general maritime law'; or (3) 'interfere with the proper harmony and uniformity of that law in its international and interstate relations.'"

Especially when it comes to oil spills and other hazmat violations; commercial fishermen's rights; and a tortfeasor's particularly egregious misconduct, some courts find their way around Robins Drydock and other federal maritime law concepts. They determine that state interests in deterring and providing remedies for such activity puts Uncle Sam and his body of uniform maritime law in a jurisdictional backseat. In their opinion, protection of certain state interests does not offend Congress' intentions or the priority of a uniform body of maritime law and, accordingly, they award purely economic damages even in the absence of damaged property. So much for foreseeable consequences of acts and omissions.

By and large, industry players shouldn't count on recovering economic damages when their own property isn't damaged and/or they have a contract with the tortfeasor, and it's often difficult to obtain insurance for lost profits. Oftentimes, the best you can do is protect yourself in your business contracts from responsibility for accidents caused by third parties.

Ref: *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *IMTT-Gretna v. Robert E. Lee SS*, 993 F.2d 1193 (5th Cir. 1993); and *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

OFFSET: CARMACK DOESN'T PRECLUDE SHIPPERS FROM DEDUCTING LOST CARGO VALUE FROM OUTSTANDING FREIGHT CHARGES.

by Steve Block

"The interstate shipment of goods is a complicated business," begins a well-written decision from the U.S. Court of Appeals for the Seventh Circuit. Complex notions of business and law are bound to collide, giving rise to confusion, dispute and lawsuits.

Shipper Circuit City engaged transportation broker C.H. Robinson to arrange transit of a cargo of DVD players from California to Illinois. C.H. Robinson arranged the three-leg shipment, booking (1) motor carriage by trucker Patriot from Circuit City's Walnut, California facility to the Union Pacific Railroad's Los Angeles depo; (2) rail carriage by the U.P. to Dupo, Illinois; and (3) drayage by trucker REI Transport from Dupo to Marion, Illinois. Patriot issued a through bill of lading (covering the entire transit) which affirmed the cargo's quantity.

The first leg went fine, but a U.P. employee noticed Circuit City's container seal was missing and reported an "unknown loss" of DVD players. The U.P. resealed the container, but mistakenly noted on the delivery receipt that the original seal was intact. REI took the freight and delivered it to Circuit City, where a shortage of \$85,429.98 in DVD players was found missing.

C.H. Robinson, probably for business reasons, paid Circuit City the value of its claim in exchange for an assignment of rights against the carriers. Exercising its rights under a clause in its contract with REI, the broker withheld \$81,232,64 in due and owing freight charges as offset against the lost cargo's value. REI sued C.H. Robinson in the U.S. District Court for the Southern District of Illinois, where the court found that the Carmack Amendment preempted REI's breach of contract claim against C.H. Robinson, and that C.H. Robinson had satisfied Carmack's requirements for a prima facie case

OFFSET: CARMACK . . . (Continued)

of cargo loss. The trial court even awarded C.H. Robinson some four grand representing the lost cargo's value and the offset freight charges.

On appeal to the Seventh Circuit, REI successfully argued that Carmack preemption doesn't apply here. Carmack provides shippers of freight in interstate transit their sole rights and remedies against motor carriers. In doing so, state and common law theories of recovery – such as negligence, intentional torts, breach of contract, and others – are “preempted,” meaning aggrieved shippers are foreclosed from basing their cargo claims on them. This provides industry players a uniform and level playing field regarding their positions in lost/damaged freight disputes. Interstate surface transit (including both rail and trucking transit) inherently involves travel through more than one state, and having inconsistent state law govern cargo lawsuits would produce uncertainty and ambiguity as to players' rights and obligations. This basically is the same concept maritime law embraces with federal admiralty jurisdiction and its uniform body of law applicable to international and interstate water carriage.

But, as the Seventh Circuit concluded, that federal-law preemption applies only to shipper claims against carriers for lost/damaged cargo, and not to carrier claims against shippers for unpaid freight charges. The latter are business issues that don't require national uniformity, and aren't encompassed by Carmack's statutory mandate.

But just because REI's breach-of -contract claim for unpaid freight charges isn't preempted doesn't mean it's valid. To prevail on a Carmack claim, a shipper must first establish a prima facie case by presenting evidence of (1) tender of freight to the surface carrier in good order and condition; (2) arrival in damaged condition (or, as here, a shortage); and (3) damages. REI conceded elements “2” and “3,” but did dispute whether C.H. Robinson had proved delivery to REI of the full alleged quantity.

The court concluded that C.H. Robinson had indeed demonstrated “1” as well, as Patriot's “pick sheet” itemized the shipment's contents,

and testimony from Circuit City left no reason to suspect that its general loading procedures weren't followed. Not analyzed in the decision is whether REI could have confirmed the cargo count when it received the freight, or why it should be bound by the count in Patriot's through bill of lading. The court did point out that once a shipper has demonstrated a prima facie case, the carrier may defend by proving one of Carmack's enunciated defenses and its freedom from negligence in causing the loss. Apparently, REI didn't even attempt to do so in the trial court proceedings.

REI did point to a contract clause which would limit its liability to damage occurring while cargo was in its “custody and control.” However, that takes us back to Carmack, which spells out all whys and wherefores of carrier liability, and therefore prohibits such restrictive contract clauses. Notably, parties to a transportation contract may partially or wholly waive Carmack (assuming they specifically do so), which might have saved REI in this instance.

The final word is that, yes, shippers may deduct outstanding freight charges from the value of lost/damaged cargo in interstate transportation. Entitlement to that deducted lost value, unless otherwise agreed to, is governed by Carmack.

Ref: *REI Transport, Inc. v. C.H. Robinson Worldwide, Inc.*, 519 F.3d 693 (7th Cir. 2008).

HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

Shipper may be liable for improper cargo stowage even though carrier directed the entire process.

Hensley v. National Freight Transportation, Inc., et al, 2008 WL 4876994 (NC App. 2008)

Shipper Allvac hired carrier National Freight Transportation (“NFT”) to haul four pallets of wire coils from Richburg, South Carolina to Huntsville, Alabama with a stop in Monroe, North Carolina for a second pickup. NFT's driver

Hot Recent Cases (continued)

arrived to fetch the freight, and told the shipper's personnel to load it on his flatbed. He didn't like the first loading job (pallets stacked on top of each other), and directed Allvac to resituate the pallets. They complied.

When the NFT driver arrived in Monroe, the Allvac plant was closed. He tightened the straps securing the cargo, hunkered down for the night, returned to Monroe the next day, and directed Allvac personnel how to load the additional freight. He then strapped down the new materials, checked all lashings, signed a bill of lading stating that the cargo had been loaded in accordance with his instructions, and handed off the load to a new driver in Harrisburg, North Carolina. A pallet fell off the flatbed shortly after the truck departed, tragically killing a motorcycle passenger.

The decedent's estate sued all involved, including Allvac, in a Tar Heel state court. Allvac moved for summary judgment, disclaiming any responsibility for involvement in the loading and securement. The trial court agreed and dismissed plaintiff's claims against Allvac.

The court of appeals reversed. Despite numerous state and federal regs imposing on carriers responsibility for freight securement, the NFT driver's admitted direction of the loading process, and his subsequent adjustment of the straps, the court found a jury question as to whether Allvac might be at least partially responsible. Allvac's wishes in how the cargo was loaded apparently played some role in the process, and the driver testified that he couldn't "tell them [Allvac's employees] how to band" the coils.

A very compelling dissent pointed out that the law clearly apportions sole responsibility for cargo stowage on motor carriers, and at least one federal court of appeals decision has held a motor carrier solely liable even if the shipper is negligent in the loading process.

Container usage lease between ocean and motor carriers doesn't invoke admiralty jurisdiction. *Mediterranean Shipping Co. (USA) Inc. v. Rose, et al*, 2008 WL 4694758 (SDNY 2008)

Ocean carrier Mediterranean Shipping and motor carrier Dock Side Transportation entered into a lease known as the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIFAA") which basically allowed Dock Side to use Mediterranean's containers when completing the land segments of through hauls the ocean carrier contracted for with its shippers. The UIIFAA provides for numerous specifics of the arrangement, including "detention charges" to the motor carrier in the event containers aren't timely returned, and a forum selection clause in Maryland.

Mediterranean felt that Dock Side owed it detention charges for late returned containers in the Empire State, and sued the trucker in the U.S. District Court for the Southern District of New York alleging federal admiralty jurisdiction. Dock Side didn't appear within the allotted time, prompting Mediterranean to move for a default. The federal court sua sponte (i.e., on its own motion), examined whether it had admiralty jurisdiction over the claim, and found it did not.

Admiralty jurisdiction generally applies, among other things, to maritime contracts. Citing earlier precedents, "mixed contracts" (i.e., those with both maritime and non-maritime elements) fall outside of admiralty unless (1) a distinct and severable maritime element of the contract is at issue; or (2) if the principal objective of the contract is maritime commerce (a la Kirby). The contract at issue here was strictly a land-based equipment lease. Dock Side wasn't a party to the ocean carrier's maritime contracts. Unlike the Kirby scenario, this contract wasn't for the carriage of goods at all. While maritime demurrage cases are subject to admiralty, detention costs in those cases are closely related to ocean carriage.

But couldn't Dock Side enjoy the benefits of Mediterranean's bills of lading per their Himalaya Clauses, again a la Kirby? If that's the case, why shouldn't the predominantly maritime nature of an ocean shipping contract extend to a surface

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equipment lease. The court doesn't address that point. Nonetheless, this does not appear to be the kind of issue for which a uniform body of admiralty law would be designed or needed.

Delayed delivery produces jury verdict of consequential damages award.

Premier Graphics, Inc. v. Western Express, Inc., 2008 WL 4415773 (Tenn.Ct.App. 2008)

This opinion is rather confusing and not very detailed in its analysis, but is notable for its potential danger to carriers and brokers. Shipper Nashville-based Premier Graphics printed up conference directories and agendas for its customer and consignee McQuiddy in New York. Premier hired Intercon Systems - apparently a transportation broker, but the issue isn't analyzed - to arrange transit, specifically alerting Intercon as to the haul's time-sensitive nature.

Intercon placed the transit with motor carrier Western Express, which promised timely delivery in two segments. The shipper was assured delivery had been made without incident. The first truck had indeed arrived fine, but the second purportedly broke down in Tennessee. McQuiddy had to express mail the undelivered load to New York at a cost of \$29,500, and even with that, delivery wasn't effected until after the convention. The shipper and consignee claimed substantial financial losses including such things as lost good will, damage to their reputation, and lost profits. A Volunteer State trial court granted the plaintiff shipper summary judgment regarding liability, and submitted the damages issue to a jury trial. A clearly ticked-off jury saw things the shipper's way, and awarded the shipper and its customer \$61,578 against the carrier.

On appeal the Tennessee Court of Appeals affirmed after reviewing a panoply of transportation law issues. While there was no delivery date promised in the bill of lading, rate quotes demonstrated the broker's and carrier's knowledge about the freight's time-sensitive nature. Citing a 1980 District of Maryland

decision, the court found that damages resulting from "unreasonable delay" are recoverable under the Carmack Amendment. This is because motor carriers are obliged to transport cargo "with reasonable dispatch," which wasn't done here. Why? Apparently because the carrier didn't correctly apprise the shipper of the circumstances. Moreover, even under a strict Carmack analysis (in which damages are calculated as the reduced difference in value at destination after damage or loss), the cargo was worth "zero" at a convention that had already concluded.

Rejecting the transportation providers' arguments about inadequate notice of claim, speculative damages crunching, and bad jury instructions, this court socked it to the carrier. Special and consequential damages were held recoverable.

Carmack's "Savings Clause" doesn't save much, if anything.

Fyke Trading USA, Inc. v. New England Motor Freight, 2008 WL 4443222 (WDNY 2008)

This opinion from the Western District of New York is somewhat confusing, but contains a legal analysis potentially useful in federal court removal motions. Plaintiff Fyke Trading is described as a broker but identified as the owner of goods carrier New England Motor Freight shipped in interstate commerce. It's not clear what wrong - something about removed security devices and/or negligence by the carrier's personnel - but somehow the undescribed cargo was damaged. Fyke sued, alleging negligence, in New York state court. The carrier removed to federal court citing Carmack preemption. On cross motions for summary judgment, the plaintiff "shipper" moved to remand back to state court, and the carrier moved to dismiss the negligence claims as preempted.

The federal court quickly and properly found the negligence claims preempted by Carmack, and granted New England Motor Freight's motion. The motion to remand was denied based on an analysis of Carmack's "Savings Clause," which provides that "[e]xcept as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or

Hot Recent Cases (continued)

common law." Fyke apparently interpreted that to mean that common law theories such as negligence survive Carmack. Noting the myriad cases that have held the opposite, the Western District of New York observed that the "Savings Clause" "rarely 'saves' claims for two main reasons." First, it only saves federal law claims (and not state law ones), lest the clause would "destroy the act itself." Second, Carmack and other provisions of the Interstate Commerce Act "precludes any federal common law claims." What could possibly be left? While the issue is purely academic, it is interesting to consider just what the Savings Clause is there for.

COGSA's statute of limitations doesn't apply to a trucker unless COGSA does.

Kellaway Intermodal & Distribution Systems, Inc. v. The Gillette Company, 2008 WL 4353501 (D. Mass 2008)

Shipper Gillette Company engaged a forwarder to arrange transit of a cargo from Ayer, Massachusetts to England. The forwarder retained ocean carrier P&O Nedlloyd, which hired motor carrier Kellaway to haul the load from Ayer to Philadelphia for transloading to the steamship line's vessel. The Kellaway truck caught fire en route to Philly, destroying Gillette's cargo to the tune of some quarter million dollars.

Things heated up between the players, and after passage of a year, Kellaway raced to the U.S. District Court for the District of Massachusetts courthouse with a motion for declaratory judgment. The motor carrier wanted a determination that the one-year statute of limitations contained within the U.S. Carriage of Goods by Sea Act ("COGSA") applied to the transportation's land-based segment. This would preclude Gillette from suing the Kellaway.

Gillette had prepared a bill of lading for the through transit. Kellaway never issued a bill of lading, and was never even in touch with Gillette or the forwarder. P&O Nedlloyd also never got around to issuing a bill of lading, apparently because it planned to do so only after the freight was loaded onto its vessel.

Moreover, the ocean carrier's standard bill of lading doesn't extend COGSA beyond its statutorily "tackle-to-tackle" boundaries, which means it wouldn't have applied to the motor carrier anyway. True, the unissued through ocean bill of lading contains a Himalaya Clause that would extend the ocean carrier's rights to connecting surface carriers, but those extended rights, again, would only be while freight was on P&O Nedlloyd's vessel. Consequently, COGSA and its short statute of limitations don't save Kellaway.

The court touched on the motor carrier's potentially limited liability, but concluded that Kellaway's tariff, which contains a limitation of liability clause, doesn't govern. Left open for future consideration is whether Gillette's bill of lading may limit the carrier's liability, a result that would be as unintended as it would be ironic.

Owner-operator's Truth-in-Leasing Claims aren't time barred, but they are subject to mandatory arbitration.

Davis v. Larson Moving & Storage Co., 2008 WL 4755835 (D. Minn. 2008)

Owner-operator Davis was under lease to household goods mover Larson Moving & Storage, originally under a 1998 independent contract operating agreement, and then a superseding 2004 agreement. A dispute erupted between the parties (the opinion doesn't tell us the specifics), which prompted Davis to sue Larson with allegations of Truth-in-Leasing regulation violations in the District of Minnesota. Those regs are at 49 CFR § 376.12 and are promulgated under 49 USC § 14704(a)(2). Davis claimed violations under both lease agreements.

Larson moved to dismiss the claims asserting they were time barred by the regs' two-year statute of limitations. Davis responded that no statute of limitations is specified for § 14704(a)(2), and that therefore the four-year catch-all limitations period of 28 USC § 1658 applies. A technical issue indeed, but a very important one.

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At the heart of the analysis was a typo, or “scrivener’s error,” within the text of 49 USC § 14705(c), which Larson pointed out was intended to confer a two-year statute of limitations on § 14704(a)(2) and not, as it is written, on § 14704(b). However, the Eleventh Circuit Court of Appeals has refused to correct this typo, pointing out that “there is no absurd result imposing different statute of limitations for two different types of claims arising out of § 14704,” which is what otherwise results. This court refused likewise.

Larson also urged that Davis’ claims were subject to mandatory arbitration under the lease’s terms, a position Davis resisted. Davis asserted that Congress didn’t intend the federal regulatory scheme pertinent to motor carrier leasing to be subject to contractual arbitration, but couldn’t point to any precedent or authority for that position. Because the Federal Arbitration Act imposes liberal enforcement standards on contractual arbitration clauses, Davis’ claims are headed for arbitration.

CONTACT INFORMATION

For comments or additional information on the articles in this issue please contact the authors either by phone at (206) 292-9988 or by email.

Steve Block
sblock@bpmlaw.com

Brandon Carroll
bcarroll@bpmlaw.com

Dana Henderson
dhenderson@bpmlaw.com

Stacia Hofmann
shofmann@bpmlaw.com

Andrea Holburn
aholburn@bpmlaw.com

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