

SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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CARMACK GOVERNS OCEAN CARRIER'S LIABILITY: U.S. SURFACE CARRIAGE LIABILITY LAW HITS THE HIGH SEAS

BY Steve Block

The disarray continues in the aftermath of the U.S. Supreme Court's 2004 decision in *Kirby v. Norfolk Southern*. What was hailed as long-awaited judicial clarification about what most sectors of transportation law and industry already understood has proven to be more the subject of new distortion and confusion than law's accommodation of industry's evolution. The situation may be getting worse, and not better.

Misapplication, some would say disregard, of *Kirby* is becoming a national phenomenon. In the *Sompo Japan* decisions, the Second Circuit found that Carmack can govern liability for losses that occur during the surface leg of a multimodal haul implemented pursuant to through ocean bills of lading that extend the U.S. Carriage of Goods by Sea Act (COGSA) to succeeding carriers. Under those decisions, railroads and truckers in America's northern states could be deprived of COGSA's protections and limitation of liability.

A recent Ninth Circuit decision goes at least one step further, holding that ocean carriers might be subject to Carmack. That's right - steamship lines are now (or at least could be) *de facto* surface carriers for liability purposes. Most troubling about the Ninth Circuit's decision is that it makes damn good sense in its deciphering of incongruous terms contained in two parallel liability regimes, and increases one's wonderment about whether judicial decisions can ever sort the mess out.

Like most other cases in the past five years addressing these issues, our fact pattern is conveniently simple. Ocean carrier K-Line issued several shippers through bills of lading covering

INSIDE THIS ISSUE

Carmack governs ocean carrier's liability: U.S. surface carriage liability law hits the high seas by Steve Block	1
Maintenance and Cure: Collectible Under Penalty of Punitive Damages (Jones Act Notwithstanding) by Steve Block	2
Hot Recent Cases in Motor Carrier Law by Steve Block	4
Contact Information	7

carriage of freight from China to points in the U.S. Midwest. Those bills of lading contained jurisdiction clauses mandating that cargo litigation take place in Tokyo. Connecting surface carriage was to be effected by the Union Pacific Railroad. A UP train derailed, damaging the cargo. At issue in a lawsuit the shippers brought against both carriers in the U.S. District Court for Central California was whether the forum selection clauses were enforceable.

Under COGSA, they clearly would be under long-existing U.S. law. The district court, and later the Ninth Circuit, went through analyses of whether the parties had effectively opted out of Carmack. If they hadn't, Carmack's specific venue provisions (mandating litigation in a "judicial district" which means, in essence, somewhere stateside) would govern. Following the same reasoning applied in the *Sompo Japan* decisions, the trial and appellate courts in this matter concluded that parties cannot contractually eliminate Carmack simply by extending COGSA. They also distinguished *Kirby* on the grounds it was concerned only with application of state law, as opposed to a federal statute like Carmack whose terms were intended to be "parallel" to COGSA's.

CARMACK GOVERNS ... Continued

The Ninth Circuit didn't agree with the Central District of California's conclusion. Actually, it didn't agree with anyone at all, including any of the parties. The lower court ruled that the parties had indeed opted out of Carmack properly, such that COGSA governed and the forum selection clause was valid. It applied the provisions of 49 USC § 10709, which is designed for carriers that are not exempt from Surface Transportation Board regulation. Over the plaintiffs' objections, it concluded that the carriers were under no obligation (per that section) to offer their shippers "Carmack protections" of full liability unless alternate liability terms are offered, etc. The Ninth Circuit rejected plaintiffs' contention that 10709 does require Carmack protections, and refused to accept defendants' position that the transportation agreement was subject to 10709 because, well, it said it was.

The Ninth Circuit instead looked to the nature of the transport, focusing on 49 USC § 10502(f)'s exemption from Board jurisdiction transportation by a rail carrier that is part of a continuous intermodal movement. This statute would define K-Line as a "rail carrier" for purposes of that section (i.e., it contracted to undertake carriage by rail). Thus, the shipping contract was subject to and defined by 10502 because it concerned an exempt transportation. To fully adjudicate the matter, a factual determination must be made of whether the carriers had offered their shippers Carmack protections. The Niners sent the matter back down the hill for further proceedings.

The Ninth Circuit's analysis is certainly engaging if not entirely persuasive. It makes sense. Indeed, the Court of Appeals somewhat sheepishly remarks, citing *Sompo*, that "[t]he parties' confusion is understandable given the 'muddled state of the law.'" The problem is that this decision is at complete odds with the policy considerations of *Kirby* and cases following it. It further complicates issues and leaves parties less secure in their understanding of what their transportation relationships can lead to. It also makes clarification of the issues by way of a future U.S. Supreme Court decision (potentially in *Sompo Japan*) more difficult.

Ref: *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985 (9th Cir. 2009).

MAINTENANCE AND CURE: COLLECTIBLE UNDER PENALTY OF PUNITIVE DAMAGES (JONES ACT NOTWITHSTANDING)

by Steve Block

Maritime law consists of myriad principles that have evolved over the ages. Some have roots thousands of years in the past, some are newbies that go back only a century or two, and a few are innovations even more recent than that. Sure, the concepts are interpreted and reinterpreted in the context of contemporary circumstances, but the law - by and large - has remained the same (the names haven't been changed to protect those who originally conceived them).

Law governing water carriage has always recognized and appreciated the risks and sacrifices mariners make to provide that most quintessential element of interstate and international commerce - waterborne transportation. While circumstances have improved, vessel operation has always been a dangerous business, and one that inherently displaces seamen from their homes and families. Thus, international maritime law - since time immemorial - has always provided sick and injured vessel crewmembers certain benefits. The right to "maintenance and cure" has been around perhaps as early as the Philistine period, and was recorded in the Rolls of Oléron, the first formal statement of maritime law promulgated in 1160 A.D. Maintenance and cure rights undoubtedly pre-date that most famous of international ocean voyages, that of Columbus to America.

The common law doctrine of maintenance and cure essentially make vessel operators their seamen-employees' comprehensive medical and disability insurer. Put briefly, it obligates maritime employers to pay the medical costs of their seafaring employees through the point of

MAINTENANCE AND CURE. . .

“maximum medical improvement,” and the value of room and board of the quality a seaman enjoys on a ship (which isn’t a particularly high standard, and typically is valued at 20 to 50 bucks a day). Liability for an accident is irrelevant; maritime employers are responsible for taking care of their employees even if they’re completely fault free.

Fast forward, let’s say, a millennium or so, and the United States gets around to codifying points of maritime law as federal statutes. In 1920, Congress promulgated The Merchant Marine Act, colloquially known as “the Jones Act” (after its sponsor, Senator Wesley L. Jones of Washington), which incorporated certain common law provisions regarding seamen’s rights. But it’s silent as to maintenance and cure, as well as that other age-old American claimant’s trump card, punitive damages.

It’s not surprising that the evolution of antediluvian concepts – after centuries of being construed and reconstrued within progressive social, technological and legal frameworks – have generated uncertainty and incongruity. You can’t reduce a vast and history-enriched body of law to a few statutory phrases and expect everything to be as crystal clear as the Caribbean Sea. No wonder legal concepts frequently come to a head in our industry.

That recently happened with respect to maintenance and cure and punitive damages when tugboat seaman Edgar Townsend hurt his arm while on duty. His employer, Atlantic Sounding Company, advised him the company would not pay him maintenance and cure. Mr. Townsend sued Atlantic Sounding in the U.S. District Court for the Middle District of Florida, not just for his medical expenses, room and board, but for punitive damages resulting from the employer refusing to pony up the same.

Atlantic Sounding moved to dismiss both claims. It argued that the Jones Act was designed to provide injured seamen their *exclusive* remedy against their employers. It could have stated specific rights had Congress intended it to, including maintenance and cure and punitive damages.

The court denied Atlantic Sounding’s motion, and case worked its way to the United States Supreme Court, which granted *certiorari* based on discrepancies in decision of a few U.S. Court of Appeals. Settling the question, the High Court ruled that Mr. Townsend is indeed entitled as a matter of common law to maintenance and cure, and to punitive damages based on Atlantic Sounding’s “willful” refusal to pay it.

Seamen plaintiffs are empowered to “elect” to bring their claims under common law *and/or* the Jones Act. The Jones Act didn’t eliminate any common law rights, even though it codified certain ones within its text. If the statute had been meant to be a seaman’s exclusive remedy, it would have said so. The Supreme Court “has consistently held that the Jones Act preserves common-law causes of action such as maintenance and cure . . .”

Atlantic Sounding pointed to a couple of earlier Supreme Court precedents it interpreted to impose a choice of common law or the Jones Act on seamen. That interpretation was erroneous, as the cited case law addressed whether common law provided remedies for certain claims, and whether the Jones Act statutorily limited available remedies. That’s a whole different question than the one presented here. The earlier cases did not force seamen to elect statutory or common law, or provide that the Jones Act controls exclusively.

Similarly, the general maritime law allows punitive damages awards. Indeed, the availability of punitive damages for nonpayment of maintenance and cure “has been recognized for more than a century.”

Many maritime personal injury attorneys, as well as their clients, operate under the assumption that the Jones Act is the be all, end all, source of their rights and remedies. That presumption actually would achieve a fundamental goal of admiralty law – uniformity and defined expectation of rights and remedies. With the Supreme Court’s latest pronouncement, counsel and parties to

MAINTENANCE AND CURE ...Cont'd

maritime injury litigation are reminded that their entitlements and exposures are broader and less defined than a handy-dandy statute might suggest.

Ref: Merchant Marine Act (the Jones Act), formerly 46 USC § 688 and recodified on October 6, 2006 as 46 U.S.C. § 30104; *Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009).

HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

South Carolina revamps its law governing employee/independent contractor status based on owner operator claim.

Wilkinson v. Palmetto State Transportation Company, 2009 WL 1203298 (S.C. 2009).

Wilkinson was a staff driver employed by carrier Palmetto State Transportation Co. He apparently bought his own rig and entered into a standard lease agreement as an owner operator with Palmetto State. The lease agreement makes clear Wilkinson's status was as an independent contractor. Tragically, he was killed in an accident.

Pursuant to the lease agreement, Wilkinson had procured life insurance for his wife, which was paid out. But then his wife brought a state worker's compensation claim asserting that Wilkinson was an employee. As with most jurisdictions, South Carolina analyzes primarily the degree of control the putative employer has in determining whether a worker is an employee or independent contractor. The lower court, applying rather stringent law, ruled Wilkinson had been an employee on the basis of a rather slanted analysis of control issues that earlier South Carolina precedents mandated. That law provided, get this, that virtually any factor suggesting a degree of control was sufficient to make a worker an employee:

[F]or the most part, any single factor is not merely indicative of, but, in practice,

virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all.

That law is now history in South Carolina, per the recent ruling from that state's high court. While the law favors an employee relationship, "[t]hat principle, however, does not go so far as to justify an analytical framework that preordains the result. Moreover, that principle should not trump an unchallenged independent contractor arrangement where the parties' conduct follows the agreement in every material respect."

In analyzing the agreement and relationship issue, the court concluded that the degree of control Palmetto State exercised over Wilkinson didn't rise to the level of employer/employee. GPS systems the carrier required are for the customers' benefit. Wilkinson furnished his own equipment, and a Palmetto State cab insignia is far less significant as an item the carrier supplied. True, Wilkinson could terminate the lease, but so could Palmetto State, and the terms for doing so were spelled out in the lease. This differs greatly from the employment-at-will concept governing most employer/employee relationships.

The court recognized federal law at 49 CFR § 376.12(c)(1) mandating that motor carriers have exclusive possession of their lessors' trucks and bear responsibility for the same. But this reg and similar ones are designed for public safety reasons, and not to impact employment relationships. They don't change the equation.

Thus, Mr. Wilkinson was an independent contractor of Palmetto State, and his wife is not entitled to benefits available to employees.

Carmack Preemption: Not to be confused with limitation of liability.

Taylor v. Allied Van Lines, 2009 WL 1148582 (D. Ariz. 2009)

Allied hauled a load of household goods for shipper Taylor from Texas to Arizona. The carrier

Hot Recent Cases...Continued

didn't issue a bill of lading, and something bad apparently happened to the freight (the opinion doesn't say what). Taylor sued Allied in state court alleging state law theories of liability and omitting Carmack. Allied removed to U.S. District Court for the District of Arizona and moved to dismiss the defective complaint. The state law claims were dismissed, and plaintiff later re-pleaded them in addition to Carmack.

Allied brought a second motion to dismiss. By this time Taylor must have read up on Carmack, and opposed Carmack preemption on the ground Allied failed to issue a bill of lading as required under the statute. The court rejected that argument and again granted Allied's motion. Just because a carrier might face obstacles in limiting its liability (a bill of lading typically is required to do so) doesn't mean Carmack doesn't apply. As the court put it, plaintiff "confuses the issues of liability and preemption." Carmack, for better or worse, governs this claim.

More Carmack preemption for household goods: allegations substantiating a claim are needed to survive summary judgment, and an insurer's letter isn't necessarily written notice of claim.

Allstate Ins. Co. v. Mayflower Transit, LLC, 2009 WL 1015120 (C.D. Cal. 2009)

Household good shipper Miller booked transit of his stuff from California to Arizona with Mayflower. The truck crashed en route, and Miller collected insurance proceeds from insurer Allstate. Apparently, an Allstate adjuster sent a letter to Mayflower asserting subrogation rights and asking for reimbursement of the insurance payout.

Litigation ensued in California state court, and Mayflower removed Allstate's subrogation action to the Central District of California's federal court. The carrier then moved for summary judgment. The complaint alleged state and common law theories of liability (is this beginning to sound familiar?), and the shipper

failed to issue written notice of claim before expiration of the statutorily-blessed nine-month deadline.

The court granted the motion. Allstate urged that while its complaint didn't specifically allege Carmack liability, it should be construed to have done so because the allegations would constitute a *prima facie* case under the statute. That may be true (and some courts have so held), but the shipper still has to show evidence in response to a summary judgment motion that liability under Carmack isn't indicated. It's not enough just to argue that pleadings are sufficient, you have to show there's evidence supporting your position.

The court also found the shipper failed to give timely notice of claim. Precedents hold that an insurer's subrogation letter to a carrier will suffice, but the insurer's communication still must contain (1) sufficient identification of the shipment; (2) an assertion of liability; and (3) a demand for payment of a determinable amount of money. The court ruled that Allstate's letter didn't adequately identify the shipment. Case dismissed.

Did an imposter "carrier" steal the freight? It's a question of fact.

Northern Indiana Metals v. Iowa Express, Inc., et al 2009 WL 1139986 (N.D. Ind. 2009)

This case presents the bizarre scenario of an internet transportation broker that engaged a carrier to haul freight that disappeared, with the carrier disclaiming any knowledge of the interstate transport whatsoever.

Shipper Northern Indiana Metals booked two loads of brass through internet transportation broker Gateway Freightways. Gateway had teamed up with motor carrier Iowa Express, and verified its FMCSA status with a W-9, permit, proof of insurance and MC number. A trucker pulled up to Northern Indiana's facility in an Iowa Express truck, issued an Iowa Express bill of lading, and left with the second of two loads. It was never seen again.

Hot Recent Cases...Continued

Iowa Express denied any knowledge of the haul. It asserted that none of its employees fit a description of the driver who came for the load. It disavowed the typewritten W-9, claiming that it always handwrote its forms. The only potential hole in the carrier's story was its policy of allowing its drivers to take their rigs home after work, suggesting carrier negligence in allowing an Iowa Express truck to be misappropriated.

Litigation in the Northern District of Indiana was followed by cross motions for summary judgment. All were denied. On the one hand, it's unclear whether Iowa Express was an engaged motor carrier subject to Carmack, but then identity theft is not a carrier defense under that statute. How did Iowa Express get the assignment from Gateway if one of its six office computers didn't get the email? The court clearly wasn't comfortable sorting out this unusual mess based on numerous contested issues of fact. Should be an interesting trial!



Motor truck cargo insurance meets civil procedure: a complex "occurrence."

Budway Enterprises, Inc. v. Federal Insurance Company, 2009 WL 1014899 (C.D. Cal. 2009).

Motor carrier Budway was insured by Federal Insurance Company for cargo loss and damage. Budway accepted for shipment two loads of aluminum, which were loaded in two trailers attached to two separate rigs, from shipper Alcoa. Both loads disappeared from Budway's yard at the same time.

Budway's policy with Federal provided up to \$100,000 per "occurrence," but Alcoa's claim for both loads totaled \$150,679.43. The insurer refused to pay more than \$100,000, asserting that the theft resulted from a single insurable occurrence. The players found themselves in litigation in the Central District of California.

The insurer brought a FRCP 12(b)(6) motion to dismiss Budway's breach of contract claim based on the policy's use of the word "occurrence." Budway pointed out that the term is undefined in the policy, is ambiguous, and should be interpreted against the insurer's interests. Under California law, "occurrence" means "cause." The focus is on the underlying cause of the claim, and no evidence or allegation suggested more than one event caused the loss. Other case law supported that conclusion. Thus, nothing in the record supported a breach of contract claim, and it was dismissed.

On the other hand, Budway's allegation that the insurer breached its implied covenant of good faith and good dealing was adequately pleaded. The insurer allegedly conducted no investigation and denied the claim nonetheless. That's a no-no in the insured-friendly Golden State. That portion of the claim survives the motion to dismiss.

Is a transportation broker the constructive trustee of its shippers' funds? Questions of fact abound.

Summit Financial Resources, LP v. Big Dog Enterprises Logistics, LLC, 2009 WL 901159 (S.D. Ill. 2009)

This case presents how the complexities of transportation middlemen's business practices come to a head when a broker goes belly up leaving other players with unpaid bills. Broker Big Dog apparently got into financial trouble and borrowed capital from Summit Financial Resources. It secured the debt with its accounts receivables, including payments from Big Dog's shippers, and had Big Dog send notices of assignment to its customers. However, a broker's ARs include funds intended for the motor carriers minus comparatively small commissions the broker keeps.

Broker went out of business, leaving Summit, a number of carriers, and at least one shipper unpaid. The mess went to the U.S. District Court for the Southern District of Illinois, with

Summit seeking to collect some 414 grand shipper Peerless owed for transportation services Big Dog provided. Peerless conceded it owed as much to someone, but wasn't sure to whom, and didn't want to pay someone twice. It therefore interpleaded the sum it owed, asking the court to sort out who gets it. Everyone moved for summary judgment.

The carriers argued that the \$414 grand - less Big Dog's commission - were funds that should be construed as held in trust by Big Dog for their benefit. Big Dog, they urged, had no interest in their freight charges, and therefore couldn't have pledged them to collateralize a loan. Summit felt that Big Dog paid carriers from its own general funds, and wasn't in the practice of simply passing along freight

payments from shippers. One carrier actually had a contract with Big Dog which provided that that an express trust would be created, so it was off the hook. The court also ruled that Big Dog - and therefore Summit - was clearly entitled to the broker's commission portion of Peerless' withheld charges, but questions of fact remained for the principal.

The remaining motions were denied based on issues of fact as to how Big Dog conducted its business. Moreover, Summit knew of bill of lading arrangements calling for payment to carriers, so it wasn't factually clear it was a *bona fide* purchaser for value. Factual issues also clouded an analysis of whose rights - carriers' under their bills of lading or Summit's under its assignments - controlled.

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