SURF & TURF

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BY LAND OR BY SEA . . . A COMPARISON OF THE FUNDAMENTALS OF THE CARMACK AND COGSA LIABILITY REGIMES—PART III & IV

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COGSA

In contrast to Carmack, COGSA's dominion over a cargo claim issue is founded on ocean carrier possession of cargo. The statute applies "tackle-to-tackle," i.e., from the time an ocean carrier receives cargo to the time it discharges it.[22] However, COGSA specifically allows, and parties frequently agree to, extension of COGSA's applicability beyond those parameters.[23] Otherwise, the Harter Act typically governs claims that materialize before or after the ocean carrier possesses the freight.

Jurisdictionally, a vast body of law, encompassing substantive and procedural decisions that once derived from an independent federal court system, has developed regarding primary federal jurisdiction over claims sounding in admiralty.[24] Admiralty jurisdiction is reserved to the federal judiciary in 28 USC § 1333, which provides that: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The "saving to suitors" clause allows admiralty plaintiffs the right to bring suit in state court if they so choose, precluding defendants from removing to federal court unless they have another jurisdictional basis for doing so (usually diversity). Thus, especially for smaller cases or matters in which a plaintiff might deem state court procedure, environments or juries desirable, state courts often hear cases subject to federal maritime law.

At this juncture, it is worth exploring briefly the significance of recent federal court decisions regarding extension of COGSA (and therefore admiralty jurisdiction) concepts to losses that occur on land pursuant to an intermodal transportation. Intermodal transportation is not a particularly new concept. Cargo has always moved into the U.S. by ocean carrier, been transferred to rail or motor carriers, and then been transported to an inland destination. Carmack was held to would govern the surface carriage segment over 20 years ago:

> We therefore hold that when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading. It is irrelevant that the foreign and domestic legs of the voyage are effected by different shippers or carriers, that the intended consignee or its agent takes temporary custody of the goods at the port of discharge, or that the domestic leg does not cross state lines.[25]

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The advent of through bills of lading, an industry development, prompted reanalysis by high federal courts of Carmack's application in 2004. This was accomplished in the U.S. Supreme Court's landmark decision in *Norfolk Southern Railway Co. v. Kirby* ("*Kirby*"),[26] which applied a conceptual, as opposed to a spatial analysis of maritime contracts and resulting admiralty jurisdiction.[27] Based on that jurisdictional analysis, COGSA was held applicable (and preemptive of conflicting state-law theories of liability) in intermodal freight claims, even if a loss actually occurred on land, when that federal statute was contractually extended.[28]

Many transportation practitioners hailed *Kirby* as a long-awaited clarification of increasingly important points of law. Law governing the modes had finally been reconciled to comport realistically with modern shipping practices. Unfortunately, the U.S. Court of Appeals for the Second Circuit issued a poorly reasoned less than two years later in *Sompo Japan Ins. Co. v. Norfolk Southern Ry. Co.* ("*Sompo Japan*")[29] that, at a minimum, confused the issue. Under *Sompo Japan*, the agreement by parties to a transportation contract that COGSA will govern connecting surface carriers' potential liability is unenforceable. Carmack will still govern freight claims (at least in the northeastern states within the Second Circuit's jurisdiction) when losses occur on land.[30]

While *Sompo Japan* is pending appeal,[31] years of uncertainty could pass before final adjudication is rendered. Industry participants and their attorneys are left with exactly the kinds of uncertainty and lack of uniformity COGSA and Carmack are intended to avoid. Surface carriers are left to wonder whether they must issue separate bills of lading when transporting freight into certain geographical regions, lest their reliance on limited liability pursuant to through oceans bills of lading be misplaced.

Liability Standards and Carrier Defenses Under Both Regimes

<u>Carmack</u>

Carmack is a codification of common law that imposes essentially strict liability on surface carriers regarding lost/damaged cargo. It "has been interpreted by the Supreme Court . . . to provide that 'a common carrier is liable for all losses which occurred while the goods were being transported by it, unless the carrier can demonstrate it is free from fault."[32] The statute recognizes five defenses that derive from *force majeure* and shipper fault considerations. These are "(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods."[33]

To demonstrate a *prima facie* case against a surface carrier, an aggrieved shipper must produce evidence of (1) delivery in good condition; (2) arrival in damaged condition; and (3) the amount of damages. The burden then shifts to the carrier to show both that it was free from negligence and that damage to the cargo was due to one of the excepted causes relieving the carrier of liability.[34]

<u>COGSA</u>

COGSA, too, imposes shifting burdens of proof on litigants, first requiring shippers to demonstrate *prima facie* cases of cargo tendered in good order and condition, lost or damaged freight, and damages. However, COGSA provides 17 carrier defenses, which include: negligent navigation or mismanagement of the ship, fire, perils of the sea, acts of God, acts of war, acts of the public enemy, arrest or seizure of the ship, quarantine, acts or omissions of the shipper or owner of the goods, strikes or labor disturbances, riots, attempts to save life or property at sea, inherent vice of the goods, insufficient packaging, inadequate marks, latent defects not discoverable by due diligence, and the catch-all "any other cause without the actual fault of the carrier."[35]

These defenses are grounded in a negligence analysis. For instance, the fire, peril of the sea, acts of God, strike or labor and, of course, the absence of carrier fault defenses do not apply if carrier negligence (including a vessel operator's disregarding knowledge of adverse circumstances) contributed to the loss. To succeed with any enumerated defense, an ocean carrier must concurrently prove its freedom from negligence.

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The most controversial COGSA defense, one that carrier interests successfully lobbied for despite its absence in the Hague Rules, is "negligent navigation or mismanagement of the ship."

With this defense, carriers actually succeed in defending cargo claims if they can demonstrate their own negligence, a concept that is abhorrent to most systems of civil justice.

The defense of "attempts to save life or property at sea" gives ocean carriers the right to declare "general average," a concept that can leave unsophisticated shippers bewildered. Maritime law implies a notion that carriers and all of their shippers are party to a fictional joint venture enterprise in which all concerned share risk and good fortune in the event of a peril at sea. In circumstances wherein a vessel operator incurs costs or damages while trying to preserve or rescue cargo, the shippers are liable for a proportional share of those losses. Thus, not only does a carrier have a defense in those circumstances, it actually may have a claim against its shippers.[36]

While the divergent focuses Carmack and COGSA provide in the liability analysis provide fodder for interesting academic debate, and are a point raised in *Sompo Japan* regarding whether notice of limited liability under one regime is adequate for the other, query whether there is much practical difference between the two. Both statutes and interpretational case law allow carriers to argue freedom from fault under defenses that must be analyzed factually. True, an initiating surface carrier is primarily liable for cargo loss/damage caused by its connecting carrier(s), but it typically will implead the connecting carrier(s) and/or urge the latter's freedom from fault as well.

Limitation of Liability

Transportation's inherent risks impose on its providers and consumers the necessity of a mutual business decision. Transit risk is expensive to whichever entity accepts it, in terms of allocation of resources, costs of insurance, potential lost profits, and otherwise. This phenomenon is not unique to transportation, but it cannot be disputed that movement of freight is among the most volume and risk intensive industries outside of insurance. Limitation of liability is a contractual feature of all modes of transportation, but Carmack and COGSA treat it somewhat differently.

COGSA and Carmack, as defined by their interpretational case law, are similar in their recognition of limited carrier liability as a practical necessity, as well as their disinclination to impose limitation of liability on an unwitting consumer. Under both regimes, carriers may enforce limited liability terms only when they demonstrate they clearly offered their shippers the option of procuring full carrier liability (often at a prohibitively high freight rate).[37] A bill of lading or other contract of carriage must be issued; and the shipper must have declined or ignored its opportunity for full liability (typically by checking a box and stating the freight's value).[38] Earlier case law references a requirement that the surface carrier have a tariff on file with the Interstate Commerce Commission, but that requirement has been eliminated.[39]

<u>Carmack</u>

Carmack provides as follows:

> . . . a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter . . . establish rates for the transportation of property (other than household goods described in section 13102 (10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.[40]

The term "reasonable under the circumstances" is liberally defined and applied, and carrier liability of $0.10/pound has been

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enforced. Courts most typically analyze this term in the context of whether a carrier has effectively limited its liability, as opposed to whether the limited liability is reasonable.

COGSA

As discussed above, COGSA allows ocean carriers to limit their liability to a minimum of $500 per package, which if not evident from the bill of lading's cargo description, is defined as the "customary freight unit." This is less convenient than the cents-per-pound limitation Carmack allows, as parties frequently dispute what constitutes a "package" or "customary freight unit."[41]

Other Particulars

Certain other considerations within COGSA and Carmack merit brief mention. Parties to surface transportation contracts may waive Carmack dominion altogether, or any portion of that statute, by written agreement.[42] As noted above, ocean shipping contracts may extend COGSA's applicability to before or after the carrier takes possession of cargo, and as mentioned above, through Himalaya Clauses to include service providers other than the carrier. However, COGSA is statutorily applicable at least during the "tackle-to-tackle" segment of an ocean transport. Of course, courts will enforce stipulated deviation from certain COGSA provisions (such as its limitation of liability and statute of limitations), but the statute itself has the force of law.

COGSA contains a self-executing one-year statute of limitations.[43] Carmack empowers surface carriers to impose whatever time period for bringing suit they choose, so long as that period is not less than two years. Similarly, surface carriers may deny claims as time barred if written notice is not presented to them within a stated time period, so long as that time period is not less than nine months.[44] In other words, Carmack contains no statute of limitations; it merely restricts the time period within which a carrier may require notice of claim and filing of suit. If shipping documentation is silent as to time to file suit (or if no documentation is issued at all), a laches analysis will be applied.

Carmack's jurisdictional provisions are addressed above. The location of a party, the place of a transportation contract's making, and the situs of a loss at issue can determine what jurisdiction – state or federal – might be appropriate. COGSA cases consider similar factors. However, the U.S. Supreme Court by its 1995 decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*[45] declared that foreign jurisdiction selection clauses are enforceable. The vast majority of ocean carriage is undertaken by foreign-flagged vessels, most of which include in their standard bills of lading forum selection clauses requiring that cargo claims be brought in foreign countries. Consequently, the volume of ocean cargo litigation in the United States has declined dramatically over the past decade.
Lastly, it should be noted that COGSA, being subject to admiralty jurisdiction, does not grant parties the right to a jury trial.

Conclusion

Why do we not have a single liability regime governing all mode of transportation? Despite different statutory originations and their historical impacts; international considerations which play a much larger role in ocean shipping; a few mode-specific defenses; and some operational particulars, does it seem so unattainable a task for Congress to assemble concepts that could be reduced to a statute applicable to all modes?

Apparently, yes. Congress has a long track record of taking little or no action on transportation law matters unless virtually all parties are in agreement. Historically, ocean carriers have

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successfully thwarted passage of proposed new cargo liability regimes simply by writing one-page letters to Congressional committee chairs contemplating new legislation. With the United States being home to no significant ocean carriers, foreign concerns have mobilized well toward preventing American legislation that likely would prove contrary to their interests.

Proponents of a unified liability regime in the United States are not organized, and have no real example to follow in other countries. All of the world's major trading parties face the same dilemma of reconciling primarily international considerations in ocean shipping with primarily domestic ones in surface transportation. Any country, including the United States, attempting to solidify its transportation law would have to risk potentially severe international treaty implications in addition to the daunting task of becoming reoriented to new legal concepts.

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Still, even limited legislation and/or clarifying jurisprudence could improve the legal landscape tremendously. While merging Carmack and COGSA would be problematic, more clearly defined applications would enable industry and practitioners to better contemplate and allocate responsibility for lost and damaged freight. This could be accomplished with some level of new federal legislation and/or definitive jurisprudence on multimodal issues.

Endnotes

[22] Section 1 of 46 USC § 30701, COGSA's definitional section, states that "(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

[23] Section 7 of COGSA, entitled "Agreement as to liability prior to loading or after discharge" provides that "Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

[24] *See* Schoenbaum, 1 Admiralty & Mar. Law § 17-2 (4th ed.), §§ 3-1 – 3-12.

[25] *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986).

[26] 543 U.S. 14, 125 S.Ct. 385 (2004).

[27] For a detailed analysis of the Kirby decision and its impact, see Block, *Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., d/b/a Kirby Engineering, and Allianz Australia Insurance Limited: The U.S. Supreme Court Blesses Industry's Trend Toward Intermodalism*, Vol. 7, No. 2 THE TRANSPORTATION LAWYER at 29 (Oct. 2005).

[28] This is typically accomplished by Himalaya Clauses which have long been standard in ocean and through bills of lading. *See* Block, The *Himalayas: Taking Those Old Mountains to New Heights,* MARINE DIGEST AND TRANSPORTATION NEWS (Feb. 1999), available *at* http://www.bpmlaw.com/TransportationLL9804/tabid/1713/Default.aspx.

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[29] 456 F.3d 54 (2nd Cir. 2006).

[30] The Second Circuit unpersuasively distinguished Kirby by asserting that the Supreme Court was concerned only with preemption of state and common law claims in that decision. For a detailed analysis of the *Kirby* decision and its impact, *see* Block, *Kirby's wake? How the calm waters of ocean transportation intermediary and subcontractor liability suddenly became unpredictable*, presented at the Pacific Admiralty Seminar on October 2, 2008 and available at http://www.bpmlaw.com/Resources/Publications/TransportationLL0808/tabid/2131/Default.aspx.

[31] Reversal by the U.S. Supreme Court is widely anticipated in transportation law practitioner circles.

[32] *Allied Tube & Conduit Corp. v. Southern Pacific Transp. Co.*, 211 F.3d 367, 369 (7th Cir. 2000) *citing Pharma Bio, Inc. v. TNT Holland Motor Express, Inc.*, 102 F.3d 914, 916 (7th Cir.1996) (quoting *Jos. Schlitz Brewing Co. v. Transcon Lines*, 757 F.2d 171, 176 (7th Cir. 1985)).

[33] *Missouri Pac. R. Co. v. Elmore and Stahl,* 377 U.S. 134, 137, 84 S.Ct. 1142, 1144 (1964).

[34] *Id.*

[35] 46 USC § 30706.

[36] *See* Schoenbaum, 2 Admiralty & Mar. Law § 17-2 (4th ed.).

[37] Actually, Carmack has been interpreted to require only that carriers offer their shippers "a reasonable opportunity to choose between two or more levels of liability." *See, e.g., Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834, 836 (11th Cir. 2003). However, an opportunity to declare the property's value is required, and most frequently an opportunity to procure full carrier liability is one of the two options.

[38] This frequently is done by way of incorporated "terms and conditions" and other documents. Some courts enforce limitation of liability based on parties' course of dealing even when a specific waiver of full liability has not been expressed in a particular transit's documentation. *See, e.g., Insurance Co. of North America v. NNR Aircargo Service (USA), Inc.,* 201 F.3d 1111, 1113 (9th Cir. 2000).

[39] The Trucking Industry Regulatory Reform Act of 1994, Pub.L. No. 103-311, 108 Stat. 1673, and the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, eradicated the Interstate Commerce Act and tariff filing requirements, a point to be made when uninformed tribunals seek to enforce this requirement.

[40] 49 § 14706(c)(1)(A), entitled "Shipper waiver."

[41] 46 USC § 30701(5). *See Travelers Indem. Co. v. Vessel Sam Houston*, 26 F.3d 895 (9th Cir. 1994) for an example of such dispute.

[42] 49 USC § 14101(b), providing "[i]f the shipper and carrier, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies."

[43] 46 USC 30701(6).

[44] 49 USC § 14706(e)(1), providing that a "carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section."

[45] 515 U.S. 528, 115 S.Ct. 2322 (1995).

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 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.

HOT RECENT CASES . . . Continued

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)

Households 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.

Iowa Express denied any knowledge of the haul. It asserted that none of its employee 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

HOT RECENT CASES . . . Continued

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

HOT RECENT CASES . . . Continued

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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