

The sophisticated shipper doctrine: Look out!! The longer you've been in the world of shipping, the more you're presumed to understand.

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Ocean shipping is complex stuff, especially when it comes to the rights, obligations and liability of various players for lost and damaged cargo. Most folks outside our universe (and a few inside) look at bills of lading, service contracts and other shipping documents as rocket science. Trouble is, far more outsiders necessarily have dealings in transportation than they do in aerospace technology.

In an industry driven by volume processing and movement, parties' rights and obligations are routinely determined by pre-printed forms. With advanced technology and the advent of electronic shipping documentation, our industry has streamlined the paper trail to save costs and time, and eroded traditional means of memorializing legally binding agreements.

Shippers, intermediaries and others often must take specific action to avoid such things as limited carrier liability or responsibility for certain costs. How they do so isn't always obvious or logical to a newby, so the law is flexible in accommodating those who understandably aren't up to speed. But to promote efficiency in the transportation process, the law won't give an inch to players who are, or should be, familiar with how modern transportation works when they plead ignorance regarding the implications of their paper handling.

These concepts gelled in federal court rooms of the mid 1970s, giving rise to the "sophisticated shipper doctrine." This legal principle has been applied in all modes of transportation and recognizes a need to cut some slack to occasional shippers or those who have minimal familiarity with transportation, while fostering the industry's efforts to expedite the bookkeeping process in dealings between its seasoned participants.

The sophisticated shipper doctrine is a loosely defined mechanism whereby courts can exercise their discretion in deciding how strictly to enforce shipping documentation principles. The issue most often arises when a shipper or intermediary doesn't denote *ad valorem* value for its cargo in a bill of lading, and the carrier seeks to limit its liability to low dollars per pound or package when the cargo is lost. Unless the parties contract otherwise, the law requires a carrier to put shippers on notice of its limited liability before the carriage, and give shippers an opportunity to opt for full liability by declaring the value of their cargo in a contract of carriage.

Under the sophisticated shipper doctrine, a frequent purchaser of transportation services who leaves blank the space on its own form bill of lading where cargo value could be inserted likely will be unable to claim it had no notice of the limited liability, even if the carrier never said or wrote a word about it. Conversely, a first-time shipper who simply

signs a carrier-prepared bill might get a break under the doctrine, and defeat the carrier's attempt to limit its liability.

In a deregulated era when shipper/intermediary/carrier negotiations play a bigger role in how transportation is accomplished, coupled with broader options available through intermodalism, the sophisticated shipper doctrine takes on increased significance. The U.S. Court of Appeals for the Ninth Circuit recently addressed an instance whereby a shipper and ocean carrier set up a complex, three-mode transport of a cargo of grapes from Mexico to England pursuant to an electronic sea waybill. The shipper alleged it had obtained the carrier's verbal promise to deliver the grapes before competitors' product hit England's shores, and an electronic record doesn't have those teeny words, found on the backside of a traditional bill of lading, which disclaim any obligation by the carrier to deliver cargo by any certain time. In fact, the shipper in this instance never even received the electronic waybill.

Sound like enough to defeat the carrier's defense to liability (based on language found in its paper waybills) when the cargo didn't arrive until after European grapes had flooded Her Majesty's market? Read on.

True, the shipper never received any carrier disclaimer regarding time frames for delivery *for this shipment*, but the shipper had previously shipped numerous cargoes of the same commodity with the same carrier with paper bills of lading, and knew (or should have known) the same terms would apply with the virtual document. As the Court of Appeals observed, "actual possession of the bill of lading is unnecessary in situations like this one, in which a shipper is familiar as a matter of commercial practice with the terms and limitations of [the carrier's] bill of lading." Thus, subject to a some other points that must first be decided, the carrier may be off the hook for its late delivery.

Many folks assume that only the paper that paves the road of each carriage dictates the rights and obligations of transportation relationships. This is often true, but not always. If you've been at the game for a while, make sure you know the rules.

Ref: Sea-Land Service, Inc. v. Lozen International, Inc., 2002 WL 496943 (9th Cir. 2002)