



SURF & TURF

Legal News in Transportation & Logistics

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R.M.S. TITANIC: The Legendary Disaster Continues to Make History

BY STEVEN W. BLOCK

Because this month didn't see much significant transportation law, you are treated herewith to a nugget of maritime law history and culture. *RMS Titanic's* 1912 sinking is an enduring element of our lore for many reasons, ranging from scientific points at the heart of the disaster to psycho-sociological issues its study forces us to consider. But from the transportation lawyer's perspective, *Titanic* is an ongoing source of doctrine, of lessons taught in maritime law courses throughout the country. The ship is a living and dynamic force in jurisprudence that bears on numerous current and potential issues.

Titanic's wreckage was discovered in 1985 under 12,000 feet of North Atlantic water. A Connecticut outfit working in coordination with French entities, known as RMS Titanic, Inc. (RMST), after a few organizational and name changes, brought up some 1,800 artifacts from the ship's wreckage. RMST laid claim to the relics under the maritime law doctrine of salvage with the blessing of a French administrative tribunal that adjudicates such contentions. Throughout proceedings, RMST presented itself as

an altruistic benefactor uninterested in taking commercial advantage of property that likely would fetch big bucks on the open market. The artifacts have been shown in various places, but France is their primary home.

Fast forward to 1993, after RMST had raised additional artifacts which were taken to the United States (specifically, Virginia). RMST wanted clear title to both the 1987 booty and the new stuff, so it brought an action in a Virginia federal court to gain proper title. No one was around to contest or otherwise respond to the action, so the court invited a University of Virginia Law School legal clinic to file an *amicus* brief (i.e., a brief filed by a "friend of the court" by an entity without a real stake in the case's outcome). The federal district court rejected the French administrator's conclusion, as well as its effect, and dismissed RMST's claim that it should be awarded title under the law of finds.

On appeal, the U.S. Court of Appeals for the Fourth Circuit went through a neat little review of some interesting maritime law principles, cleared up some issues, and sent the case back down the hill for the district court to entertain further proceedings.

Maritime law is somewhat unique in that its subject matter is inherently transient, with players often remotely located. Because enforcement of judgments in this environment is challenging, cases in admiralty (the federal jurisdiction concepts to which maritime cases are subject) see more claims against property itself than most other legal fields. Shipping

claims commonly pit a plaintiff claimant against defendant property, typically a vessel or cargo. If you think the defendant property in such an *in rem* action (Latin for “against the thing”) is yours, you’d better come speak up and make your claim for it in court. This process allows those aggrieved in shipping and other relationships to seek redress even if an alleged wrongdoer can’t be found or won’t cooperate.

The only caveat is that the property subject to a court’s *in rem* jurisdiction has to be within the court’s territorial jurisdiction. Because RMST’s 1987 artifacts weren’t in the Old Dominion State, the Fourth Circuit concluded that the district court had no jurisdiction over them. Thus, the lower court didn’t have any business ruling on RMST’s claim to that property, one way or the other.

Moving on to RMST’s claim to the 1993 artifacts, the court grappled with maritime law’s doctrine of salvage, a venerable legal accommodation designed to encourage rescue efforts by empowering salvors to claim ownership in property they save. The court also considered RMST’s position that the disfavored common law of finds should apply.

Salvors get a legally-determined, if necessarily somewhat arbitrary, reward for risking life and limb in a successful salvage effort. The award is based on the saved property’s value and expended efforts to save it (See October 2000 Legal Lookout article). The law of finds is basically a finders-keepers-losers-sweepers analysis that, when applied, basically bestows on the lucky finder complete ownership in discovered property. The district court rejected RMST’s attempt to change hats midstream from salvor to finder, and the Fourth Circuit agreed.

The law of finds, in addition to creating much risk of inequity, has by and large been supplanted in maritime law by salvage principles. Finds principles typically kick in when the property in question is a naturally occurring phenomenon, like ocean plant life or minerals no one else could claim title to. True, a number of courts have treated ancient shipwrecks as transmogrified elements of nature. But here, RMST had proclaimed itself a “salvor” for decades. Maritime public policy notions favoring salvage and disfavoring finds would suffer if a court ruled players like RMST could change their theories willy-nilly to procure a better legal position. The district court now gets to sort the mess out from there.

Many legal principles governing ocean transportation are millennia old, progressing through the centuries as a reflection of technological advancement,

steeped in evolving commercial tradition, and founded upon human commercial instinct. It’s appropriate that *Titanic* lives on as a force shaping fundamental principles of maritime law.

Ref: *R.M.S. Titanic, Inc. v. The wrecked and Abandoned Vessel, et al*, 435 F.3d 521 (4th Cir. 2006); and Maritime Salvage: the Big Business of Saving Vessels, Cargo and Equipment (*Legal Lookout* October 2000).

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Warehouseman Liability: It May Be Limited, but the Details Must Be Clear

BY STEVEN W. BLOCK

Logistics providers such as warehousemen face some of the same economic issues as do carriers and other transportation companies when it comes to risk management and allocation of resources. Put simply, shouldering risk costs money (whether or not loss actually comes into play), and those costs – in one form or another – have to be passed along to consumers. If a shipper wants its provider to take on unlimited liability for lost or damaged cargo, it should expect to pay higher freight tabs. If the buyer is willing to run some risk or purchase outside insurance coverage, the charges should come down.

In the usual course, stationary warehouse operators don’t face the same menaces as do mobile carriers. However, the storage business is plagued by perilous difficulties of its own. The term “warehouseman” is imbued with legal significance as defined by state statutes and interpretative case law. It encompasses commercial storage centers and those personal property “drop and locks,” and can also apply to those in the transportation business when their operations include temporary or long-term storage. If a consignee refuses a carrier’s tender of freight, the delivering trucker or railroad transmogrifies, as a matter of law, into a “warehouseman” with respect to its rights and duties vis-à-vis the freight’s owner. The carrier-cum-warehouseman may still hold an enforceable lien for unpaid freight charges, but warehouse law governs how that lien will be enforced.

The bill of lading's analog in the warehouse industry is the "warehouse receipt," although issuance of formal documents – not unlike the tradition in certain transportation sectors – can often be loosey-goosey. Some storage facilities simply don't do a good job of documenting their agreements, either because they feel comfy enough with the customer or they just don't want the bother. But like a trucker who blows off drafting adequate bills of lading or maintaining an accessible set of terms and conditions, a warehouseman can see a letter containing blasé reference to limitation of liability come back to bite it in the assets.

Just ask Gress Poultry Corporation, a Pennsylvania outfit that runs warehouse storage operations. Leprino Foods first contacted Gress in the late 1980s about storing large volumes of mozzarella pizza cheese in Gress warehouses. In 1988, Gress' owner wrote Leprino a letter enclosing a tariff which would limit Gress' liability to 50¢ per pound of lost or damaged cheese, and offered to sell the customer "insurance" for "four cents per \$100.00 declared value per month." In 1992, Gress sent Leprino another letter that didn't mention limitation of liability, but declared "[t]his does not cover everything in detail a standard warehousing procedures as assumed to be followed as well." Gress did issue warehouse receipts that incorporated Gress' tariff and limited the warehouseman's liability to 20¢ per pound of product, but Leprino declared it was unaware of those provisions at the time it haggled out the memorialized agreement with Leprino in 1992. Moreover, Leprino believed any such terms would amount to Gress unilaterally changing the earlier agreement, something the law forbids without value flowing from Gress to Leprino. Lastly, Gress didn't enforce limited liability in at least one Leprino claim (a small one) during the 1990s.

Fast forward a decade, and Pizza Hut rejects some eight million pounds of Leprino cheese that tasted "fruity." Yes, fruit compounds had been stored in Gress' warehouse near the cheese, suggesting the warehouseman was to blame. When the two companies went to the mat, Gress asked a federal court in the Keystone State to rule as a matter of law on a number of issues including whether the warehouseman's liability was limited to relative peanuts. The stakes were huge – each of the eight million pounds was worth \$1.6575; if Gress could limit its liability to 20¢ or even 50¢ per pound, well, you do the math.

To succeed on a "motion for summary judgment" of this nature (and avoid a trial), Gress had to show

there essentially was no counter-evidence to its position. The court denied Gress' motion, finding too many issues of fact were created by the happy-go-lucky documentation. What the parties agreed to, as well as when and for what purposes they did so, were pretty much a he-said-she-said game, one the court determined a jury must scrutinize during trial. The fact that Gress had paid an earlier claim without asserting limited liability (probably because it valued the business relationship more than a small claim) was evidence no agreement was ever reached. The term "standard warehousing procedures" in Gress' 1992 letter, probably used to dodge detailed contract drafting, was ambiguous and unenforceable in a dispositive motion.

Like other players in our industry, warehouse operators should be attentive to the paperwork details. While customer relationships and the inconvenience of disputing a small claim make quick settlement appealing, doing so creates an inference that limitation of liability wasn't intended. Like their more mobile cousins, warehousemen must be proactive in attending to freight liability.

Ref: Leprino Foods Company, Inc. v. Gress Poultry, Inc., et al, 379 F.Supp.2d 659 (M.D. Penn 2005).

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Hot Recent Cases in Motor Carrier Law

BY STEVEN W. BLOCK

FMCSA may require owner operators to hang on to their toll receipts

Commodity Carriers, Inc. v. Federal Motor Carrier Safety Administration, 434 F.3d 604 (DC Cir. 2006)

The Federal Motor Carrier Safety Administration assigns safety ratings to motor carriers when its auditors undertake compliance reviews. Commodity Carriers was unhappy with a "conditional rating" FMCSA slapped on it based on log falsifications

committed by the carrier's owner operator drivers. In violation of FMCSA records retention regs, the drivers didn't have toll receipts confirming their log entries.

Commodity Carriers took the matter to court, alleging that the FMCSA regs in question didn't apply to owner operators. If the feds thought they should apply, urged the carrier, then a formal rulemaking procedure (with public notice and opportunity for comment) would be required before the regs' implementation. Otherwise, enforcement would be arbitrary and capricious, i.e., a willy-nilly agency act prohibited under administrative law.

The U.S. Court of Appeals for the District of Columbia Circuit disagreed. Federal government agencies get a degree of deference when it comes to interpretation of their own rules. An earlier precedent had found owner operators were included in the class of regulated entities that affect commercial motor vehicle safety. Another decision to the contrary had been "almost immediately contradicted" by a definitive case on point. Owner operators are within the class of drivers for whom carriers must keep records.

Drivers who make of intrastate deliveries of products pursuant to a national distribution scheme are exempt from overtime-wage laws

Billings, et al v. Frito-Lay Sales, et al, 2006 LEXIS 4698 (S.D. Tex 2006)

Frito-Lay manufactures and distributes its snack food products through a series of centralized distribution centers. The company runs its own private motor carrier service with its own drivers who don't receive overtime wages.

A class of such drivers sued Frito-Lay claiming violations of the Fair Labor Standards Act ("FLSA"), which requires employers to pay increased wages to employees who work over 40 hours per week. However, employed drivers whose time is regulated by the U.S. Secretary of Transportation, i.e., those who run interstate hauls, are exempted from the benefit.

The plaintiff drivers pointed to the fact that they operate only intrastate, such that federal regs governing hours of service didn't affect them. In ruling on Frito-Lay's motion for summary judgment, the U.S. District Court for the Southern District of Texas ruled that the exemption didn't kick in when

the DOT Secretary regulated a driver. It's enough if U.S. transportation's top dog has the power to do so. Here, he does.

The transportation at issue is within the DOT's jurisdiction because it "is a practical continuity of movement from the manufacturers or suppliers without the state, through [the carrier's] warehouse and on to customers whose prior orders or contracts are being filled." In other words, the "essential character" of the plaintiff drivers' work was interstate. Points of origin and ultimate destination are in different states, and a series of factors addressing the transportation's nature show an interstate undertaking. The court reluctantly, indeed with express apology, dismissed the drivers' claims to overtime pay.

Improved packaging for second and third delivery attempts is inadmissible post-loss remedial measure

Specialty Products International, Ltd. v. Con-Way Transportation Services, Inc., 2006 U.S. Dist. LEXIS 2985 (M.D.N.C. 2006)

Shipper Specialty Products International booked transit of two beer brew tanks with carrier Con-Way from North Carolina to California. The shipper packaged up the tanks with bubble wrap, foam, stretch wrap and pallets, and the freight left the Tar Heel State in good order and condition. It arrived with two puncture marks, prompting the consignee's rejection.

When at first you don't succeed, try, try again. The shipper tried again with Con-Way, wrapping the freight similarly. The freight arrived with the same puncture marks in the same places.

Where there's a will, there's a way. The shipper packaged up a third set of brew tanks, this time with larger skids and wooden box encasements. Third time's a charm; the freight arrived without incident.

But Specialty Products wasn't totally happy, given the four brew tanks it manufactured and lost. It sued Con-Way, seeking damages as allowed under the Carmack Amendment. Con-Way defended by claiming the shipper's packaging was inadequate. The best evidence of this, urged the carrier, was that when Specialty Products finally did get it right, the freight made it safely.

The shipper moved in limine to strike that argument as a post-loss remedial measure, and generally for summary judgment. Con-Way argued that the new packaging wasn't really after the fact, as the transportation relationship was an ongoing event until a successful delivery. The Middle District of North Carolina disagreed, ruling that this was a textbook case of post-loss remedial measure. Enough question of fact remains, however, to defeat the shipper's summary judgment motion.

Owner-operator is not a carrier's statutory employee absent a written lease

Bookwalter, et al v. Prescott, et al, 2006 Ohio App. LEXIS 535 (2006)

Driver Prescott appeared, under the usual analysis, to be an owner-operator in interstate transit who routinely hauled a chemical between two companies. He owned his own truck, paid for its fuel and upkeep, insured it, and outfitted it with his own placards. Trouble was, he had no written lease with the company he drove for.

Prescott was involved in a horrific accident in which several motorists were killed. The deceaseds' estates sued the driver, and later named the shipper and consignee companies as defendants based on alleged vicarious liability. The companies moved to dismiss on the ground Prescott was not their employee.

Affirming a trial court's order, the Ohio Court of Appeals dismissed claims against the carrier and consignee. The court scrutinized federal law (with which Ohio is in accord per the "majority view") governing owner operators being their carrier-lessees' "statutory employees" for purpose of liability. Distinguishing a number of seemingly controlling precedents because they were all based on written leases, the court held inapplicable precedents making motor carriers their owner operators' employers for accident purposes. Instead, the court applied a common law analysis of the carrier-driver relationship, and concluded neither company exercised requisite control over Prescott to be his employer.

In pursuit of business: trucker's insurance coverage is excluded

Canal Insurance Company v. Underwriters at Lloyd's London, 2006 U.S.App. LEXIS 2014 (3rd Cir. 2006)

Owner operator Singh leased his rig to carrier BIR. Canal Insurance Company insured Singh's truck when used for BIR's freight hauling purposes. Singh's truck also was covered by his own "Non-Trucking Liability" policy through underwriters at Lloyd's. The latter policy contained an exclusion for losses incurred pursuant to the truck's "business uses."

Mr. Singh engaged another driver to run the truck to a dealer so as to investigate a trade in for a new truck. On the way, the truck collided with another motorist in Pennsylvania. Canal defended the motorist's claims against BIR. Some 85 grand in liability and defense costs later, Canal turned open-palmed to Lloyd's seeking indemnity.

Affirming the Eastern District of Pennsylvania's granting of the Lloyd's underwriters' motion for summary judgment, the Third Circuit analyzed Pennsylvania insurance law in the context of federal motor carrier insurance requirements. When Singh dispatched his truck for purposes of a possible trade in, he was undertaking a business pursuit. True, he may have thought he'd purchased the non-trucking liability policy for just this purpose, i.e., for coverage when he wasn't hauling BIR's loads. Canal argued that the exclusion was overly broad and ambiguous, as it implied that only BIR's business uses would be excluded. The court disagreed. The exclusion within Lloyd's policy was clear, and insurers regularly include such terms in policies marketed and sold for limited personal exposures. Regardless of who was behind it, the trip at issue was a business endeavor.

Air waybill issued after tender doesn't control limitation of liability

KPX, LLC v. Transgroup Worldwide Logistics, et al, 2006 U.S. Dist. LEXIS 6772 (D. Ariz. 2006)

Shipper KPX engaged forwarder Road-e-o to arrange transit of a load of scooters from KPX' facility in Sugarland, Texas to Arizona. Road-e-o brokered the load to forwarder Transgroup, which placed the haul with motor carrier Value Truck. In keeping with its usual practice with Transgroup, Road-e-o typed up a bill of lading containing a \$25.00/pound limitation of

liability, and gave it to KPX for presentation to the trucker.

On behalf of Transgroup, the Value Truck driver accepted the Road-e-o bill of lading, but submitted to KPX its own document, an "air waybill" containing a 50¢/pound limitation of liability. Yes, the freight was damaged and arrived short, prompting KPX to sue Transgroup in the U.S. District Court for the District of Arizona.

This apparently was a rather small claim in relation to the efforts all concerned invested; the federal court dismissed KPX's actual freight claim because the bill of lading value was less than \$10,000 (the amount needed for Carmack to drive federal jurisdiction). But the court retained jurisdiction based on allegations that Transgroup violated federal regs by masquerading as an air freight forwarder, and took the opportunity to make definitive decisions on Transgroup's liability for lost/damaged cargo. The court determined that Carmack provides a private right of action for such no-no's, finding that Transgroup's impersonation was part and parcel of KPX' loss. There are time when truckers can operate under an air waybill (e.g., to and from airports, and

when air transit is originally contemplated and later rendered impossible), but none were the case here.

The court ruled that Road-e-o's first bill of lading trumped Transgroup's waybill. Not only was it improperly issued, no one rightfully expected it to control. It didn't offer the shipper a reasonable opportunity to choose full liability (a prerequisite to limitation of carrier liability); was essentially a connecting carrier's document not binding on the shipper; and was not communicated to Road-e-o. The court suggests the air waybill was pretty much an attempted sidestep, and awarded the shipper attorneys' fees.

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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 using:

Steven W. Block
Dana A. Henderson
Maury A. Kroontje
Jody K. Reich

sblock@bpmlaw.com
dhenderson@bpmlaw.com
mkroontje@bpmlaw.com
jreich@bpmlaw.com

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