

SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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The U.S. Supreme Court simplifies the dismissal of misplaced lawsuits

By Steve Block

Few industries are subject to as many forum selection issues as is transportation, especially the international sector. In our business, players virtually always are remotely located from each other. Oftentimes, disputing parties prefer their own national law over their partners', and no one likes to bear the expense and inconvenience of traveling halfway around the world to pursue a cargo claim. Thus, battles over freight liability often begin with battles over selection of the battlefield.

U.S. law, more than most of the world, has developed jurisprudence to accommodate jurisdictional and forum-selection issues. We have our own internal issues on the subject, given that we're comprised of 50 separate state jurisdictions and have a parallel federal infrastructure. We're also the world's biggest international trading partner, supplying us ample opportunity to explore these issues on the international scene. Which court should hear what, and under what circumstances, understandably takes center stage time and again.

Far more than could even be summarized here could be, and has been, written about these and related concepts. A common (but often unspoken) theme, however, is that parties feel their chances are better in front of a particular tribunal, and are concerned enough about jurisdiction to fight about it. Sometimes judges or juries in certain courts have reps of being liberal or conservative; plaintiff- or defendant-friendly; procedurally desirable or undesirable; and/or subject to particular law that could turn the case. On top of these are concerns about

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the location of the court, parties, witnesses and evidence.

The process is anything but simple, especially when entrenched legal principles collide. Jurisdiction and venue get more attention than any other aspect of U.S. procedural law. Typically, a plaintiff files suit in a court of its choosing and preference (which should be given a level of deference under U.S. law), and one or more defendants move to dismiss or transfer to another court. The most common bases for transfer or dismissal are (1) lack of subject matter jurisdiction (the court's capacity to adjudicate an issue); (2) lack of personal jurisdiction (the court's dominion over a person or business entity); (3) improper venue (plaintiff selecting the wrong court within a jurisdiction, as another tribunal would be more convenient); and (4) *forum non conveniens* (Latin for "inconvenient forum," this doctrine applies when a court has proper jurisdiction, but another tribunal does also, and is better suited to hear the matter).

Axiomatically, a U.S. court cannot adjudicate any element of a case unless it has both subject matter and personal jurisdiction. Only the latter may be intentionally or unintentionally waived. In the context of the strategically

The U.S. Supreme Court (continued)

and emotionally charged complex of American forum selection law, and set on the salty stage of an ocean transportation freight claim, the U.S. Supreme court recently tackled the issue of whether an American federal court must first decide it has jurisdiction before it can dismiss a case based on *forum non conveniens*. The High Court's decision is significant in that it impacts how improperly venued actions may be transferred to more appropriate forums.

In this matter, freight was shipped from Philadelphia to China. Ocean carrier Malaysia International's bill of lading triggered payment to the U.S. supplier under a letter of credit. The Chinese purchaser apparently was unhappy with the deal, and was upset to learn that payment to the supplier was released. The purchaser sued Malaysia International in a Chinese court (alleging bill of lading irregularities); the court accepted jurisdiction and issued a warrant for the subject vessel's arrest. Malaysia International, not content with Chinese jurisdiction, then sued the Chinese purchaser in the U.S. District Court for the Eastern District of Pennsylvania, alleging that the purchaser's fraudulent misrepresentations to the Chinese court had prompted the vessel arrest. The U.S. supplier wasn't even a party to the suit!

The defendant purchaser moved to dismiss the action based on *forum non conveniens*. Come on. This matter had virtually nothing to do with the Keystone State. Almost no witnesses or evidence were stateside, and the primary issue was one affected and governed solely by Chinese law. The district court dismissed the action.

On appeal to the U.S. Court of Appeals for the Third Circuit, Malaysia International argued the district court's jurisdiction hadn't been established, such that *forum non conveniens* wasn't an appropriate issue. That doctrine, by its own terms, applies only when two or more courts accept jurisdiction. The Third Circuit reversed the district court.

The Supreme Court accepted *certiorari*, and in a decision that should save litigants big bucks in procedural matters, reversed the Third Circuit

and reinstated the district court's dismissal. In order to fully develop jurisdictional arguments, the parties would have to endure time-consuming and expensive discovery. Jurisdiction typically is fact-driven, and you can't just make a "gimme-a-break" argument for or against it even in the face of a scenario this extreme.

District courts now enjoy discretion over determinations of party and witness convenience, as well as practical difficulties of litigating issues. *Forum non conveniens* is a "nonmerits ground for dismissal," meaning the facts supporting or opposing it need not be formally acquired through sworn deposition and other discovery. True, federal courts should consider such things as whether the other tribunal will hear the matter or apply a statute of limitations against it, but those considerations weren't present here. If they were, a district court would use its discretion to keep the case.

Ref: Sinochem International Co., Ltd. v. Malaysia International Shipping Corp., 127 S.Ct. 1184 (2007).

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Carmack doesn't save a shipper's claim against an NVOCC, notwithstanding *Sompo Japan*

By Steve Block

Told you so. See how *Sompo Japan* muddies the waters and darkens the landscape that looked so clear and bright for a few months after *Kirby*?

For a quick refresher on this, check out the January 2005 and August 2006 Legal Lookout articles. The former hailed the U.S. Supreme Court's uniformity-promoting, containerization-embracing decision in *Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., d/b/a Kirby Engineering, and Allianz Australia Insurance Limited* ("Kirby") as accepting industry's venerable practice regarding intermodal limitation of liability. The latter piece bemoaned the Second Circuit Court of Appeals' call in *Sompo Japan Insurance Company of America v. Union Pacific Railroad Company* ("*Sompo Japan*") which, well, pretty much did the opposite.

Kirby took a look at the realities of containerized shipping and how admiralty jurisdictional concepts have evolved with contemporary shipping practices. For a variety of reasons, including players' reasonable expectations and the realities of modern-day transportation, the Supreme Court recognized the effect of standard bill of lading Himalaya Clauses. Per that contractual term, a railroad's liability was limited to the \$500/package stated in an ocean carrier's through bill of lading and permitted by the U.S. Carriage of Goods by Sea Act ("COGSA"). COGSA had come ashore.

Sompo Japan, on the other hand, focused on the duality of COGSA and America's surface transportation liability regime, the Carmack Amendment (recodified as part of the Interstate Commerce Commission Termination Act). The Second Circuit determined that only Carmack governs a surface carrier's liability, derailing a Himalaya Clause's extension of the ocean carrier's limitation of liability. Yeah, yeah, the *Sompo Japan* court "distinguished" *Kirby*, claiming that the High Court hadn't been

presented with and didn't consider Carmack. However, one gets the feeling the Court of Appeals was accusing the Supreme Court of ignoring a 900-pound gorilla in its courtroom. Needless to say, *Sompo Japan* is pending appeal.

So here we are, stuck with two decisions that don't jibe, at least for the time being. Is the observation merely an academic one? Maybe, inasmuch as both decisions leave players fully capable of protecting themselves by contract, and sophisticated shippers through their educated and savvy attorneys can make sure they know in advance what they're up against liability-wise. But what about situations involving smaller shippers or losses involving exceptionally improbable circumstances?

Consider the Southern District of New York's recent analysis in *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.* There, shipper Rexroth contracted with NVOCC Ocean World Lines ("OWL") for the transport of electronics equipment from Rotterdam to Englewood, Colorado via the Port of Houston. OWL booked the haul with Cosco, including the surface leg through Cosco North America. The ocean carriage went fine, but while the freight was in a Denver warehouse, Rexroth instructed OWL not to tender the cargo to consignee/purchaser TDI. Apparently, Rexroth had become justifiably concerned about TDI's intentions. Through some sort of unexplained mix up, Cosco North America botched OWL's instructions not to release the property. TDI didn't pay Rexroth, and the ticked-off shipper sued OWL for breaching the contract of carriage.

OWL sought to limit its liability to the COGSA-blessed \$500/package (peanuts compared to the freight's value). OWL's bill of lading incorporated a tariff that provided the limitation "whenever COGSA is applicable." It also contained a Himalaya Clause. Rexroth argued that Carmack, and not COGSA governed. Just like the scenario in *Sompo Japan*, this loss occurred while the freight was in a railroad's care, custody and control. Thus, neither OWL's limitation of liability nor its Himalaya Clause applied. A fair argument, right?

Carmack (continued)

The district court didn't buy it, and limited OWL's liability. The opinion is a bit less than satisfying, raising as many questions as it answers. The court ruled

The short answer to plaintiff's position, however, is that *Sompo Japan* addresses the impact of the Carmack Amendment, which applies only to certain rail carriers, to the liability of a rail carrier. But the issue of rail carrier liability is not presented here. The issue in this case is whether an NVOCC or other non-rail carriers are entitled to the benefit of COGSA package limitation under the parties' contracts. Nothing in *Sompo Japan* sheds any light on that question.

The court leaves the reader begging for the "long answer," which isn't provided. Its most profound observation is in the last sentence of that passage.

Why did the Southern District of New York dismiss rail carrier liability as an issue in this context? Just because only an NVOCC was being sued? After all, a rail carrier screwed up here. The decision is correct, *ala* Kirby, but without effectively distinguishing *Sompo Japan*. Expect more of the same as long as we have two inconsistent opinions on the books.

Ref: Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., 2007 WL 541958 (SDNY 2007); *Sompo Japan Insurance Company of America v. Union Pacific Railroad Company*, 456 F.3d. 54 (1st Cir. 2006); *Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., d/b/a Kirby Engineering, and Allianz Australia Insurance Limited*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004).

Hot Recent Cases in Motor Carrier Law

By Steve Block

Two federal courts confirm carrier right to remove Carmack claims.

Baker v. Allied Van Lines, 2007 WL 461029 (M.D. Fla. 2007); and *Fraser-Nash v. All Points Moving & Storage*, 2007 WL 419515 (S.D. Tex 2007)

Over the past few years, we've seen a number of federal courts refuse to accept jurisdiction of Carmack claims when plaintiff shippers originally file in state court. Either on the shipper's motion or *sua sponte*, those courts, often recognizing authority to the contrary, rule that a party's right to choose its forum extends to interstate freight claims. They conclude that state courts have jurisdiction, even though federal law applies.

A couple recent cases, one from the Southern District of Texas and the other from the Middle District of Florida, blessed carriers' removal to federal court. Both actions involved improperly asserted state and common law theories of recovery which the courts dismissed with leave to the shippers to file under Carmack. The analyses are sufficiently thorough regarding Carmack's preemption of state law to demonstrate the courts were mindful of jurisdiction when electing to hear the cases. Notably, the *Fraser-Nash* case gives guidance as to how improperly asserted state law claims may be dismissed after removal pursuant to Fed.R.Civ.P. 12(b)(6). These cases properly effect statutory intent, perhaps over considerations of crowded docket clearing.

A ride to the yard counts as commercial activity for purposes of insurance coverage.
Republic Western Insurance Co. v. Williams, 2007 WL 81683 (4th Cir. 2007)

Owner operator Williams had his own coverage for non-commercial use of his tractor through insurer Republic. Williams was under lease to carrier P.B. Express ("PBX"), which had coverage for its leased trucks' commercial

Hot Recent Cases (continued)

activity through carrier Carolina Casualty, so long as the activity was with PBX's permission. PBX required its drivers to report to its terminal in the mornings when they were scheduled to duty, where they would receive their assignments. PBX supplied each leased truck with an accident kit, which included Carolina Casualty's accident information form.

On the way from an overnight parking lot to the PBX terminal one morning, Williams was involved in an accident. The parties involved in the accident pointed fingers at each other, litigation ensued, coverage from both insurers was implicated, and it boiled down to which insurer gets to cover Williams.

The accident, PBX conceded, was "DOT Recordable," a circumstance that would apply only if the driver was on company time. After the accident, PBX directed Williams to fill out the Carolina Casualty form in the accident kit. Carolina Casualty urged that Williams could not have been engaged in commercial activity because he was not carrying a load at the time of the accident. However, the driver was doing just what PBX directed him to do by driving to the terminal to get his assignment, which was in the usual course of the carrier's business.

Carolina Casualty argued that its policy didn't apply to owner operators, who didn't require their carriers' "permission" to operate their own tractors bobtail. However, because PBX procedure contemplated Williams driving his rig to and from work, it was necessarily "permissive." Carolina Casualty must cover.

Whether freight is "in transit" is a question of fact.

Cargo Master, Inc. v. ACE USA Insurance Company, 2007 WL 121429 (Tenn. 2007)

Carrier S&A Trucking's driver detached his rig and left a load of tires in the parking lot of the consignee's facility (apparently, a Tennessee intrastate haul). Next morning, the freight was gone. It's not clear why the freight was left

there - the opinion speaks to "no one [being] there to receive the goods," and allegations of mechanical breakdown - but a week passed before the theft was discovered.

The shipper and its broker made a freight claim, and coverage under the carrier's insurance policy was asserted. The insurer, ACE USA, refused coverage on the basis that coverage was for cargo "in transit" only. After a Tennessee state judge granted ACE's motion for summary judgment, the whole mess went up to the Volunteer State's court of appeals.

There, the insurer's case was viewed skeptically. True, the freight wasn't in motion at the time it was lost, and nothing in the record even suggests it ever would be again. But a review of decisions from various jurisdictions demonstrated that a variety of factors dictate whether freight is still in transit. The court reversed the summary judgment order, finding material questions of fact as to whether the stoppage was "merely incidental to the main purpose of delivery." Nothing in the record demonstrated the freight had been left as a result of deviation or for the driver's own convenience. In other words, the purpose and extent of the stop had to be clarified before the court could rule transit had concluded as a matter of law.

Directed verdict affirmed absent evidence suggesting shipper's improper loading of container was latent and responsible for accident.

Brashear v. Liebert Corporation, 2007 WL 184888 (Ohio App. 2007)

Driver Brashear was tragically killed when the trailer he was hauling for shipper Liebert turned over. Liebert had loaded the trailer with a cargo of batteries. Brashear's estate sued the shipper in Ohio state court, alleging the freight was not properly loaded. Specifically, the pallets were not secured to the trailer's floor with "nailers," allegedly causing it to shift while the truck went around a ramp.

Hot Recent Cases (continued)

At trial, the driver's estate put on evidence of how the trailer was loaded. Liebert requested and was granted a directed verdict on the ground reasonable minds could not conclude that the shipper was responsible.

The Ohio court of appeals agreed, and affirmed the directed verdict. While shippers are responsible for securing freight properly when they load their own trailers, drivers bear a duty to ensure their loads are secure that is "superior" to the shipper's. Shippers have a duty to use ordinary care, and they will be liable only if any improper loading is latent. The court adopted a principle other jurisdictions have applied, i.e., that "what is patent and obvious in an ordinary inspection depends, in part, upon the experience of the observer."

Brashear, a driver with over ten years experience (much of which with this shipper), could have walked the entire length of the unsealed trailer to make sure nailers were used. A number of other options apparently were available to him to ensure the load was safe. Because no principle of law dictates that a jury must be allowed to deliberate whether comparative fault is a factor, the trial court properly took it away from the jury.

Intervenor's contract rights limit document production from carrier to drivers.

Owner-Operator Independent Drivers Association v. Landstar Inway, Inc., 2007 WL 521245 (M.D. Fla 2007)

A certified class of drivers under OOIDA sued carrier Landstar Inway alleging improper charge-backs to the drivers' accounts, which would violate the Truth-in-Leasing provisions of the Motor Carrier Act of 1980. Earlier this year, the U.S. District Court for the Middle District of Florida ruled that Landstar had not improperly hit the drivers with fees. However, the court also ruled that the carrier had failed to disclose documents to the drivers necessary to determine the validity of the charges as required by section 376.12(h) of the federal statute.

When Qualcomm found out Landstar planned to disclose to the drivers confidential information pertaining to Qualcomm pricing, it intervened in the action. The court agreed that the Qualcomm documentation was irrelevant to remaining issues, and preliminarily enjoined the production (the order strongly suggests the injunction will become permanent). In doing so, the court disabused OOIDA's drivers of the notion that its earlier ruling already holds Landstar responsible for documenting to the drivers its transactions with Qualcomm. Put simply, Qualcomm costs were not "charge-back" items, because they may be financed directly from Qualcomm. The service provider demonstrated it would suffer irreparable harm by the disclosure of its pricing, so the injunction was proper.

What remedy is available to drivers for carrier's failure to disclose documents supporting charges?

Id., 2007 WL 473995 (M.D. Fla 2007)

In preparation for trial on remedies available to the plaintiffs as a result of the nondisclosure, the parties brought motions in limine (mostly addressing evidentiary issues and other points that will guide trial proceedings). The motions fleshed out the nature of the remaining issues. At the heart was a determination of what remedy(ies) the OOIDA drivers could pursue. The court took this opportunity to answer that.

Plain and simple, the drivers have to demonstrate they suffered actual damages as a result of the nondisclosures. The statute provides that equitable relief is available for such violations, i.e., "injunctive relief, damages sustained, and attorney's fees." The plaintiffs apparently used this as a second opportunity to seek "restitution and disgorgement" which, they claimed, are species of injunction. The court disagreed, and reaffirmed its earlier conclusion that these remedies are not available to the drivers, as the statute doesn't provide for them. True, the court has inherent equitable authority, but a line of cases and the court's discretion dictated a court's general mandate is not expanded beyond what Congress clearly intends. Various motions in limine to this effect were granted and denied.