

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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## SHIPPERS WHO LOAD AND SEAL THEIR OWN CONTAINERS MAY HAVE TOUGH BURDEN OF PROOF IN OCEAN CARGO CLAIMS.

By Steve Block

The law just doesn't like uncorroborated he-said-she-said contests.

Plaintiff shippers typically have a burden of proof to demonstrate by a "preponderance of the evidence," i.e., substantiation that each element of their claims - on a more likely than not basis - is true. If they have no evidence supporting an element of their claim, well, they often get tossed out of court.

An entity owned by Victoria's Secret, Mast Industries ("Mast"), recently said that a container it loaded and sealed contained 106,000 bras worth some 580 grand. Everybody agreed that container was lost or stolen en route from Israel to Columbus, Ohio. Mast wanted to recover its losses, and sued its transportation providers in the U.S. District Court for the Southern District of Ohio.

After the shipper, its intermediary and a Danmar Lines sorted out who had what legal status in their transactions with each other, the court took a look at the elements of a cargo claim governed by the U.S. Carriage of Goods by Sea Act, 46 USC App. §1303 et seq ("COGSA"). COGSA requires carriers to issue a bill of lading for each cargo it transports. Among other things, a bill of lading must describe a cargo's content and volume. Danmar issued to Mast a bill of lading that confirmed the same cargo count Mast claimed. All were missing, and the value per bra was documented. End of story, right?

Wrong. Historically, and in keeping with COGSA's historical intentions, a carrier's bill of lading that stated a cargo's count was prima facie evidence of the quantity of items within that freight. Latin for "at first appearance," a plaintiff's demonstration of

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an element of its case by prima facie evidence served to shift the burden of proof - as to that one element - to the defendant. In other words, if a carrier issued a bill of lading confirming volume, it was stuck with that concession unless it had (or could get) controverting evidence of a smaller volume.

But COGSA was enacted in 1936, long before the advent of containerization. At that time, carriers could take easy look-sees at just what their shippers were tendering. The risk of error was small and entirely within the carrier's control. Now, however, shippers often load and seal their own containers, and tender them to steamship lines (or, as here, a non-vessel operating common carrier) without giving them a chance to confirm the contents. Additionally, modern day shipping volumes render carrier attention to each container impractical.

The court surveyed various precedents which had held bills of lading stating cargo counts of freight loaded and sealed by shippers are not prima facie evidence of what actually was tendered. According to those earlier cases, even if a carrier issues a bill of lading stating quantity, the shipper still must come forward with evidence to demonstrate exactly what was tendered.

## SHIPPERS WHO LOAD ... (Continued)

And that burden of proof is a "high" one, observed the court. Citing those other precedents, the court ruled that "direct evidence" - meaning eyewitness testimony - was needed to confirm the volume of tendered freight. Mast came forward with packing lists, invoices, certificates of origin customs documentation, and weight reports, all demonstrating the quantity of its cargo. In dismissing Mast's claims, the court found those documents were inadequate.

For years, carriers have recognized the problems created by COGSA's bill of lading requirement and the impossibility of confirming the contents of each container. They've taken creative steps to remedy those problems. First we saw the awkward notation "said to contain" before the cargo description in shipping documentation, and then the more specific "shipper's load, stow and count." But it's never been clear under prevailing law whether these notations satisfy COGSA, or whether courts should recognize them.

This case demonstrates the critical need for cargo liability reform. Courts have gone in different directions on these issues (yes, the Mast court could have followed different precedents to the opposite conclusion). A modified version of COGSA was discussed, drafted, and proposed to congress nearly a decade ago. It would have dealt with the shipper-packaged freight count issue.

That draft was tabled due to disinclination of the ocean carrier industry, which is now almost exclusively foreign, to bless an American regime that had unfavorable provisions and might be at odds with international regimes. Negotiations toward a uniform regime subsequently fired up before the United Nations, and have appeared near completion a number of times in the past few years. Nothing has emerged yet, but the latest word is that negotiations before the U.N. will continue in earnest this summer.

Meanwhile, shippers, intermediaries and their insurers should be mindful of evidentiary burdens of proof that govern potential cargo claims, and have appropriate procedures in place during loading of containers. Otherwise, they may lose an expensive he-said-she-said contest.

Ref: *Limited Brands, Inc., et al v. F.C. (Flying Cargo) International Transportation, Ltd.*, 2008 WL 859013 (S.D. Ohio 2008).

## CAN CARGO OWNERS WHO AREN'T SHIPPERS OF RECORD SUE CARRIERS FOR LOST/DAMAGED FREIGHT?

By Steve Block

Don't you just hate it when courts raise interesting and profound legal questions, but then proclaim they won't rule on them because, well, they don't have to reach the issue to make a final ruling in the case? Here's a prime example of such a frustration-provoking waive off, one that underscores a recurrent issue in all modes of transportation.

Professional Products, Inc. (PPI) purchased electronic equipment from Omneon Video for delivery to City University of New York. Omneon engaged carrier Haas Industries to make the haul. Haas issued a bill of lading naming Omneon as shipper and the University as consignee. The freight arrived short to the tune of some 105 grand.

Omneon filed a cargo claim with Haas, and the carrier pointed to a limitation of liability clause in its bill of lading. Omneon accepted \$88.00 from the carrier, representing the limited liability amount. Meanwhile, PPI filed a cargo insurance claim with its insurer OneBeacon, which paid the loss' full value. OneBeacon then sued Haas in subrogation in the Northern District of California. Haas moved to dismiss based on the doctrine of accord and satisfaction.

## CAN CARGO OWNERS . . . (Continued)

The court did an excellent job of expressing its conundrum. "On the one hand," lamented Magistrate Judge Zimmerman, "judicial economy suggests the owner of the goods should be able to sue the carrier directly under the Carmack Amendment. The alternative would be for the owner to sue the consignor or shipper who would then have to sue the carrier."

But on the other hand, "allowing someone not a party to the bill of lading to sue the carrier after it has reached an accord and satisfaction with the shipper would seem to discourage carriers from settling claims."

Who has standing to sue is a common issue faced by those involved in cargo loss and damage claims. The scenario in this case is typical. Oftentimes, brokers and forwarders with business relationships to preserve with their customers pay damaged freight claims to shippers, but don't situate themselves properly to have standing to collect from carriers. Cargo insurers can get themselves into a mess of trouble by not making sure an uninsured entity upsets the liability picture. Conversely, carriers don't always have it straight as to what entity(ies) they can go after for general average, improperly packaged cargo that causes problems at sea, unpaid freight charges, and other matters.

Usually, the shipper of record reliably has standing, but a bill of lading doesn't answer all questions about title, equitable interests, and assigned rights. In an era of complex, multi-party business transactions, complicated by insurers and transportation facilitators who have their customers' and own interests to protect, a cargo loss can aggrieve more than just a shipping document's recipient.

Whether OneBeacon has standing to sue was unsettled, but the court found it immaterial and didn't reach the issue. Haas had effectively limited its liability, so the proper plaintiff's identity didn't matter. While we'll never know how this court would rule, the proper answer probably lies in the bill of lading, and the fact that PPI could have protected itself by shipping

the freight in its own name after agreeing to acceptable terms with Haas.

Various players have mechanisms to avoid misunderstanding in the event of a loss. First and foremost, everyone involved in the manufacture, sale, purchase, shipment, transportation administration and insurance of commodities should reach an agreement as to who bears the risk of loss through every point in the process. This can be done in various contractual documentation, including the bill of lading. Second, insurance coverage may be purchased or insisted upon, with each party at risk enjoying the benefit of coverage. That way, standing isn't so much of an issue, but it can be costly.

Perhaps most importantly, however, is that all affected participants should make sure they don't make decisions - like accepting a settlement from a carrier or intermediary - without fully understanding the repercussions and obtaining the others' consent. This can be achieved by fluid communication and agreement by cargo interests from the moment a cargo loss becomes known. A manufacturer/seller of a product that is damaged during transit after risk of loss has passed has nothing to lose. Except perhaps someone else's resentment, cessation of business dealings, or legal action.

Ref: *OneBeacon Ins. Co. v. Haas Industries, Inc.*, 2008 WL 1847182 (N.D. Cal. 2008).



## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

### Federal law doesn't preempt state law that squelches liability waivers

*Ryes v. Home State County Mutual*, 2008 WL 2038819 (La.App. 3rd Cir. 2008)

Louisiana-based carrier Scout Transportation entered into a lease of a rig owned by Phillip Boudreaux. Scout allowed drivers to carry passengers who signed a waiver of liability for injuries suffered during a haul. Scout assigned its driver Liney Ryes to move a load in Boudreaux's rig from the Pelican State to Longhorn country. In keeping with Scout's policy, Liney brought along his wife Beatrice, who had put her John Hancock on Scout's waiver. Beatrice was injured in a one-vehicle accident in Texas.

The Ryes sued Scout, Boudreaux and their insurers in Louisiana state court. They pointed to a Louisiana statute that puts the kibosh on waivers such as the one Beatrice signed. Scout and company urged that federal law at 49 USC § 14501(c)(1) preempts state law that affects interstate carriage, and argued that Texas law (sans kiboshing statute) should govern. The trial court didn't buy any of it.

Neither did the Louisiana court of appeals. Affirming the trial court's summary judgment, the higher court ruled that preemption statutes specifically don't apply to state law designed to promote safety. Scout's cited precedents dealt with pricing, and not law that ups the ante on carrier safety responsibilities. Because the contracts and individuals were all in Louisiana, that state had the more compelling interest in enforcing its law. The carrier side is on the hook.

. . . but state regs requiring truckers to be "certified installers" just might be preempted  
*Taylor v. State of Alabama*, 2008 WL 1868083 (11th Cir. 2008)

Certain truckers in Alabama transport pieces of prefabricated homes to destinations where they are assembled into livable dwellings. The

Alabama Manufactured Housing Commission (AMHC) regulates the Yellowhammer state's prefab industry, and decided to make such truckers become "certified installers" of transportable homes, as well as subject to a 72-hour notice provision whereby they must give AMHC a heads up about all moves.

After he "renounced, tore up and destroyed his AMHC license as an installer" right in the office of the agency's director, trucker Taylor sued the state to rescind AMHC's new regs. At issue was preemption by 49 USC § 14501. In response to the state's dispositive motion, the U.S. District Court for the Northern District of Alabama dismissed Taylor's complaint on the pleadings, finding the regs were within the safety regulatory authority exception of § 14501(c)(2)(A). Taylor appealed to the Eleventh Circuit.

Whether or not a state law falls within that exclusion is a question of fact determinable only on a developed factual record. Moreover, a state law is only preempted if it has a "significant impact on carrier rates, routes, and services," and the extent of the AMHC regs on interstate carriage was completely undeveloped in the record. Thus, the court of appeals remanded the claim's dismissal to allow the parties to answer a series of questions which would determine whether preemption applies.

**A household goods bill of lading is a contract, and shippers need to treat them as such**  
*Hoover v. ABF Freight System, Inc.*, 2008 WL 1805392 (C.D. Ill. 2008)

Law governing interstate transportation gives consumers quite a bit of leeway that commercial shippers don't get, taking into consideration that ordinary folks making a personal move just don't have the capacity to learn industry concepts. Just ask the Hoovers, who moved from Florida to Illinois a few years ago.

They engaged ABF Freight System based largely on its nifty and cost-effective program of having an empty trailer delivered to their old home, loading the trailer themselves, and having ABF transport it to their new residence.

## Hot Recent Cases (Continued)

A couple of bumps in the road before ABF took off with the Hoovers' stuff might have alerted them to future problems. A bill of lading ABF used offered both limited and full liability options, and the Hoovers asked for the latter when they booked the haul. When an ABF driver showed up with his rig to fetch the loaded trailer, the bill of lading he presented showed limited liability. Ms. Hoover called or emailed ABF (she couldn't recall which), and purportedly was told to sign the proffered bill of lading, and that "insurance" would be provided in the event of an accident. She did so, there was one, and, yes, ABF sought to limit its liability to peanuts.

In response to ABF's motion after suit was filed, the Central District of Illinois applied general contract integration and parole evidence analyses to the circumstances. The ABF bill of lading, which properly incorporate the carrier's tariff, was fully integrated. Any statement by a party to the contract that contradicts an unambiguous contract term is excluded as parole evidence. ABF's liability is limited. One wouldn't think household goods shippers should have to hire lawyers to get their belongings moved, but as this case shows, shipping contracts are subject to some of the same, often confusing concepts as any other.

### Where national uniformity in interstate carriage law falls short: state statutes at the heart of insurance coverage issue

*Moper Transportation, Inc. v. Norbet Trucking Corp.*, 399 N.J. Super. 146, 943 A.2d 873 (March 2008)

Owner operator Moper Transportation, owned by Manuel Flores, was under lease to motor carrier Norbet Trucking. New Jersey was where the companies were located, the transportation service agreement (TSA) was consummated, and both obtained insurance. On the way home from a haul, Flores was headed to his New York home when he was involved in a bobtail accident.

Per the TSA's terms, Norbet procured a commercial trucker's liability policy with the

Insurance Company of the State of Pennsylvania (ICSOP), and Moper bought a non-trucking liability policy from Great American Assurance Company. The latter coverage applied to bobtail and deadhead movements, and contained a business use exclusion. Neither insurer wanted to pay. ICSOP argued that Flores was bobtail ad driving home (as opposed to running a commercial haul); Great American pointed out that Flores was under dispatch and returning home after a scheduled transport). After an injured claimant's case against Flores was settled, the coverage mess went up the hill to New Jersey's high court.

At issue was whether New York or New Jersey law applied. An Empire State law known as a "deemer statute" essentially extends insurance coverage where a claimant would otherwise be left without recourse because a foreign tortfeasor's auto coverage was limited. ICSOP urged that New York had the greatest interest in applying its law (the accident occurred there); and that the deemer statute would be upset if Moper's insurance coverage wasn't extended to cover the loss.

The court disagreed. The companies, their contract, and their insurance all grew in the Garden State. This was a coverage issue, and not the accident claim itself. The goals of New York's deemer statute wouldn't be defeated by applying New Jersey law, as there would be coverage in any event. The deemer statute itself didn't foreclose a choice of law analysis (as ICSOP had further argued without authority). ICSOP gets to pay.

**Confusion when Ma-and-Pa truckers go belly up**  
*Crown Transportation, Inc. v. Smith Systems Transportation, Inc. v. SST Financial Group, LLC*, 2008 WL 1766736 (N.D. Okla 2008)

Owner operator Crown, owned solely by Charles Crafton, was under lease to carrier Smith Systems. Smith was to pay Crown percentages of collected freight and fuel surcharges. Crown sued Smith in the Northern District of Oklahoma, alleging underpayment of freight and surcharges, and for omitting provisions in the lease agreement that the Truth in Leasing Act, 49 USC § 14704 (TLA) requires. Smith counterclaimed, alleging irregularities in Crown's administration of a fuel advance account,

## Hot Recent Cases (Continued)

and for stranding drivers on Smith's nickel. This sounds like a garden variety operator-carrier dispute, until Mr. Crafton files for personal bankruptcy.

Apparently, Crafton did not apprise his bankruptcy trustee about his ownership of Crown and about Crown's suit against Smith. This omission prompted Smith to argue judicial estoppel in defense of Crown's claims. Smith's theory was that by misrepresenting to the bankruptcy court the extent of Crown's assets (the claims against Smith being one of them), Crown should be prohibited from pursuing them now. Judicial estoppel serves to prevent a litigant from taking clearly inconsistent legal positions in the same proceeding. Moreover, urged Smith, TLA doesn't apply to this type agreement, as Crown allegedly didn't own non-exempt equipment when it entered into the agreement.

The court didn't buy it. First, Crafton, and not Crown, was the bankrupt entity. There wasn't enough evidence demonstrating that he was Crown's alter ego. Second, the failure to disclose a claim isn't so clearly inconsistent with Crown's assertions of claims as to warrant judicial estoppel. Crafton hadn't "succeeded" in persuading the bankruptcy (which, by the way, was a different court and proceeding) to accept his earlier position that no lawsuit existed. Lastly, Smith couldn't show it would suffer any unfair detriment by the nondisclosure.

As to the TLA, the court found that Crown could have leased non-exempt equipment to Smith at some point in the lease (even if it was after the signing). Too many unanswered issues of fact remain to determine TLA's applicability on summary judgment, do denial of this part of the dispositive motion was indicated as well.

## UPCOMING EVENTS



Steve Block to Present at the Pacific Admiralty Seminar on October 2-3, 2008.

Steve Block will present "Caught Between the Shipper and the Deep Blue Sea: How NVOCCs Fare Under New Law Governing Intermediary Liability" at the 2008 Pacific Admiralty Seminar in San Francisco, California. Mr. Block is a member of numerous maritime and transportation professional associations, including but not limited to: Association of Transportation Law Professionals; Conference of Freight Counsel; Editorial Advisory Board, Admiralty and Maritime Section of the Transportation Law Journal, University of Denver School of Law; Maritime Law Association of the United States, Proctor in Admiralty; National Industrial Transportation League; Transportation Lawyers Association. [Click here](#) to learn more about this two day Pacific Admiralty Seminar.

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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.

**Steve Block**  
sblock@bpmlaw.com

**Brandon Carroll**  
bcarroll@bpmlaw.com

**Dana Henderson**  
dhenderson@bpmlaw.com

**Stacia Hofmann**  
shofmann@bpmlaw.com

**Andrea Holburn**  
aholburn@bpmlaw.com

For additional articles or background information on each attorney please see the Betts Transportation & Logistics' Web page at <http://www.bpmlaw.com/PracticeAreas/TransportationandLogistics/tabid/1591/Default.aspx>

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