



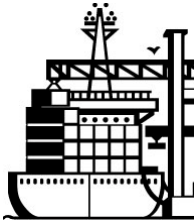
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Legal News in Transportation & Logistics

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The New Wave of Maritime Asbestos Litigation

BY STEVEN W. BLOCK

The maritime industry has long defended claims brought by its workers suffering from various asbestos-related illnesses. Vessel construction and maintenance during the first two thirds of the twentieth century involved extensive use of asbestos containing products. Mariners, construction workers, maintenance technicians and others brought claims against their employers seeking to recover damages suffered as a result of lung conditions, many of which are fatal cancers.

Asbestos litigation in the U.S. reached a peak in the 1980s through early 1990s, extending to numerous industry sectors. The primary targets were some two dozen asbestos manufacturers, along with employers in certain industries for which protection and insulation from extreme temperatures are essential. Through most of the last century, ships of the U.S. Navy, as well as most merchant lines, were equipped with asbestos products in their engine rooms and other compartments.

Maritime claimants typically allege they inhaled asbestos particles which became airborne during operations and maintenance, resulting in lung

conditions in their later lives. The medical etiology debate over certain lung conditions is the stuff of asbestos trials, and is far too extensive for this article. However, enough medical literature and testimony claim that certain catastrophic diseases (most particularly, mesothelioma) are caused only by asbestos that jury trials on the issue can be risky propositions. A central issue in most asbestos litigation is "product identification," or defendants arguing their asbestos-containing products or workplaces weren't involved.

Vessel operators face an added burden when defending asbestos claims. The Jones Act, 46 USC App § 688, a federal statute custom-made to protect seamen from the dangers of life at sea, pretty much renders maritime employers their workers' comprehensive medical and disability insurers. More importantly, the burden of proof maritime personal injury plaintiffs face under the Jones Act is much less daunting than that of their land-based cousins under state law.

Thus, while workers exposed to asbestos in factories typically base their claims on a product liability theory, maritime workers have the added benefit of concurrently stating their beef in federal court (if they so choose) under the Jones Act. With an injured maritime worker enjoying status as "ward of the admiralty" – something approaching the legal equivalent of His Honor's nephew – you can see why the shipping industry has always been particularly nervous about asbestos claims.

Asbestos-containing products have been illegal in the U.S. for over a generation, installation on vessels has long since ceased, and the number of maritime claims has abated. But they haven't fully ceased. A characteristic of asbestos, one which has numerous implications, is that disease can manifest decades after the last exposure.

Take, for example, a claim recently tried and appealed in Louisiana, where a 77-year old retired merchant mariner died in 1994 of mesothelioma caused by his work at sea in the 1940s. His widow brought a Jones Act/state product liability claim against a former maritime employer, and was awarded some \$2 million. This case involved mostly legal procedural issues. However, it affirms, at least in the Pelican State, that maritime plaintiffs enjoy the Jones Act's burden of proof advantages without losing their entitlement to recover for losses that federal statute doesn't allow (here, the spouse's loss of society damages as provided by state law). Interestingly (if alarmingly for the defendant employer and those similarly situated), the jury had refused to find a connection between asbestos exposure fifty years ago at sea and the deceased plaintiff's lung disease. But the judge exercised her authority to rule that conclusion was unsupported by evidence and testimony, and set aside the jury's feelings to find the employer fully liable.

With asbestos litigation's enormity, settlement and judgment costs have gotten close to (or exceeded, depending on how you calculate) one trillion dollars. Most of the old-line defendants, i.e., the asbestos manufacturers, have gone belly up. With fewer and fewer defendants to sue, asbestos plaintiffs have become more expansive in their theories of liability and in deciding whom to sue.

This concept extends to the maritime facet of asbestos litigation. Whereas shipyards and carrier lines were the primary accused in salty asbestos claims of 20 years ago, we now see a wider array of service and product providers being hauled into court. Now it's not just the shipyard and asbestos manufacturer defending a mesothelioma claim; it's also the manufacturers of the maritime employer's air conditioning units, hoisting equipment, and metal piping. Even the manufacturers of respiratory masks and protective gloves used to prevent exposure currently are named as defendants (based on alleged product failure).

Like the new wave of defendants in most all other industries, maritime newcomers should avoid becoming the next mainstay of asbestos litigation.

The well-organized asbestos plaintiffs bar, consisting of attorneys from throughout the country, knows just who is doing what in defense of claims. Information about how named defendants behave in litigation is evaluated, disseminated, and used in subsequent determinations about who gets sued.

In other words, simply paying out claims to avoid trial and litigation costs can be an even riskier proposition.

Ref: *Torrejon v. Mobil Oil Company*, 2004 WL 1338156 (La. App. 4th Cir.)

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Maritime Arbitration: Dispute Resolution Outside the Courtroom

BY STEVEN W. BLOCK

Let's face it. Ours is a complex industry full of unusual concepts, business practices, terms and nomenclature which many folks just don't get. Laypeople find the transportation industry's underpinnings even more Byzantine. If you don't understand the principles and doctrines, how can you figure out *why* they're there, and what purpose they serve?

For those and other reasons, federal law nixes the right to trial by jury when it comes to most admiralty jurisdiction cases (those pertaining to waterborne carriage), and places parties to maritime conflict solely before a black-robed referee who rules as to matters of both law and fact. Judges are accustomed to discerning esoteric subjects and getting to the heart of what's legally at issue.

But many in the shipping business, especially when it comes to big-stakes claims, aren't comfortable with a landlubber making the calls. They feel the bench's view of the waterfront just isn't broad enough, despite judges' impressive credentials and experience. So it's not surprising our industry often seeks means for dispute resolution outside the courtroom.

Arbitration essentially empowers non-judicial organizations or persons to rule definitively on

disputes that otherwise would be submitted to court litigation. The concept has been around longer than courts have, although the circumstances have evolved as a function of the pluses and minuses of conference-room trials. With some court dockets now bumping trial dates out two years or more, those interested in expedited decisions might embrace a private proceeding whose duration may be shortened. Federal court litigation's rigid formalities can be expensive, as can be the hoops parties must jump to get evidence before His Honor. These costs often may be avoided in arbitration. One caveat, however, is that some arbitration organizations have gotten rather pricey themselves.

Discovery, i.e., the parties' broad right to obtain information and evidence pertaining to their cases, may be curtailed in arbitration proceedings. The transportation industry and those it services often aren't keen on broadcasting to the world business secrets (which typically include the contents of confidential service contracts). Even if information must be disclosed in an arbitration, the sensitive stuff can better and more reliably be kept under wraps when it's presented in a closed proceeding (instead of a public trial), and won't be left sitting indefinitely in a court's archives.

Another compelling reason why parties arbitrate is that it's a much less confrontational experience for parties and witnesses. When players might like to continue doing business with each other, or if they're concerned about their industry image, the chummier arbitration environs might spell the difference between long-term, productive friendship or eternal animosity. With the number of industry participants shrinking as a result of mergers and business failures, this point can be significant.

But the selection of an industry-familiar arbiter ranks highest in the list of reasons why maritime conflicts often are arbitrated. Salty lawsuits frequently involve fact-driven issues in the context of those hard-to-follow business principles and strange language. Arbitrators can be plucked right from industry, or from prominent lawyers in the admiralty bar. These folks need not be educated ground up, they have a big-picture perspective of the issues involved; and they can usually see through the ship in deciding what caused a conflict. A flourishing cottage industry caters to maritime dispute resolution by providing lists of arbitrators versed in nearly every imaginable sub-category of the shipping business.

Parties must agree to arbitration, usually done in advance as part of a contract (thus, those arbitration

clauses usually found toward the bottom of lengthy bills of lading and other shipping documentation). Even without prior contractual terms, parties can agree to submit their beef to alternative dispute resolution in lieu of a court proceeding, or even after one has begun. In fact, parties can submit only a part of their quarrel to arbitration (typically technical or operational fact issues), leaving application of the law to a court.

Volumes have been written about this subject. Paradoxically (given how much judges love docket-clearing arbitration), a large body of judicial case law addresses alternative dispute resolution. Cases deal with the subject in the context of an entire section (Title IX) of the U.S. Code, generally enforcing the Federal Arbitration Act's preference for arbitration liberally.

All in all, arbitration makes sense, unless you're trying to beat your adversary by financial attrition, have a weak case you'd just as soon have decided by someone not versed in shipping, you already can't stand your adversary, and/or you'd prefer to wait a couple years before paying up (don't write, that irony reflects the attitude of only a small minority of maritime litigants). To the extent possible, dispute should be resolved amicably. When used correctly, arbitration can be the least expensive, most reliable and expeditious way to get conflicts behind you.

Ref: The Federal Arbitration Act, 9 USC §§ 1 *et seq*, available at <http://www4.law.cornell.edu/uscode/9/>.

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Hot Recent Cases in Motor Carrier Law

BY STEPHEN L. DAY
AND STEVEN W. BLOCK

Carrier not liable for owner operator's negligence after transport ends, but hay, where does it end?

Oldakowski v. M.P. Barrett Trucking, Inc., 680 N.W.2d 590 (Minn Ct. Apps 2004)

Owner-operator Scholl regularly hauled hay to farmer Oldakowski's place. This time, he did so at motor carrier Barrett's behest. Scholl's lease was only for transport services, but per his usual practice, he unloaded the freight at destination "as a favor" for Oldakowski. Scholl apparently dropped a bale on Oldakowski, hurting him.

Oldakowski sued Barrett. Barrett moved a Minnesota state court for summary judgment, urging that its statutory liability for Scholl's acts ended when the owner operator pulled up to the Oldakowski farm. The trial court granted Barrett's motion.

The court of appeals reversed. Even though Scholl was only doing Oldakowski "a favor," there was at least a question of fact as to whether the owner operator had extended the terms of his lease by agreeing to offload the hay, such that he potentially was still within the statutory employment scope when Oldakowski was hurt.

Hmmm. Can a driver do that unilaterally? Is the North Star State's court of appeals messing with federal regs addressing terms of owner operator leases? Of course, its just hay.

How much diligence is due when a broker selects a carrier?

CGU International Insurance, PLC v. Keystone Lines Corp., 2004 WL 1047982 (N.D. Cal. 2004)

Keystone acted as a broker when selecting carrier Europa to haul Asia United Enterprises' cargo of Coca Cola labeling machines. Europa's driver crashed into an overpass, damaging the freight to the tune of some four hundred grand. The shipper's insurer paid up and brought a subro action against the broker (a revealing, though not fully explained, footnote is that Europa's principal received an insurance check for this accident, and proceeded to spend it for personal use). The subrogated insurer alleged Keystone negligently selected Europa, having failed to fully investigate its background.

The parties agreed that a broker owes a duty of care to its shipper customer, which rises only to the reasonably prudent man standard. However, they disagreed as to what a reasonably prudent broker would, or should, do in selecting a motor carrier. Keystone verified Europa's licensing and insurance. It even had recently visited Europa's facility.

The insurer thought the broker should have been more thorough, and had been hasty in selecting Europa to meet a deadline. The Northern District of California disagreed. An insurance record review revealed Europa's safety record in relevant regard. The carrier's size and assets were adequate for the haul. Confirmation of these, the court found, was enough to satisfy a broker's duty to its shipper customer.

Judicial forum hopscotch: A Carmack case bounces twice from federal to state court

Ervin v. Stagecoach Moving and Storage, et al, 2004 WL 1253401 (N.D. Tex 2004)

Here's a carrier that *really* wanted a case heard in federal court, and a federal court equally unenthused about taking it on. A shipper sued a couple of carriers for freight damaged in interstate transit, improperly alleging state law theories of liability. The carriers removed from Texas state court to the Northern District of Texas.

The federal court remanded the carriers' removal based on the Fifth Circuit's decision in *Beers v. North American Van Lines*, 836 F.2d 910 (5th Cir. 1988). The Northern District of Texas held that the "well-pleaded complaint rule" precludes federal jurisdiction under those circumstances.

But a few weeks later, the Fifth Circuit ruled that the U.S. Supreme Court's *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), had made hash out of *Beers*. Moreover, the *Ervin* shipper amended its complaint to include agency theories of liability.

These developments prompted the carrier to seek removal again. The Northern District of Texas remanded again, ruling that changes in the law came too late to help the carriers' cause. Moreover, the bases of federal jurisdiction take effect when they first are learned, and have only a 30-day shelf life. The amendments to the shipper's complaint didn't present anything new, ruled the court, and certainly weren't a recently created basis for federal jurisdiction.

And while we're discussing removal in the Longhorn state. . .

Marks v. Suddath Relocation Systems, Inc., 2004 WL 1173016 (S.D. Tex 2004)

This time the removal stuck. Here, a shipper booked a cargo of household goods for transport from San Diego to Spring, Texas. The freight was packaged and warehoused in California by two agents of carrier United Van Lines (“UVL”). Although the warehousing apparently wasn’t really part and parcel of the haul, neither the agents nor UVL jumped hoops required by 49 CFR 375.12(c) and 609 to change the storage’s legal status to permanent (as opposed to in-transit). Thus, the freight remained governed by UVL’s bill of lading.

When the shipper’s stuff arrived damaged in crushed up boxes, he sued in Texas state court. The carrier and agents removed to the Southern District of Texas. The shipper moved to remand, and the agents moved for summary judgment. The shipper urged his belongings were damaged during storage, and not in transit. But the Fifth Circuit recognizes the doctrine of complete preemption, such that the question of where and how the property was damaged is irrelevant. If it was governed by an active bill of lading, the rest matters not. The motion for remand was denied.

But the agents are still on the hook. True, they were not carriers. But they were *agents* of carrier who are still subject to Carmack liability as provided by 49 USC 13907(a). Case law supports the notion. Of course, questions of fact remain as to where, how and under whose watch the freight was damaged.

Carmack dogged by a through ocean bill of lading

Allianz CP General Insurance Co. v. Blue Anchor Line, et al, 2004 WL 1048228 (S.D.N.Y. 2004)

Insurer Allianz CP General, as subrogee of shipper Tractabel, sued a number of water and surface carriers, in addition to a freight forwarder, when a cargo of power plant equipment was damaged on the highway. The freight was en route from Thailand to Mt. Vernon, Ohio based on a through bill of lading issued by the ocean carrier (actually, a non-vessel operating common carrier, the wet equivalent of a surface freight forwarder). The motor carrier had issued its own bill of lading as well, but the ocean bill was still effective.

The surface carrier (whose driver botched up by hitting an overpass) moved to dismiss, claiming it wasn’t subject to liability under the ocean bill, and that Carmack didn’t apply. The Southern District of New York agreed Carmack didn’t control. Case law

clearly states that a through ocean bill governs the stateside portion of an international haul, the trucker essentially being a participant in the transit’s ocean character. Unless the connecting surface carrier has received consideration for its services in addition to that provided for the through ocean haul, Carmack doesn’t apply.

However, the trucker does qualify as a “participating carrier” under the subject ocean bill of lading’s terms (i.e., the Himalaya clause). The through bill precluded actions against participating carriers as a matter of contract, placing the surface carrier outside the loop of directly liable carriers. The trucker’s motion for summary judgment on this issue was granted. The shipper may proceed against the ocean players only, and gets to struggle with the \$500 limitation of liability provided by the U.S. Carriage of Goods by Sea Act.

The U.S. Supremes may answer this question definitively when, and if, they decide the issues in the currently pending *Norfolk Southern Railway, Company v. Kirby* (No. 02-1028), reviewing an 11th Circuit decision.

OOIDA plaintiffs don’t have enough for a preliminary injunction

OOIDA v. Swift Transportation, et al, 367 F.3d 1108 (9th Cir. 2004)

The Owner-Operator Independent Drivers Association sued a number of carriers alleging various violations of federal Truth-in-Leasing regs. They claimed terms regarding duration and compensation weren’t spelled out properly in their leases. The drivers asked the District of Arizona to slap a preliminary injunction on the carriers to prevent further harm. The district court refused to enjoin the carriers, and OOIDA appealed to the Ninth Circuit.

The applicable standard for deciding preliminary injunction motions is an equity balancing test which addresses specified factors. These include (1) the likelihood of the moving party ultimately prevailing on the merits; (2) the possibility of irreparable injury absent a preliminary injunction; (3) a look at the parties’ respective hardships under the proposed injunction; and (4) public interest concerns. The drivers lost in this analysis, and didn’t feel they shouldn’t have.

But they did disagree as to whether the court should apply the traditional equities balancing test in the first

place. Rather, OOIDA urged that a rarely applied “reasonable cause” test should be used (which would address the issue from the “likely future violations” perspective). Congress has imposed a “flat ban” on certain activities violative of Truth-in-Leasing regs. This, urged OOIDA, should move the analysis into a new realm.

The Court of Appeals disagreed and affirmed. Congress didn’t explicitly state that the reasonable cause should be used in Truth-in-Leasing motions for preliminary injunction (as had it with other statutes). Instances of judicial application of the alternative standard were far more compelling than, and

distinguishable from, this essentially commercial row. Because *any* statutory restriction could be interpreted as a “flat ban,” the statute’s nature and intent didn’t change the equation.

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