Entrenched Inter-Circuit Conflicts in Cargo Law: Breaking the Package Limitation

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I. The COGSA package limitation following an unreasonable deviation

COGSA § 4(4) provides that a "reasonable deviation" does not violate the act or the contract of carriage, and that the carrier is not liable for any loss or damage resulting from a "reasonable deviation," but the act makes no explicit provision for the consequences of an *un*reasonable deviation. The obvious corollary implied by section 4(4) is that an unreasonable deviation *does* violate the act and the contract of carriage, and that the carrier is liable, at least to some extent, for loss or damage resulting from an unreasonable deviation. This corollary, however, could mean several different things. U.S. courts have divided on the applicability of the COGSA § 4(5) package limitation following a deviation (but the conflict tilts strongly in one direction).

Most circuits have held or suggested that a carrier loses the benefit of the package limitation following an unreasonable deviation. Cases from the Second Circuit include Ingersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293, 301, 1988 AMC 223, 234 (2d Cir. 1987); English Elec. Valve Co. v. M/V Hoegh Mallard, 814 F.2d 84, 89, 1987 AMC 1351, 1358 (2d Cir. 1987); General Elec. Co. v. S.S. Nancy Lykes, 706 F.2d 80, 86–88, 1983 AMC 1947, 1957-59 (2d Cir. 1983); Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser, 507 F.2d 68, 71, 1975 AMC 33, 37 (2d Cir. 1974) (dicta); Du Pont de Nemours Int'l S.A. v. S.S. Mormacvega, 493 F.2d 97, 100 n.9, 1974 AMC 67, 71 n.9 (2d Cir. 1974) (dicta); Encyclopaedia Britannica v. SS Hong Kong Producer, 422 F.2d 7, 18, 1969 AMC 1741, 1756–57 (2d Cir. 1969); National Starch & Chem. Co. v. Project Asia Line, 13 F. App'x 54, 57–58 (2d Cir. 2001). In SNC S.L.B. v. M/V Newark Bay, 111 F.3d 243, 1997 AMC 1952 (2d Cir. 1997), the carrier "urge[d] [the court] to reconsider and overturn the general maritime law doctrine of 'unreasonable deviation' as an outmoded and unjustified exception to the plain requirements of COGSA." 111 F.3d at 247, 1997 AMC at 1957. Because the court found that the deviation before it had not been unreasonable, it "d[id] not consider [this] argument." 111 F.3d at 250, 1997 AMC at 1962. The court's dicta could easily be read, however, as a reaffirmation of circuit precedent.

Cases from the Fifth Circuit include Scapa Forming Fabrics v. Blue Anchor Line, 243 Fed. App'x 846, 849, 2007 AMC 2108 (5th Cir. 2007) (per curiam); Constructores Tecnicos, S. de R.L. v. Sea-Land Serv., Inc., 945 F.2d 841, 844–45, 1992 AMC 1284, 1289 (5th Cir. 1991); Calmaquip Eng'g W. Hemisphere Corp. v. West Coast Carriers Ltd., 650 F.2d 633, 638, 1984 AMC 839, 846 (5th Cir. 1981); Spartus Corp. v. The S/S Yafo, 590 F.2d 1310, 1317, 1979 AMC 2294, 2304 (5th Cir. 1979).

Cases from the Ninth Circuit include Vision Air Flight Serv., Inc. v. M/V Nat'l Pride, 155 F.3d 1165, 1173, 1999 AMC 1168, 1179 (9th Cir. 1998); Yang Mach. Tool Co. v. Sea-Land Serv., 58 F.3d 1350, 1352, 1995 AMC 2153, 2155–56 (9th Cir. 1995) (dicta); Nemeth v. General S.S. Corp., 694 F.2d 609, 612-13, 1983 AMC 885, 889 (9th Cir. 1982).

The Fourth Circuit and the Eleventh Circuit have indicated in dicta that they would adopt the same reasoning. For the Fourth Circuit, *see* Caterpillar Overseas, S.A. v. Marine Transp. Inc.,

900 F.2d 714, 720–21, 1991 AMC 75, 85 (4th Cir. 1990) (indicating a preference to follow the Second Circuit's approach); Aetna Ins. Co. v. M/V Lash Italia, 858 F.2d 190, 192 & n.2, 1989 AMC 135, 136–37 & n.2 (4th Cir. 1988) (if an unreasonable deviation had been found, the package limitation would not have applied). For the Eleventh Circuit, *see* Unimac Co. v. C.F. Ocean Serv., Inc., 43 F.3d 1434, 1437 n.5, 1995 AMC 1484, 1487 n.5 (11th Cir. 1995); C.A. La Seguridad v. Delta S.S. Lines, 721 F.2d 322, 324 (11th Cir. 1983). In any event, the Eleventh Circuit holds itself bound by decisions of the "old" Fifth Circuit prior to October 1, 1981. so it would consider itself bound by *Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633, 1984 AMC 839 (5th Cir. 1981). Furthermore, *Calmaquip* should be a particularly good indicator of the views of the Eleventh Circuit, for it was a "Unit B" case (meaning that it was decided by members of the Fifth Circuit who joined the Eleventh Circuit after the split).

The Third Circuit has recognized that "most courts have held that an unreasonable deviation [defeats] the $500 per package limitation." SPM Corp. v. M/V Ming Moon, 965 F.2d 1297, 1303, 1992 AMC 2409, 2416 (3d Cir. 1992). In *Ming Moon*, however, the court concluded that there had been no deviation, and thus found it unnecessary to resolve the issue itself.

The outlier court is the Seventh Circuit, which has carefully considered the issue and held that an unreasonable deviation does not oust the package limitation. In *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872, 874–75, 1963 AMC 665, 668–69 (7th Cir. 1963), the court concluded that the statutory phrase "in any event" means "in any event," including in the event of a deviation. Some district courts in other circuits have followed this reasoning, but it is clearly the minority rule.

II. The fair opportunity doctrine

Although COGSA § 4(5) gives the carrier an unconditional right to limit its liability to $500 per package (in the absence of a declaration of higher value), several U.S. courts have restricted this right under a judicial invention known as the "fair opportunity doctrine." Applying that doctrine, those courts have required the carrier to give the shipper a "fair opportunity" to declare the true value of the shipment. The precise definition of "fair opportunity" varies among the circuits that have adopted the requirement, but the penalty for failing to satisfy the requirement (in the circuits that recognize the requirement) is always the loss of the right to rely on the package limitation.

The Ninth Circuit created the fair opportunity requirement in *Tessler Brothers (B.C.) v. Italpacific Line*, 494 F.2d 438, 443, 1974 AMC 937, 942 (9th Cir. 1974), and for many years thereafter it enforced the most stringent standard. It demands that the bill of lading legibly recite the relevant language of section 4(5) so that the shipper will have notice of its right to declare a higher value. *See* Nemeth v. General S.S. Corp., 694 F.2d 609, 611–12, 1983 AMC 885, 888 (9th Cir. 1982); Komatsu, Ltd. v. States S.S. Co., 674 F.2d 806, 1982 AMC 2152 (9th Cir. 1982); Pan Am. World Airways v. California Stevedore & Ballast Co., 559 F.2d 1173, 1175–77, 1978 AMC 1834, 1836–38 (9th Cir. 1977) (per curiam). The most recent Ninth Circuit decisions, however, suggest that the requirement is less demanding than some earlier cases suggest. *See*, *e.g.*, Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty, 408 F.3d 1250, 1255–57 (9th Cir. 2005); Vision Air

Flight Serv., Inc. v. M/V Nat'l Pride, 155 F.3d 1165, 1168–69, 1999 AMC 1168, 1171–72 (9th Cir. 1998); Yang Mach. Tool Co. v. Sea-Land Serv., 58 F.3d 1350, 1354–55, 1995 AMC 2153, 2158–60 (9th Cir. 1995); Royal Ins. Co. v. Sea-Land Serv. Inc., 50 F.3d 723, 726–29, 1995 AMC 1189, 1191–96 (9th Cir. 1995); Travelers Indemnity Co. v. Vessel Sam Houston, 26 F.3d 895, 1994 AMC 2162 (9th Cir. 1994); Mori Seiki USA, Inc. v. M.V. Alligator Triumph, 990 F.2d 444, 1993 AMC 1521 (9th Cir. 1993); Institute of London Underwriters v. Sea-Land Serv., Inc., 881 F.2d 761, 766, 1989 AMC 2516, 2522–24 (9th Cir. 1989); Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897, 1989 AMC 913 (9th Cir. 1989). *See also* Propak Sys., Ltd. v. M/V Cecilia I, 1996 AMC 2773, 2779 (S.D. Tex. 1996) (noting the shift in Ninth Circuit jurisprudence); Granite State Ins. Co. v. M/V Caraibe, 825 F. Supp. 1113, 1119, 1994 AMC 680, 687 (D.P.R. 1993) ("even the Ninth Circuit appears to be moving toward the [majority] standard").

The Fifth Circuit accepted the Ninth Circuit's creation of a fair opportunity requirement, but rejected the creator's approach. Relying more on the existence of an opportunity to declare a higher value than on the shipper's awareness of it, the Fifth Circuit developed an evidentiary analysis. If the carrier provides evidence that the shipper could have declared a higher value—showing, for example, that the filed tariff gave the shipper a different freight rate when there was an excess value declaration—then the requirement is satisfied. But when the carrier does not offer such evidence, it loses section 4(5)'s protection. *See* Wuerttembergische v. M/V Stuttgart Express, 711 F.2d 621, 622, 1984 AMC 2738, 2740 (5th Cir. 1983) (per curiam); Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415, 419–25, 1982 AMC 929, 935–44 (5th Cir. 1981). Recent district court decisions in the Fifth Circuit, however, generally take more of a "notice" approach in the fair opportunity context. *See*, *e.g.*, Outokumpu Stainless USA, LLC v. M/V Vegaland, 21 F. Supp. 3d 816 (S.D. Tex. 2014); Cargill Ferrous Int'l v. M/V Medi Trader, 513 F. Supp. 2d 609, 622 (E.D. La. 2007), *aff'd sub nom*. Tradearbed Inc. v. Western Bulk Carriers K/S, 374 F. App'x 464 (5th Cir. 2010) (per curiam); Industrial Mar. Carriers (Bahamas), Inc. v. Siemens Westinghouse Power Corp., 2002 AMC 2081, 2084 (E.D. La. 2002); Steel Coils, Inc. v. Captain Nicholas I M/V, 197 F. Supp. 2d 560, 567 (E.D. La. 2002); Perusahaan Pertambangan Minyak Dan v. Chainat Navee M/V, 136 F. Supp. 2d 586, 589 (E.D. La. 2001).

The Eleventh Circuit, following the Fifth Circuit, has also held that a carrier gives a shipper the required "fair opportunity" with either a clause paramount in the bill of lading that incorporates COGSA or a valid tariff that offers a choice of rates. *See* Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 996, 2001 AMC 2474 (11th Cir. 2001); Unimac Co. v. C.F. Ocean Serv., Inc., 43 F.3d 1434, 1438, 1995 AMC 1484, 1490 (11th Cir. 1995); Insurance Co. of N. Am. v. M/V Ocean Lynx, 901 F.2d 934, 1991 AMC 64 (11th Cir. 1990). The Eleventh Circuit has also imposed the additional but related requirement that a "carrier must give the shipper adequate notice of the $500 limitation by including a 'clause paramount' in the bill of lading that expressly adopts the provisions of COGSA." Insurance Co. of N. Am. v. M/V Ocean Lynx, 901 F.2d 934, 939, 1991 AMC 64, 69 (11th Cir. 1990). *See also*, *e.g.*, Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 996, 2001 AMC 2474 (11th Cir. 2001). The Eleventh Circuit has explicitly rejected arguments based on expansive decisions of the Ninth Circuit. Thus it is clear that COGSA does not require a specific blank or space on the bill of lading in which to make a value declaration. *See*, *e.g.*, Insurance Co. of N. Am. v. M/V Ocean Lynx, 901 F.2d 934, 941, 1991 AMC 64, 72 (11th Cir. 1990). Furthermore, the courts in the Eleventh Circuit have been particularly sensitive to the business reality that shippers generally prefer to rely on their

own cargo insurance policies rather than declare a higher value and pay a higher freight rate. *See*, *e.g.*, *id*. at 940, 1991 AMC at 71.

The remaining circuit courts that have adopted the doctrine have followed the Ninth Circuit's notice analysis but have been much more generous to the carrier in deciding what constitutes sufficient notice. The Second Circuit held, in early cases, that a clause paramount incorporating COGSA on the back of a bill of lading and a space on the front for declaring excess value were enough to satisfy the requirement. *See* Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing, 167 F.3d 99, 102, 1999 AMC 913, 917 (2d Cir. 1999) (per curiam); General Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1029, 1987 AMC 1817, 1827 (2d Cir. 1987); Binladen BSB Landscaping v. M/V "Nedlloyd Rotterdam," 759 F.2d 1006, 1017 n.12, 1985 AMC 2113, 2128 n.12 (2d Cir. 1985). It has since held (following the lead of district courts in the circuit) that a clause paramount on the back of a bill of lading is, by itself, sufficient. *See*, *e.g.*, OOO "Garant-S" v. Empire United Lines Co., 557 F. App'x 40, 44–45, 2014 AMC 600 (2d Cir. 2014).

The Fourth Circuit first considered a case involving shipment under a "short form" bill of lading that did not include section 4(5)'s language, but instead incorporated COGSA and the "long form" bill of lading by reference. The long form and the tariff each contained language that would have satisfied even the most demanding standard. The court held for the carrier, concluding that on these facts it had satisfied the fair opportunity requirement. *See* Cincinnati Milacron, Ltd. v. M/V Am. Legend, 804 F.2d 837, 1987 AMC 282 (4th Cir. 1986) (en banc) (per curiam). In subsequent cases, the Fourth Circuit has continued this approach, extending it as necessary. Thus the court has never stated a general rule establishing the minimum standards that a carrier must satisfy, but has instead concluded on the facts of each case that the shipper had the required "fair opportunity." In *Aetna Insurance Co. v. M/V Lash Italia*, 858 F.2d 190, 193–94, 1989 AMC 135, 139–40 (4th Cir. 1988), the court held that the carrier satisfied the fair opportunity requirement when (1) the bill of lading outlined the limitation of liability and explained the opportunity to avoid the limitation by declaring a higher value and (2) the tariff provided for an excess value declaration. In *Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714, 1991 AMC 75 (4th Cir. 1990), the court held that the carrier satisfied the fair opportunity requirement despite the fact that no bill of lading was ever issued because the bill of lading that would have been issued contained language that was adequate to satisfy the requirement, and the experienced shipper had had ample opportunity to know what the bill of lading would say. In *Pearson v. Leif Hoegh & Co.*, 953 F.2d 638, 1992 AMC 1025 (4th Cir. 1992) (per curiam) (aff'g 769 F. Supp. 940 (E.D. Va. 1991)), in which the bill of lading referred to a package limitation without giving the $500 limitation amount, the court, holding for the carrier, relied on (1) the clause paramount, which incorporated COGSA (including the § 4(5) package limitation), (2) the bill of lading's package limitation provision (despite its failure to say "$500"), (3) the carrier's tariff, which provided for ad valorem rates on declared values in excess of $500, and (4) the experience and expertise of the freight forwarder, which should be imputed to the shipper.

The Sixth Circuit has held that a bill of lading incorporating the language of section 4(5) is adequate to give the shipper the required "fair opportunity." *See* Acwoo Int'l Steel Corp. v. Toko Kaiun Kaish, Ltd., 840 F.2d 1284, 1288–89, 1988 AMC 2922, 2928–30 (6th Cir. 1988).

The First Circuit carefully considered the fair opportunity doctrine in *Henley Drilling Co. v. McGee*, 36 F.3d 143, 1995 AMC 173, 1995 AMC 1047 (1st Cir. 1994), but concluded that (as

the carrier had satisfied any court's fair opportunity requirement) it need not decide what version of the doctrine—if any—it would adopt. 36 F.3d at 146 n.5, 1995 AMC at 177 n.5, 1995 AMC at 1051 n.5. In dicta, the court raised serious doubts about the doctrine, describing the existence of the doctrine as "a problematic question," and quoting authority for the proposition "'that the [COGSA] package limitation should not be subject to a fair opportunity requirement.'" *Id*.

Finally, the Third Circuit has rejected the doctrine entirely. In *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 219–228, 2006 AMC 1217 (3d Cir. 2006), it carefully reviewed the subject in a detailed opinion and held that the doctrine "is inconsistent" with COGSA.