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COGSA, the whole COGSA and nothing but the COGSA – A FINDING OF COMPLETE PREEMPTION

Short delivered was an intermodal shipment of computer laptops moving from Miami, Florida to Chile via Port Everglades. The Plaintiff consignee engaged an NVOCC which issued a bill of lading that included a Clause Paramount extending COGSA's application "before loading on and after discharge from the vessel and throughout the entire time the Goods are in the custody of the Carrier." The bill also recited COGSA's one year statute of limitation provision.

The case was tried to a jury on state law causes of action, including one for conversion, on a complaint filed more than one year after delivery. The NVOCC moved for a directed verdict based on the contention COGSA provided the exclusive remedy and was time barred. The trial court agreed and entered judgment in favor of the defendant.

On appeal, the consignee argued COGSA did not prevent the jury from considering the state law causes of action, particularly as motor carriage was also involved.

Instead, the appellate court found the bill of lading was a maritime contract because it

required substantial carriage by sea (citing *Norfolk S. Ry. Co. v. Kirby*, 543 US. 14, 18-19 (2004). The also court found valid the bill of lading's extension of COGSA beyond the tackles.

Then, the court found that, when applicable, COGSA provides complete preemption in that it "leaves no state remedy in its wake." (citing *Continental Ins. Co. v. Kawasaki Kisen Kasha, Ltd.*, 542 F. Supp. 2d 1031, 1034 (N.D. CA 2008). The appellate court also rejected the contention that conversion survives COGSA due to public policy considerations.

Because the complaint was brought after the COGSA one-year statute of limitation, dismissal of the complaint was affirmed.

***Mauricio Importadora v. Jet Speed Logistics (USA), LLC,* No. 3D19-2430 (Fla. 3d DCA, August 26, 2020)**

You Don't See It, Now You Do - A PRIMER ON THE CARMACK AMENDMENT PREEMPTION AND THE LIMIT OF A FRCP 12(b)(6) MOTION TO DISMISS

In this suit for damage to household goods, Mary and Lewis German shipped their belongings from Phoenix, Arizona to Indian Trail, North Carolina. The Germans engaged a household goods common carrier.

Through counsel, the shippers sued the carrier in the local state court, asserting three state court causes of action, i.e., breach of contract, unjust enrichment and unfair and deceptive trade practices.

The carrier first removed the case based on complete preemption by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §14706. The carrier then responded with a F.R.C.P. 12(b)(6) motion to dismiss.

The shippers became *pro se* litigants in federal court, following the court granting their counsel's motion to withdraw.

Consistent with the broad preemptive effect afforded Carmack, the court found that each

of the three causes of action was preempted and required dismissal.

Nevertheless, the court characterized the complaint as one asserting a Carmack claim and thereby recast the state law claims as asserting a federal cause of action for breach of the Carmack Amendment. Citing Supreme Court precedent, the court noted that in cases of complete preemption "a lawsuit that purports to raise only state law claims may be construed as raising federal law claims..."

The court buttressed its decision on the fact that the carrier knew the case raised a Carmack claim by virtue of its Notice of Removal.

The court ended its decision with advisory information to plaintiffs on how to meet their obligations to oppose the subsequently filed motion for summary judgment ("MSJ").

Note: While not identified in the decision, docket research confirms the carrier's MSJ was based on the alleged failure to provide a proper notice of claim, i.e., one with a quantified claim amount.

***German v. Bekins Van Lines, Inc.,* U.S.D.C., W.D.N.C.; Case No. 3:19-cv-00558 (FDW)(DSC); decided by Judge Frank D. Whitney, dated September 1, 2020**

Show Me the Jurisdiction – DEFAULTED OR NOT

In an unpublished decision, the District Court in New Jersey considered a consignee's motion for default judgment against a foreign freight forwarder.

The motion papers which showed the containerized cargo moved under a through bill of lading from Nairobi, Kenya to Bentonville, Arkansas via Mombasa and Newark. The plaintiff averred 1) the defendant was a Kenyan business entity with its principal place of business in Kenya, 2) the container was "subjected to standing water immediately prior to loading in Mombasa," and 3) the water damage was discovered in New Jersey on its way to destination. The defaulting forwarder's bill of lading contained a forum selection clause entitled

"Jurisdiction" that stated:

Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business…"

In denying the request for entry of default judgment, the court said although it must accept as true the factual allegations in the complaint following default, a gating issue to entry of judgment is a determination that the unchallenged facts constitute a legitimate cause of action.

The court went on to say that "as a threshold matter, the court must first satisfy itself that it has personal jurisdiction over the party against whom default judgment is requested."

Citing the Supreme Court's decision in *Bristol-Meyers Squibb Co. v. Superior Court*, 582 U.S. ___; 137 S. Ct. 1773 (2017), the court discussed the two types of personal jurisdiction- general and specific- along with the required nature and extent of the defendant's contacts with the forum asked to adjudicate the matter.

The court determined that the consignee did not demonstrate to the court that it had general or specific jurisdiction and therefore, the power to enter a judgment. Instead, the court focused on the allegation of pre-ocean carriage damage and the bill of lading's "jurisdiction/forum" clause mandating proceedings at the defendants' principal place of business, Mombasa, Kenya.

Finally, the court advised the plaintiff to demonstrate in any renewed request that venue was also proper, saying "[t]he court is unaware of any authority that designates venue as the place wherein damages are discovered."

***Mahco, Inc. v. Sovereign Logistics Ltd.,* U.S.D.C., NJ; Case No. 19-14742 (SRC); decision of Judge Stanley R. Chesler, dated June 16, 2020 (Not for publication)**

A broken commitment- MOTOR CARRIER'S MALFEASANCE RESULTS IN BROKER'S LIABILITY FOR COSTS OF REPAIR AND FOR LOST PROFITS

In a split decision, a state appellate court in Louisiana affirmed a motor property broker's joint liability for cargo damage during interstate motor carriage.

The transaction was typical: A shipper engaged a broker to arrange for carriage of a machine from California to Louisiana. The broker engaged a trucker to move the freight.

The shipper paid the broker for dedicated or full truck carriage. The broker echoed the request to the trucker. At origin, the shipper participated in the stowage of the machine on the truck.

Upon delivery, the machine was found restowed and damaged, with the trailer also carrying other cargo.

After the shipper obtained a default judgement against carrier, the shipper pursued the broker as a joint obligor. The trial court agreed with the shipper and found the broker liable for repair costs and lost profits.

The appellate majority concluded the broker's obligation was delivery of the cargo on a dedicated truck which justified a finding of joint liability with the trucker whose obligation was to deliver the cargo.

Louisiana law allows an obligor (broker) to be released from liability to the obligee (shipper) if the third party (trucker) assuming the obligation agrees in writing with the obligor (broker). Civ. C. Art. 1821. Here, because the broker failed to secure a written acknowledge from the trucker of the trucker's assumption of the broker's obligation to the shipper, the broker remained liable to the shipper.

On damages, the court recognized that a broker is not subject to the Carmack Amendment. Applying Louisiana law, the court determined loss of profit is an element of

damages recoverable for breach of contract. Acknowledging the broad deference afforded to the trial court, the appellate court affirmed the finding that the lost profits testified to by the shipper's general manager were demonstrated with reasonable certainty and not based on speculation and conjecture.

***Ross and Wallace Paper Products, Inc. v. Team Logistics and Pittsburgh Logistics Systems Inc.*, 2019 CA 0196 (La. Ct. App. July 8, 2020)**

Trucker Eats its Freight Charges – TRUCKER'S CLAIMS FOR FREIGHT FAILS AGAINST CONSIGNEE UNDER DOOR BILL OF LADING

In an unpublished opinion, a California appellate court weighs in on a trucker's freight claim against a cargo receiver associated with Hanjin's bankruptcy.

The importer hired Hanjin to move containers of cargo on CY/Door (Container yard to consignee's door) basis. Under the all-inclusive rate, the consignee paid the ocean carrier the transportation charges covering both the ocean and overland portions of the moves. Meanwhile, the consignee vetted and "nominated" two preferred motor carriers to handle the inland deliveries. The ocean carrier agreed with the nomination.

The ocean carrier, trucker and receiver understood deliveries would be made at the request of and for the receiver and billed to and paid by the ocean carrier.

The consignee paid the ocean carrier the all-inclusive amounts due but several of the motor carrier's invoices to the ocean carrier went unpaid as a result of Hanjin's bankruptcy. The motor carrier then began billing the consignee for the deliveries. The trucker brought a collection action against the consignee after it refused to pay the trucker's freight charges.

The trial court granted summary judgment to the consignee. The trucker appealed.

In an unpublished decision, the appellate court affirmed dismissal of the trucker's suit, finding that the trucker's claims were equitable in nature and that the consignee did not engage in inequitable conduct to justify it having to pay twice for the same service. The court relied on two

federal cases that found the non-payment of freight charges by third parties did not shift the risk of non-payment from the motor carrier to an innocent consignee.

The court distinguished those cases that have found cargo interests obliged to pay twice by referring to contractual agreements or the parties' conduct whereby they agree the carrier will have recourse for freight charges after the first "bill to" party defaults.

Here, the trucker did not prove a contractual right to payment from the consignee, inequitable conduct by the consignee, or an expectation of payment per the transportation and billing practices to justify imposing on the consignee the obligation to twice pay freight charges.

***XPO Logistics Drayage, LLC v. Epson America Inc.*; (Cal. App., June 30, 2020) (Not for publication)**

Flipping the Script with a Twist – LIMITATION OF LIABILITY UPHELD

The trucker's limitation on a triple brokered load is upheld under the principle expressed in *Kirby* and under an undisclosed contract that included a waiver of Carmack protection.

A custodial motor carrier brought a declaratory relief action against the shipper and brokers on a triple brokered truckload consisting of landing gear. On summary judgment, the trucker argued its liability was limited by contract to $1 per pound for carriage of used equipment. All parties agreed the landing gear qualified as used equipment.

The contract at issue was between the plaintiff motor carrier and its contracting counter-part, the last broker. The shipper was generally made aware of the existence of a carriage agreement but not the limitation of liability.

In binding the shipper to the broker-carrier agreement, the district court extended the law of the sea to the terra firma. "When an intermediary contracts with a carrier to transport goods….the cargo owner's …recovery against the carrier is limited by the liability limitation to

which the intermediary and carrier agreed." *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 33 (2004). And "[t]hough Kirby concerned maritime law, the …principles of fairness and efficiency animating the *Kirby* rule operate equally in contracts for carriage on land."

Thus, the court found that the cargo owner was bound to the limitation of liability of which it had no knowledge. And this the court said would be so even if the shipper was misled in believing a shipment would remain in one carrier's custody throughout the transit. This court found the efficiency rationale giving rise to the *Kirby* rule trumps voiding a limitation because of an upstream party's misrepresentation to a shipper. In that situation, the shipper's recourse is against the misrepresenting party.

Interestingly, the court also found that the carrier broker agreement was a 49 U.S.C. §14101 (b)(1) agreement which waived the application of the Carmack Amendment. As such, the court did not address the "offer of alternative rates" requirement for the effectiveness of a Carmack Amendment limitation of liability.

Finally, the court refused to find equitable estoppel on the Carmack Amendment's application based on the fact that the cargo owner's counsel amended its complaint to eliminate its original state law causes of action based on the representation of carrier's counsel that the Carmack Amendment is completely preemptive and on counsel's failure to disclose the existence of the Carmack waiving contract.

In this court's view, the representation of Carmack's preemptive effect was a neutral statement of law by carrier's counsel, and that the shipper could not claim ignorance of the contract provision made by the broker- its *Kirby* agent.

***Central Transport LLC v. Global Aeroleasing, LLC,* U.S.D.C., FL.; Case No. 17-cv-23788; decision of Judge Darrin P. Gayles dated May 25, 2020.**

No Hip-Pocket Practice – DISMISSAL OF AN UNSERVED COMPLAINT

On November 1, 2017, Plaintiff filed a complaint in federal court for temperature abuse to a shipment of chemicals. The case laid dormant for over two years when on April 6, 2020, the court issued an Order to Show Cause why service of process was not completed within 90 days as required by FRCP (4)(m).

Not receiving Plaintiff's response to the OSC, the court cited the relevant code section:

> If a defendant is not served within 90 days after the complaint is filed, the court-on motion or on its own after notice to the plaintiff—*must* dismiss the action without prejudice against the defendant or order that service be made within a specified time.

Given the passage of over two years and the failure of plaintiff's counsel to respond to the OSC, the court dismissed the case.

Kerry Ingredients v. ECT Transport Ltd., **U.S.D.C., S.D.N.Y., Case No. 17-cv-8438(ER); decision of Judge Edgardo Ramos dated August 31, 2020**

Meet Me in St. Louis - RULE 14(C) TENDER CANNOT CIRCUMVENT A FORUM-SELECTION CLAUSE

This case involved contamination to a shipment of rice. The shipper contracted with a barge operator to deliver the rice to an exporting ocean vessel in Myrtle Grove, Louisiana. That contract included a mandatory St. Louis forum provision. During a subsequent inspection, the rice was found contaminated which implicated the Myrtle Grove terminal which had transloaded the rice. There was no contract with the terminal.

The shipper filed suit against the terminal pursuant to Rule 9(h) of the Federal Rules of Civil Procedure and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. In response, the terminal filed an answer and third-party complaint against

the barge operator. The terminal also tendered the shipper's claim to the barge operator pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

The barge owner filed a FRCP 12 (b) motion to dismiss the Rule 14(c) tender claiming the tender cannot supersede the St. Louis forum-selection clause in the contract between the shipper and the barge operator. In short, the barge operator argued that Rule 14(c) cannot be used as a "procedural backdoor" to circumvent a valid and binding forum-selection clause. In turn, the terminal argued that a 12(b)(6) motion is an improper mechanism for enforcing the clause and that the court should use its broad discretion and permit the Rule 14(c) tender.

In confronting this procedural conundrum, the court relied upon *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 571 U.S. 49 (2013), the Supreme Court's most recent pronouncement with respect to forum-selection clauses. In *Atlantic Marine*, the Supreme Court held, in part, that a motion to transfer under 28 U.S.C. § 1404(a) serves as the proper mechanism for enforcing a valid forum-selection clause. Although neither party challenged the validity of the clause at issue, in light of this clear mandate, the court denied the barge operator's motion reasoning that "*Atlantic Marine* teaches that a motion under § 1404(a) for transfer is now the proper mechanism to enforce a forum-selection clause." Because the barge operator relied on the wrong procedural basis, the court could not enforce the forum-selection clause. Nonetheless, the court indicated that had the shipper brought a proper motion under 1404(a), the court would have likely granted the motion to transfer or considered severance of the third party complaint from the 14 (c) tender.

***Supreme Rice, LLC v. Turn Servs., LLC*, No. 20-1212 (E.D. La. July 29, 2020) (Ashe, J.)**

Other Decision of Interest

Bright Lines Rarely Exist in Water – THE ADA MAY APPLY TO SHIP BOARD EMPLOYMENT ON A FOREGIN VESSEL IN A U.S. PORT

In the context of withdrawal of a job offer, the district court was confronted with the tension between the reach of the Americans with Disabilities Act and rule of international law that the law of the vessel's flag state governs the internal affairs of a ship. Before wading into the issue, the court offered a broader view of the importance and development of maritime law which is the focus of this summary.

Citing Alexander Hamilton's Federalist Papers, the court acknowledged the law of admiralty has been so much an essential component of our legal history that its development was a central tenant to the creation of a federal judiciary.

And uniformity and consistency remains a desired but still unattained goal in large measure because judicial opinions give rise to a "species of judge-made federal common law." Inevitable are imperfections and inconsistencies from opinions "laden with different verbiage and language that the authors may not have intended to be magical or dispositive *per se* but which over time evolves into binding law."

The court reminds us of Justice Holmes' concern that "[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (dissenting).

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