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HARTER ACT STAYS WET. . . .

Cargo was shipped from Germany to Indiana pursuant to a through Bill of lading. The goods arrived at the Port of Baltimore and were then transported overland by road. The goods were damaged when the trailer overturned while on the way to Indiana.

The cargo plaintiff initially sued the trucker who argued that the suit was time-barred by the Bill of lading's one year time-bar. The cargo plaintiff contended that the suit was governed by limitations in the trucker's contracts of carriage and tariffs. The district court found the time-bar in the through Bill of lading applied to all aspects of the through bill and granted summary judgment in favor of the trucker. The cargo plaintiff did not appeal.

It then filed a suit against the ocean carrier who, in turn, brought a third party action against the trucker for contribution and indemnity. The cargo plaintiff then moved for summary judgment against the ocean carrier who filed a cross motion for summary judgment. The district court, without opinion, granted summary judgment in favor of the cargo plaintiff against the ocean carrier in the amount of the package limitation ($1,000.00 plus post-judgment interest) and in favor of the ocean carrier against the trucker in the same amount. The cargo plaintiff appealed the amount of the award and the trucker cross appealed, contesting liability. The ocean carrier did not appeal, thus not contesting the finding of liability.

The circuit court considered the case to present an issue of first impression regarding the applicability of federal maritime statutes to inland transportation under a through Bill of lading.

The court noted it had decided a number of cases interpreting similar Bills of Lading and their reference to the Harter Act, but in none of those cases had the goods begun inland transportation. The Bill of lading referenced COGSA and the Harter Act and the court noted the distinction that COGSA applies from tackle to tackle and the Harter Act to the period between discharge and "proper delivery." The court went on to note the Harter Act did not define "proper delivery;" however, it referred to several cases where delivery under Harter was considered.

Generally, proper delivery includes unloading the cargo onto a dock, segregating it by Bill of

lading and count, putting it in a place of rest so it is accessible to the consignee and affording the consignee a reasonable opportunity to come and get it. These requirements can be modified by "the custom, regulations [and] law of the port."

The Bill of lading provided that to the extent the Harter Act was compulsorily applicable, the carrier's responsibility would be subject to COGSA and, further, that the carrier would not be liable for more than $500.00 per package or unit. Therefore, if the Harter Act was compulsorily applicable to the inland transportation portion, the district court correctly limited liability to $500.00 per package.

The Bill of lading also stated where COGSA was found not to be applicable, and where the occurrence of damage could be shown to occur during transportation "in the United States," the responsibility of the ocean carrier would be to "procure transportation subject to the inland carrier's contracts of carriage and tariffs and any law compulsorily applicable."

The cargo plaintiff argued that proper delivery under the Harter Act occurred when the inland trucker acquired control and began inland transportation. The ocean carrier argued that the through Bill of lading provided for carriage to the ultimate destination, therefore, under Harter, proper delivery had not yet occurred.

The court noted there was no precedent by any circuit court interpreting the Harter Act and proper delivery with respect to the inland portion of a through Bill of lading. However, it referred to the decision of the district court in Jagenberg, Inc. v. Georgia Ports Authority, 882 F. Supp. 1065 (S.D. Ga. 1995). The court quoted from Jagenberg, which held that, because of the maritime nature of the Harter Act, inland transportation under a through Bill occurs after Harter Act proper delivery. The court noted that Jagenberg was adopted in the M/V Atlantic Conveyor, 1997 AMC 1478 (S.D.N.Y. 1997). Noting that the courts in Jagenberg and Atlantic Conveyor were not aware of a single case extending Harter to all stages of a through Bill of lading and that no contrary authority was cited by the parties in the case sub judice, the court concluded that the Harter Act was not compulsorily applicable at the time the goods were damaged.

The court stated it did not preclude contractually limiting liability during the entire time when the carrier has custody or control over the cargo. Its holding was limited to the situation where parties contractually tie that limitation to the extent where the Harter Act is compulsorily applicable.

In the district court, neither the cargo plaintiff nor the ocean carrier had moved for summary judgment against the trucker. Regardless of this, the district court granted judgment in favor of the ocean carrier against the trucker. The circuit court found this to be error. While the district court may grant summary judgment sua sponte, it must provide adequate notice and an opportunity to respond. The circuit court found the trucker to have a potentially valid defense that it was not on notice to raise. The judgment was reversed and remanded.

Mannesman Demag Corporation v. M/V Concert Express, No. 98-20877 (5th Cir. Sept. 8, 2000).

CARRIER CYCLES BACK ON LAND. . . .

A shipment of bicycles from Wisconsin to the Netherlands suffered a theft in Belgium (see

Cargo Newsletter No. 36). The district court found COGSA to apply to the entire movement and awarded plaintiff full value of the lost bicycles. If COGSA applied, the value of the bicycles was less than the package limitation; however, if the CMR should apply, there would be a significant limitation. The Magistrate Judge found limitation under CMR did not apply and that the carrier had unreasonably "deviated" from the bill of lading.

On appeal, the Second Circuit wrestled with several issues. It found that, although an amended notice of appeal was untimely, dismissal was not warranted because the initial Notice of Appeal provided adequate notice of the interest of all defendants to appeal.

It then addressed the issue of subject matter jurisdiction noting the district court somewhat side-stepped whether admiralty jurisdiction applied, dealing with the matter on diversity. The circuit court looked at admiralty jurisdiction because the district court's opinion and the plaintiff's arguments were based, in part, on the application of Federal Common Law principals developed in admiralty.

The bill of lading involved qualified as a "mixed contract" in dealing with transportation by truck, rail and sea. Noting that the loss occurred while the cargo was being transported on land in Belgium, the circuit court found the loss did not arise from a breach of severable maritime obligations.

It went on to consider whether the land segment was "incidental" to transport by sea. Noting that the bill involved land shipment from Wisconsin by Chicago by truck; Chicago to Montreal by rail; and Antwerp to Spijkenisse, Netherlands by truck, the court took judicial notice that the sum of these segments of overland transportation was at least 850 miles. It therefore concluded that the bill of lading involved land carriage that was more than incidental to sea carriage, placing the dispute outside admiralty jurisdiction.

Looking to diversity jurisdiction, the court stated the case was governed by applicable State choice-of-law rules. In looking at the bill of lading, it noted the choice-of-law provisions in the contract and found there were two applicable choice-of-law provisions. Clause 4 provided that each stage of the transport should be governed according to the law applicable to such stage, while clause 23 provided that COGSA or COGWA "except as otherwise provided herein" should govern before loading and after discharge and while subject to bill of lading.

The district court applied COGSA to the entire intermodal carriage; however, the Second Circuit concluded this was error. COGSA did not apply to the loss ex proprio vigore, which was termed by the court as a "quaint and famous Latin aphorism of the law." Treating COGSA or COGWA as another contractual term, the court applied contractual construction to give a reasonable and effective meaning to all terms of a contract if possible and held the most reasonable interpretation was that the clauses provided for the application of COGSA, unless there was a different law specifically directed at the particular stage of transport, in which case the latter would govern.

As the loss was from a truck in Belgium and Belgium had ratified the CMR, it found the CMR to apply and the carrier's liability should be assessed using the relevant portion of the CMR.

The court vacated the district court judgment and remanded with instructions that the district court should determine whether an exoneration provision in the bill of lading would be valid under CMR. Clause 4 of the bill of lading provided that the carrier would only be

liable for a loss that could be attributable to its own act, not those of "Participating Carriers." If the clause is not valid under CMR, the district court should then decide whether the limitation of liability under CMR was applicable, evaluating plaintiff's contention that even if CMR applied, the carrier could not avail itself of the limitation because they engaged in willful misconduct. Barring willful misconduct, recovery should be limited to an amount in accordance with CMR's limitation of liability provision.

Hartford Fire Ins. Co. v. OOCL (Europe) Ltd., No. 99-9502 (2d Cir. Oct. 27, 2000).

CAN-MAKER ON FLAT-RACK CANS CARRIER. . .

An action was brought to recover damage to a can-making machine, allegedly resulting from exposure to rain water during ocean transport from Seattle, Washington, to Yokahama, Japan. The cargo plaintiff moved for partial summary judgment.

The principle argument was that stowage of the cargo on-deck under a clean Bill of lading constituted an unreasonable deviation, depriving the ocean carrier of the package limitation. Assuming that the can-making machine was damaged as a result of on-deck stowage, the court found the package limitation did not apply.

The can-making machine was covered with polyethylene sheet and packed in a large plywood box which, in turn, was covered with thick tarred paper at the top and lined with polyethylene sheet. The wooden crate was then placed on a flat-rack which was stowed on deck. At the time of delivery to the consignee's warehouse, the machine was discovered to be in a heavily wetted and rusted condition.

The court found the cargo plaintiff had established the first "prong" of its prima facia case with the carrier's clean Bill of lading and evidence that a former employee supervised the packaging of the can-making machine and observed that it was in good order and condition when delivered to the carrier. No rebuttal evidence was presented.

As to demonstrating that the machine was damaged at the time it left the carrier's custody, the court rejected a surveyor's report annexed to the affidavit of counsel as containing several hearsay statements. Another declaration was found inadmissible as hearsay. As the cargo plaintiff failed to offer admissible evidence demonstrating the cargo was damaged when it left the carrier's custody, it had failed to establish the second prong of its prima facie case. On this basis, the court denied summary judgment on the issue of liability.

The court then turned to the package limitation and the argument that on-deck stowage constituted an unreasonable deviation, depriving the carrier of the package limitation.

Noting that, absent an agreement or established custom, a clean Bill of lading imports stowage below-deck and, above-deck stowage (when below-deck stowage is required) will normally constitute an unreasonable deviation. At the same time, a carrier may prove circumstances such as space limitations, safety and loading difficulties, or the custom and practice within the industry or between the parties where unauthorized deck stowage may be held reasonable. However, the carrier has the burden of establishing such where the parties did not agree to on-deck stowage.

The court stated that above-deck stowage of containerized cargo aboard container ships, specifically designed to carry containers on-deck, does not constitute an unreasonable

deviation. While referring to an initial factual dispute as to whether the vessel was, in fact, a container ship, even if it was, the cargo involved was not placed in an enclosed container and was therefore subject to the traditional risks associated with on-deck stowage, particularly exposure to the elements.

The court found the carrier failed to show that on-deck stowage of the cargo placed on a flat-rack was reasonable. It did not present any concrete evidence as to the existence of custom or practice of on-deck stowage of flat-racks in the Port of Seattle or practical exigencies which would favor on-deck stowage.

The rationale behind the exception for containerized cargo aboard container ships was inapposite, where the cargo was not placed in an enclosed container and, therefore, subject to greater risk.

The court denied the motion on the issue of liability; however, it held stowing the can-making machine in an open flat-rack above deck under a clean Bill of lading deprived the carrier of the benefit of the package limitation.

D.I. Engineering Corp. v. Nippon Express USA (Illinois), Inc. v. Westwood Shipping Lines, 96 Civ. 6843 (Aug. 25, 2000) (McKenna, J.).

ONE BILL; NO CARMACK; BYE BYE JURISDICTION. . . .

A container of Tommy Hilfiger clothing was hijacked from a truck as it left the railroad's facility in Croxton, New Jersey. The consignee and subrogated underwriter brought suit against the trucking company, the railroad, and a security service. Defendants moved to dismiss for lack of subject matter jurisdiction.

The complaint was initially filed as within the court's federal question jurisdiction under the Carmack Amendment; however, in the course of discovery, it was determined that the domestic rail portion of the shipment (Los Angeles to New York) was not covered by a separate Bill of lading. The Carmack Amendment applies to the domestic portions of shipments from foreign countries so long as the domestic portion is covered by a separate Bill of lading.

After the commencement of the action, plaintiffs amended the complaint to assert direct claims against the third-party defendant security service. As both the plaintiff and the security service were New York corporations, the court noted the alternative of diversity for federal jurisdiction was moot.

On the basis that Carmack Amendment did not apply, plaintiffs conceded that the court lacked original subject matter jurisdiction; however, requested the court to exercise supplemental jurisdiction pursuant to 28 U.S.C. §1367.

The Second Circuit has instructed that remaining state claims should be dismissed where all federal claims had been dismissed prior to trial; however, the court could retain jurisdiction if the federal claim was dismissed "late in the action, after there has been substantial expenditure in time, effort and money in preparing the dependent claims."

Plaintiffs argued that it would be wasteful for the court to dismiss the case, noting that it had been filed over one and one half years ago, that discovery had been conducted for one

year, including eight depositions taken and three appearances before the court.

The court did not accept this argument, stating the case was not at a late stage in its proceeding. While the parties conducted discovery for over a year, that discovery could prove useful in any future state proceedings. The court noted summary judgment motions loomed on the horizon and, while other courts in the district exercised supplemental jurisdiction after dismissing all federal claims, at the very least, they had reached the merits of those cases.

The court granted the motion to dismiss for lack of subject matter jurisdiction.

Tommy Hilfiger USA, Inc. v. Commonwealth Trucking, Inc., No. 98 Civ 5841 (September 7, 2000) (Keenan, J.)

THE QUALITY OF MERCY IS NOT STRAINED; IT'S TRASHED. . .

A shipment of starch components was delivered to a vessel to be shipped from Kaohsiung to Portland, Maine. The shipper contracted with the charterer (who became defunct). During loading, some of the bagged cargo got wet because the hatches were open. The officer on watch knew the bags could be damaged by rain and was on watch for bad weather for that reason.

The cargo was surveyed and discussions were held concerning the unloading of the suspect bags to allow proper testing and evaluation. In spite of these discussions, the Master decided not to unload the cargo and sailed. Subsequent to sailing, the cargo was also shifted in anticipation of loading a shipment of chrome ore which was destined for Montreal, Canada. While at sea, near the Panama Canal, the destination of the vessel was changed from Portland, Maine, to Montreal, Canada to offload the chrome ore. The altered route added a significant number of miles and days to the trip and, because of the change in course, the ship encountered a hurricane and had to alter course even farther.

After arrival at Portland, the bags of starch were discharged and high levels of mold and clumps were noted in the cargo. Because of high bacteria counts and unacceptable viscosity levels, the product was sold overseas for animal use at a substantially reduced price.

The court found there was evidence, in addition to the clean bill of lading, to substantiate delivery in good condition when turned over to the carrier. As to delivery in Portland, there was evidence that starch, once becoming wet, will become adulterated over time because of microbiological growth. Defendants argued that there should be no liability until it was shown that the starch in each bag was contaminated. The court rejected this assertion, noting the prohibitive costs to test each bag, even if this was possible. The court commented that the bags could have been surveyed and bad separated from good at the load port in Thailand and this was not done because the ship's captain chose not to do it.

Having found a prima facie case, the court found the carrier took several unnecessary risks and could have easily prevented the wetting incidents had proper precautions been taken.

As to mitigation, an argument was made that even if some of the bags had biological contamination, those bags could have been blended with good material and the average amount of contamination would then have been acceptable. The court found that such an assertion violates the Code of Federal Regulations and "borders on being unconscionable"

given the intended use of the material for human consumption. In a footnote, the court stated: "During trial, I asked [the expert] whether he would say that food with the typhoid virus could be blended and used for human consumption, he answered that it could. It is obvious to me that this man hardly has a deep compassion for the general public."

The court went on to find that selling the starch for feed was the best course of action.

A limitation of $500 per bag was asserted; however, the court found the vessel unreasonably deviated to Montreal, Canada before discharging the starch in Portland, Maine. Therefore, the limited liability protection was not available. By changing course to Montreal instead of calling at Portland first, the vessel added miles to the voyage.

Noting the circumstances of bacterial contamination, the court found delay in time would cause increased bacterial growth and more damage to the product. The court found defendants fully liable for the damages caused.

National Starch and Chemical Company v. N/V MONCHEGORSK, 97 Civ. 1448 (S.D.N.Y. August 7, 2000) (Duffy, K.T.).

(Newsletter editor's note: This matter is on appeal to the Circuit Court of Appeals for the Second Circuit.)

WHAT DOES IS PROFIT A MAN . . . .

The plaintiff consignee contracted with an NVOCC for transportation of shoes from Brazil to Columbus, Ohio. When the container arrived at Columbus, it was empty. The consignee sued both the NVOCC and the actual carrier, each of whom had issued bills of lading.

As a result of a pre-trial conference, plaintiff served an Itemized Settlement Demand which included, among other damages, a claim for "lost profits," and a claim for "marketing, administration, and processing costs." The NVOCC filed a motion for partial summary judgment, seeking a ruling that the plaintiff could not recover for these alleged damages.

With respect to the lost profits claim, the NVOCC argued that language in the bills of lading purporting to limit liability to invoice value, plus freight and insurance if paid should bar recovery; that it was not a carrier subject to COGSA; and that the shoes were "fungible goods in bulk" and lost profits could not be recovered and that the claim for lost profits was speculative and plaintiff had not mitigated damages.

As to the limitation of liability argument, the court found that the NVOCC was indeed a carrier, having issued a contract of carriage (the bill of lading), rejecting an argument that the defendant was merely a freight forwarder.

Having concluded that the NVOCC was a "carrier," the court found the bill of lading provisions violated COGSA as lessening a carrier's liability. As the court found the defendant to be a "carrier," COGSA applied rather than state law.

The court went on to state that COGSA permits the recovery of lost profits where there is sufficient evidence to support "actual damages" which can include lost profits where the goods in question are unable to be replaced. The court found plaintiff had presented testimony sufficient to show that the shoes were not able to be replaced and that the

plaintiff had lost profits as a result of the failure to deliver the shoes.

The court summarily rejected the "presumably fungible" argument noting that no authority had been submitted on this point and no evidence had been shown that the shoes could have been replaced.

As to lost marketing and processing costs, the court agreed that any damage award would be reduced by such costs, as were avoided, as a result of the failure of the shoes to be delivered: plaintiff would be entitled to recover administrative and overhead costs, that it could prove to a reasonable certainty it would have offset, if the shoes had arrived and/or, that it incurred as a result of the failure of delivery, minus any costs it avoided as a result of such failure.

Shonac Corp. v. Maersk, Inc., No. C2-99-870 (S.D. OHIO, March 30, 2001) (Sargus, Jr., J.).

HURRICANE TIDAL SURGE COMES ASHORE; CARGO CLAIM GOES OUT WITH IT. . . .

Reels of papers stowed in containers had been discharged at the Alabama State Docks and were held there pending on-carriage for delivery. Hurricane Georges made landfall in the area and the reels of paper were damaged by tidal surge flooding. The plaintiff subrogee underwriter brought suit for the damaged reels in two actions which were consolidated.

The principle issue before the court was whether the defense of "Act of God" was available to defendants. In a detailed analysis, which included fact specific references to evidence, the court found that hurricanes, such as Georges, are considered in law to be an "Act of God." At the same time, it found that defendants would not be relieved from liability through "Act of God" until it was determined whether the damage arose through want of proper foresight and prudence, and to relieve themselves from responsibility, it was incumbent upon them to prove that due diligence and proper skill were used to avoid the damage and that it was unavoidable:

... Indeed, the federal courts "weathered" experience with this defense has produced one crucial principle: if a defendant has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by the hurricane, but fails to do so, then the defendant is responsible for the loss; however, if there were insufficient warnings or insufficient means available to the defendant to protect the cargo from the "Act of God," then they are not responsible for the loss.

Turning to the evidence, the court first looked at the aspect of notice of warning or flooding. In a searching analysis of the testimony, the court found the defendants did not have any actual knowledge and/or notice of flooding from hurricanes ever occurring in the area, in order to take the precautions which the plaintiff asserted they should have.

The court then turned to whether the defendants could have been made aware of a flooding danger. Plaintiffs argued that a "Stormcheck" service should have alerted defendants. The court described a faxed bulletin as somewhat cryptic, referring only to a storm surge over coastal Alabama as anticipated. The court noted the particular pronouncement was at odds with the National Hurricane Center's own advisories in Miami. In a footnote, the court stated that for plaintiffs to prevail on the strength of this alleged "warning" they had to prove the defendant carrier should have been a customer of the service and that inherent in the argument was a corollary argument that an organization such as the carrier was not entitled

to rely on National Hurricane Center advisories, but instead must subscribe to a private source, and if there is more than one, then the most reliable one. The court found plaintiffs to have failed to meet that burden and stated the defendants were not obligated to subscribe to a particular commercial service.

... Defendants cannot be held liable because what was known and/or predicted of this hurricane simply did not warrant a decision to move the containers from the State Docks. Given the timing and content of the predictions and the logistical realities involved, the damage which was sustained simply could not have been prevented by reasonable foresight and care. The Defendants were not negligent in their protection of and/or handling of the cargo by failing to move the cargo because they did not have sufficient notice of the specific weather conditions which could be expected in this particular area in Mobile.

In light of the evidence, the court found defendants acted reasonably and with due diligence.

... instead of eyes locked on hindsight, this Court must stand with eyes directed towards what the Defendants knew at the time, to understand that the flooding which subsequently occurred and the hurricane's path was not sufficiently appreciable or foreseeable, to call for extraordinary precautions entailing substantial expenses.

The court found plaintiffs not entitled to recover because the damage was caused by an "Act of God," and not due to any negligence on the part of the defendants.

Skandia Ins. Co., Ltd. v. Star Shipping AS, d/b/a Atlanticargo, No. 99-0284-CB-L (U.S.D.C., S.D. Ala. April 5, 2001.) (Butler, Jr., J.)

SOMETIMES YOU GET WHAT YOU PAY FOR. . . .

A shipment of steel bars was booked to be transported by rail from Texas to Pennsylvania. The steel bars allegedly failed to arrive and the plaintiffs submitted a claim to the railroad. The railroad declined the plaintiff's claim and, close to two years after receiving that written notice of rejection, the plaintiff filed suit with respect to the alleged non-delivery.

Defendant moved for summary judgment on the basis that the claim was time-barred and plaintiff cross moved to transfer venue to Texas.

With respect to defendant's motion, the court found the shipment was subject to a one-year provision in the railroad carrier's circular which had been referred to in the freight invoice and the rate charge was calculated based on the rate in the exempt circular.

The plaintiff was offered the option of shipping its goods pursuant to the Carmack Amendment, which would have given plaintiff two years after declination in which to file suit. Instead, the rate charged and accepted by the plaintiff was a cheaper rate quotation which considered a one-year limitation as opposed to the two-year filing period provided by the Carmack Amendment.

Finding the plaintiff had failed to establish a triable issue of fact, the court granted summary judgment in favor of defendant on the basis that the matter was time-barred.

As to plaintiff's motion to transfer, the court denied the motion as moot; however, went on

to note the motion would still be denied, as a motion to transfer venue is not ordinarily granted at the request of the party who chose the forum in the first place.

Ferrostaal, Inc. v. Union Pacific Railroad Co., 99 Civ. 10497 (S.D.N.Y. July 5, 2000) (Schwartz, J.).

THE BILLETS TURN UP AND ONCE MORE UNTO
THE BREACH. . .

Having been dismissed from its New York action, the plaintiff initiated a suit alleging conversion in the District Court for the Eastern District of Texas. The steel billets which were not delivered had been left unaccounted for in the railroad's shipping yard in Fort Worth, Texas. Eventually, the billets were sold by soliciting bids. One of the railroad's claims adjusters was responsible for selling the unidentified billets. The plaintiff sued this individual for his actions, claiming they constituted conversion.

The court noted that before the conversion lawsuit was filed in Texas, the plaintiff had initiated a similar lawsuit against the railroad in the Southern District of New York. The plaintiff then brought an action against the employee individually, despite the fact that both parties seemed to agree that he was a railroad employee and that he was acting in the normal scope of his employment.

The court noted the outcome of the suit brought in the Southern District of New York as being time-barred and turned to the claim for conversion.

The court found the Carmack Amendment preempted state law breaches of contract and tort claims. Quoting from a 5th Circuit decision in Moffit v. Bekins Van Lines Co., 6 F. 3d 305 (5th Cir. 1993), the court stated "such a holding could only lead to the morass that existed before the Carmack Amendment. Therefore, we find the district court correctly held that federal law, via the Carmack Amendment, preempts the Moffits' state law claims. To hold otherwise would only defeat the purpose of the statute, which was to create uniformity out of disparity."

The court found the Carmack Amendment preempted the plaintiff's claim against the individual defendant. There had been no showing that he was acting outside the scope of his employment. The court held plaintiff should not be allowed to circumvent the Carmack Amendment by naming an individual employee as its chosen defendant.

The court went on to consider the impact of the decision of the District Court of the Southern District of New York.

The court found both causes of action related to actions that were taken by the individual which were under the normal scope of his employment. Plaintiff's first lawsuit was for non-delivery to steel billets under the Carmack Amendment. Plaintiff's second lawsuit for state-law conversion was preempted by the Carmack Amendment. Because the District Court for the Southern District of New York had previously held plaintiff's cause of action under the Carmack Amendment was time- barred, the court found it should no longer entertain the plaintiff's claim.

Ferrostaal, Inc. v. Don Seale, 6:00 cv 212 (E.D. Tex., Tyler Division March 12, 2001)

(Stagger, J.).

“A DAMAGE TO CARGO CLAIM OF A SOMEWHAT UNUSUAL NATURE”. . . .

A cargo of ethylene was being loaded aboard a vessel and was contaminated by a previous cargo of butadinene. The owners admitted their vessel was unfit to carry the cargo in question, having failed in their duty to exercise due diligence to clean or purge the vessel’s tanks and lines of the previous cargo. The court noted the breach must have been particularly gross since, according to the owner’s own expert cargo surveyor, the extent of the contamination observed during the initial stage of loading was likely to have exceeded anything which the attending independent surveyor then acting for the cargo interests had previously experienced. Building on this, the owners argued that the grossness of the contamination then observed supported their contention that the bulk of the loss should be regarded as having been caused by the cargo interests’ own decision to continue loading. Thus, the owners argued that while the vessel was unfit to take the cargo, the decision to continue to loading should be characterized as reckless or foolhardy and they should not be liable for their admitted breach for contamination of the balance of the parcel thereafter loaded.

In a 43-page opinion, the court noted the master of the vessel appeared to have played virtually no part in the loading process. The court noted it did not have the benefit of oral evidence from any of those who were or should have been most immediately involved, cargo interests calling only one witness with owners calling no witnesses and in particularly not calling the master.

Dealing with arguments presented on behalf of owners, the court stated the ship owner could not abdicate responsibility under the circumstances. The reality was that through a failure to observe basic tanker practice there was present in the vessel’s tanks and lines at the beginning of loading a large quantity of contaminant which derived from a previous cargo. The master should have taken whatever steps were necessary and acted. “If the only manner in which the vessel could be made fit to receive further cargo was
by removal of the cargo already loaded, it was the Master’s duty to ensure that all parties were made aware of that fact so that it could be dealt with appropriately.”

The court concluded that it could not regard the decision to continue as being the effective cause of the full cargo. The decision was not sufficiently aberrant as to wholly supplant the unfitness of the vessel as the effective cause of the contamination.

As to quantum, the claimants argued the measure of their loss should be the difference from what they would have earned had the cargo been sold and what they achieved on a distress sale. The court stated the correct measure would be the difference between sound arrived value and actual value, based on the footing that normally compensation would reflect the cost of going into the market in order to buy a substitute cargo which would in turn enable the injured party to achieve whatever price might be obtainable under his forward contract , assuming that the be higher.

The initial contract (BP) was entered into before any relevant contract to which the owners were party. The contract price was calculated by references to prices in a publication commonly used in the market. The average price spot quoted in this publication at the relevant time was less than the initial contract price (some $136 less). The court found compensation to be calculated on the relevant spot price less what was achieved on the

distress sale.

Vinmar International Ltd. v. Theresa Navigation S.A., No. 1997 Folio 1721 (High Court of Justice, Queens Bench Division, Commercial Court March 6, 2001) (Tomlinson).

STRICT PRODUCTS THEORY GOES UP IN SMOKE

An explosion on board a vessel in a containerized shipment of Thioreau Dioxide ("TDO") caused severe damage to other shipments stowed in the same vicinity and to the vessel itself.

The subrogated insurers of a cargo of men's coats commenced an action against the vessel, its owner, time charterer and a number of slot charterers and NVOCC's involved with the shipment. In a related action, the shipowner sued the shipper and freight forwarders of the offending TDO cargo. Judge Miriam G. Cedarbaum consolidated these cases for trial and thereafter issued findings of fact and conclusions of law.

The court ruled that at the time of the incident, TDO was not officially recognized as a hazardous cargo and thus not listed in the International Maritime Dangerous Goods ("IMDG") Code. The available industry literature at the time did not alert those handling the product of the likelihood that decomposition of TDO would cause an exothermic reaction.

Faced with the Fire Statute defense under COGSA, and the absence of proof of carrier negligence, the cargo claimants joined forces with the shipowner and focused the prosecution of its claims against the shipper and freight forwarder of the TDO under a theory of strict products liability. The shipowners asserted that the shipper and freight forwarders were guilty of failing to warn about the inherent dangers of TDO. In addition, the cargo interests asserted that the shipper of the TDO owed an absolute duty under general maritime law that the TDO was not hazardous.

The court rejected the plaintiffs' strict product liability theory on the grounds they failed to prove the existence of a product defect or that such defect caused the damage. The court also found that the plaintiffs could not recover because they were not "users or consumers of the defective product."

Judge Cedarbaum also dismissed plaintiffs' theory in respect of the shippers' duty to warn about the inherent dangers of TDO. The court found that none of the research available at the time of shipment was indicated that an explosion was likely during the transport of TDO.

The court also held that there was no absolute warranty on the part of the shipper that its cargo is not hazardous. This absolute warranty, to the extent it existed under common law, was cut down and modified legislatively with the enactment of COGSA, Section 1304(6) of which requires proof of "[an] act, fault or neglect of shipper" before liability may be imposed. Judge Cedarbaum held that a shipper is "chargeable only with the knowledge that it is actually or constructively within its possession" and that plaintiffs failed to prove that the shipper (or its freight forwarder "knew or should have known" that TDO could decompose exothermically.

Insurance Co. of North America a/s/o Burlington Coat Factory v. M/V TOKYO SENATOR, 2001 WL 23893 (S.D.N.Y. March 9, 2001)

CLAIMANT RUNS HAZARD OF HAZARD EXCLUSION

In an action factually related to the TOKYO SENATOR, supra, one of the NVOCC's sued its liability insurer to recover cleanup costs and fines imposed and the costs of defending a lawsuit for damage arising out of the carriage of two shipments of toxic chemicals, including the TDO carried on the TOKYO SENATOR.

The defendant insurer refused to defend or indemnify its insured on the grounds that the policy of insurance excluded toxic pollutants from coverage and had a one-year statute of limitations. The policy styled in "International Transit Liability Insurance Policy" covered certain risks attendant on the insured's business as an NVOCC. As is typical of most insurance policies, the Policy at issue contained numerous exclusions which operated to deny coverage for certain risks. The relevant exclusion, entitled "Hazardous Materials / Pollution / Contamination" provided as follows:

We will not cover any claims for environmental damage, pollution, or contamination of any kind however caused, including but not limited to: claims arising out of accidental, sudden or gradual, foreseeable or unforeseeable, intentional or unintentional occurrences.

We will not cover any claims arising out of any activity, transaction, incident or occurrence involving any explosives; pressurized gases; nuclear parts, fuels, materials or devices; hazardous, radioactive, toxic; . . . or flammable materials; any weapons or armaments; or any means of biological or chemical warfare.

Further, we will not cover claims arising out of the actual, alleged or threatened discharge, disposal, release or escape of pollutants in any stage or storage, handling or transportation; . . . whether accidental, sudden or gradual, foreseeable or unforeseeable, intentional or unintentional.

Pollutants mean but are not limited to: any solid, liquid, gaseous, thermal, radioactive, sonic, magnetic, electric or organic irritant; contaminant; or anything which causes or contributes to damage, injury, adulteration, or disease. This includes, but is not limited to smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste.

In addition, the Policy contained a clause which precluded the assured from commencing a lawsuit against the insurer after one (1) year from the date of the incident giving rise to the putative duty to defend.

In mid-May of 1995,the insured first notified the insurers of the insurers of the underlying losses when it, itself, was served with summonses and complaints in connection with two separate but related actions one filed in the Eastern District of New York, the other pending in the Southern District of New York. The Insurers promptly responded on June 1, 1995, stating that following a review of the complaints, the insurers were not obligated to provide the insured coverage based upon the hazardous materials / pollution exclusion. Almost five years later in February of 2000, the insured brought a declaratory judgment action against the insurers to declare that coverage existed. Insurers asserted a counter-claim seeking a declaratory judgment that the policy did not afford coverage.

Judge Gerard E. Lynch, on motion and cross motion for summary judgment, held that the Policy was not intended to provided the insured with coverage given the broadly-worded

hazardous materials / pollution exclusion.

The Policy excludes: "Any claims arising out of any activity, transaction, incidence or occurrence involving@ materials that are "hazardous" or "toxic." Since the court found that there was no duty to defend or indemnify on the part of the insurer, it stated that it was unnecessary to rule on the statute of limitations question. The court also considered the insurers' application for attorneys' fees and costs under 28 U.S.C. §1927, but stated that such sanctions were not warranted in this case.

Zen Continental Co., Inc. v. Intercargo Ins. Co., 2001 U.S. Dist. LEXIS 2999 (S.D.N.Y., March 21, 2001).

CLOTHIER'S CARGO COVERAGE COLLAPSES DUE TO LACK OF COOPERATION, AMONG OTHER THINGS

Plaintiffs were a manufacturer of military apparel, and its affiliate who arranged for the purchase of yarn and its conversion into finished material. They sued to recover for goods damaged when the roof of a warehouse in which finished material was stored, collapsed. The warehouseman declared bankruptcy and the warehouse was demolished a number of months after its roof collapse. Plaintiffs claimed against the warehouseman's commercial property insurance policy as a third-party beneficiary. Plaintiffs also claimed under two other insurance policies; one which only covered the manufacturer for property loss at the warehouse and, the other—an open marine cargo policy with a warehouse endorsement which named both plaintiffs as insureds.

Defendant insurance companies moved for summary judgment. The court granted summary judgment to all three defendants, albeit on slightly different grounds. With respect to the warehouseman's insurer, the court held that the plaintiffs lacked standing and that they failed to qualify as intended third-party beneficiaries under that policy because the policy specifically excluded coverage for "stock and supplies of others."

With respect to the policy which named only the manufacturers as an insured, the court held that there was no coverage because at the time of the roof collapse because the fabric in the warehouse was owned by the manufacturer's affiliate and not the manufacturer. The court dismissed plaintiffs' claim under its cargo policy since the policy's warehouse endorsement only provided coverage for "imported goods and merchandise . . . while temporarily stored in warehouses approved by this Company in writing." The evidence submitted in support of the motion indicated that the goods were not imported but rather had been manufactured in by the affiliate Pennsylvania.

Because the court found there was no coverage, it stated that it was not necessary to determine whether timely notice of claim had been given to the insurers. However, the court stated, as dicta, that it would have dismissed plaintiffs' case for their failure to provide timely notice of the claim since it was undisputed that plaintiffs only notified its own broker of their loss and the broker did not provide notice of loss to insurers within a reasonable period of time. In addition, the court indicated that it would have ruled in favor of the defendant insurers on the issue of their failure to cooperate with the insurers in proving their loss. The undisputed evidence showed that plaintiffs not only failed to properly retrieve the goods from the warehouse after the loss but they discarded the goods as trash, thus

depriving the insurers the opportunity to inspect the damage and assess the extent of the loss.

Isratex, Inc., et al. v. Strousberg Dyeing and Finishing Co., No. 108138/95 (N.Y. Sup. Ct. Feb.13, 2001) (Abdus-Salaam, S.).

COMPUTER CHIPS CAUGHT UP IN COMPLEX TREATY RELATIONS

In a recent decision that may have far reaching implications, the Second Circuit decided that since the United States signed the Warsaw Convention and South Korea only signed the Hague Protocol, that these countries were not in treaty relations with respect to international transportation of cargo by air.

The shipper delivered 17 parcels of computer chips to the air carrier for shipment from Seoul to the consignee in San Jose, California. The air carrier's air waybill provided for shipment on a non-stop flight from Seoul to San Francisco, but due to an excess of goods to be shipped, the carrier instead transported the parcels on a flight to Los Angeles. The parcels were then trucked to San Francisco. Two of the 17 parcels, weighing 35.3 kilograms and valued at $583,00.00, were missing upon arrival at San Francisco. The subrogated cargo insurer claimed subject matter jurisdiction under 28 U.S.C. § 1331. Although the United States adhered only to the original Warsaw Convention and South Korea adhered only to the Warsaw Convention as amended at the Hague, both parties agreed that the Warsaw Convention governed the dispute.

The district court applied only those portions of the Warsaw Convention to which the United States and South Korea both had agreed in adhering to two different versions of the treaty, thus, in essence, creating a truncated version of the Warsaw Convention. The district court held that the Warsaw Convention's liability limitations were applicable, and the air carrier's liability was limited to $706.00 by the truncated treaty formed by the common portions of the two versions.

On June 8, 2000, the Second Circuit reversed the district court's decision, holding that the actions of the United States and South Korea did not create treaty relations with regard to international carriage of goods by air. The court determined that the United States and South Korea were not in treaty relations with regard to the international carriage of goods by air and, therefore, the dispute did not arise under a treaty of the United States, thereby depriving the district court of subject matter treaty jurisdiction.

The case was remanded to the district court to determine whether there was another basis for subject matter jurisdiction. The cargo insurer has moved in the district court to dismiss the air carrier's affirmative defense of limitation of liability under the air waybill and tariff. A Petition for a Writ of Certiorari has been filed with the United States Supreme Court.

Chubb & Son, Inc. v. Asiana Airlines, 214 F3d 301 (2nd Cir. 2000).

11TH CIRCUIT ENTERS "MURKY WATERS" OF COGSA AND PACKS UP CLOTHING SHIPMENTS....

Containerized shipments of clothing were lost overboard. One plaintiff shipped its products in a "big pack," akin to a pallet, slotted at the bottom so it could be picked up by a forklift and partially enclosed in corrugated cardboard with a base and cover made of plastic. Inside

the big pack, were bundles of boys pants and the like wrapped in paper and sorted by style.

A second shipment consisted of assembled suit jackets which were hung from beams on nylon ropes and shipped in extra-tall containers. The pressed suits were enclosed in plastic bags and each garment-on-hanger container could hold between 4,500 and 5,500 hangers.

Both cargo plaintiffs appealed from the district court's decision holding the big pack to be the package for limitation purposes and the container to be the package with respect to the shipment of suit jackets on hangers.

The Eleventh Circuit noted the documentation, particularly the cargo manifest and the bill of lading, indicated 39 big packs and stated nothing about the smaller "dozens" or bundles inside each big pack. The court found little difficulty in affirming the limitation based upon the 39 big packs.

With respect to the garment-on-hanger container, the court stated it initially approached any attempt to define a container as a COGSA package with great reluctance: "While the "number of packages" column is plainly our starting point in determining these issues, the analysis does not end there. . . . " "[W]hen a bill of lading refers to both containers and other units susceptible of being COGSA packages, it is inherently ambiguous."

While reviewing relevant case law, the court ultimately noted the evidence presented that each garment-on-hanger container is a recognized shipping unit was inconclusive. Precedent has clearly required that the number of packages that are declared must be indicated in the package column of the bill of lading and the shipper's own documents as the next most reliable source of information should give some clear indication that more than one package is being shipped.

The court noted that the shipper had ten years experience in the shipping business and would be hard pressed to argue it did not understand the significance of correctly completing all the declaration forms and bills to avoid a COGSA limitation.

With respect to both plaintiffs, the court in a footnote noted that additional freight charges could have been paid to opt out of the COGSA limitation: "Not paying the additional amount implies a conscious decision to adhere to COGSA's limited liability. In fact, both Fishman and MacClenny chose not to opt out of COGSA's limitation but instead transferred the risk of loss greater than the COGSA limitation from themselves to their insurer."

The court also considered an argument that the district court should have followed a decision in the same district court on the basis of intra-court comity. The circuit court noted that, unlike circuit court panels where one panel will not overrule another, district courts are not held to the same standard. While the decision of fellow judges are persuasive, they are not binding authority.

The circuit court affirmed the district court's applications of the package limitation.

Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co., Ltd., 240 F.3rd 956 (2001) (11th Cir. Jan. 31, 2001).

UNFRIENDLY PERSUASION. . . .

The United States sued for loss and damage to shipments of foodstuffs to various ports in Africa. Clean bills of lading were issued for each shipment after the cargo was stowed; however, survey reports indicated several problems when discharged in Africa. Some parts of the cargo were received in a damaged and unusual condition and some parts of the cargo were not received at all. The total claimed was $203,317.87. The district court entered judgment in favor of the United States for the limited sum of $7,300.08, the amount of damage which defendants admitted occurred prior to discharge.

The 5th Circuit Court of Appeals considered the shifting burdens and accompanying presumptions of liability set up by COGSA. The court noted the shipper had established a prima facie case of loss or damage. Clean bills of lading had been issued and the reports of survey at the ports of discharge indicated loss or damage upon discharge.

A shipper's prima facie case creates a presumption of liability and, at that point, the burden of proof shifts to the carrier to prove it exercised due diligence to prevent the loss or damage or that the loss or damage was the result of one of the "uncontrollable causes of loss" enumerated in COGSA.

If the carrier successfully rebuts the shipper's prima facie case, the presumption of liability vanishes and the burden returns to the shipper to show that carrier negligence was at least a concurrent cause of the loss or damage. If the shipper establishes carrier negligence as at least a concurrent cause, then the burden shifts once again to the carrier, who must establish what portions of the loss were caused by other factors. If the carrier is unable to prove the appropriate apportionment of fault, it then becomes liable to the full extent of the shipper's loss.

The circuit court reviewed the district court's application of this "burden shifting paradigm and other legal issues de novo."

The court found little difficulty in determining that the shipper had established a prima facie case. It then went on to consider whether the carriers had rebutted the prima facie case by showing that the facts and circumstances surrounding the loss fell within one of the statutory exemptions of COGSA or demonstrated that the carrier exercised due diligence.

. . . There is considerable controversy, and even an intra-circuit conflict, as to whether the carrier's rebuttal burden with respect to most of those exceptions is one of production or persuasion.

The first sixteen of the seventeen statutory exceptions to carrier liability set out at 46 U.S.C. § 1304(2) merely provide that the carrier is not liable for losses or damages caused by one of the listed causes. In this group are included losses attributable to such things as an act of God, id. § 1304(2) (d), an act of war, id. § 1304(2) (e), and the primary exception at issue in this case, a shipper's own improper packaging, id. § 1304(2) (n). The seventeenth exception, § 1304(2) (q), is a catch-all exception, which states that the carrier is not liable for losses or damages resulting from "any other cause arising without the actual fault and privity of the carrier" or its agents. That subsection goes on, however, to provide that, with respect to § 1304(2) (q), "the burden of proof shall be on the person claiming benefit of this exception" to show that the carrier's fault or neglect did not contribute to the loss or damage. Id. § 1304(2) (q). Thus, the exception codified at § 1304(2) (q) expressly requires that the carrier prove the applicability of the exception, while the remaining

statutory exceptions are silent on the point.

The court noted some 5th Circuit Panels implicitly place a heightened burden of proof under the "q" clause and permitted a more lenient burden under the exceptions which precede it. Some panels required a carrier under § 1304(2) (q) to bear not just the burden of going forward with evidence, but also the burden of persuasion. They also noted other courts have, in similar fashion, placed the mere burden of production on a carrier when the catch-all provision ("q") was not involved. Under these authorities, once the shipper had proved his prima facie case, the carrier, claiming an exception under §§ 1304(2) (a)–(p) would bear merely a burden of production with respect to establishing the application one of these exceptions. Where, however, the "q" clause was involved, the carrier would bear the ultimate burden of persuasion as well.

The court then traced the history of decisions on the issue and noted that the earliest 5th Circuit decision at least implicitly reached a different conclusion. Referring to Waterman S. S. Corp. v. United States Smelting, 155 F.2d 687 (1946), the court noted that a carrier seeking to avoid liability on the theory of perils of the sea or latent defects, bore both "the burden of going forward" to demonstrate the applicability of the exception and "the risk of non-persuasion."

The court noted that there did not appear at this time any consensus among the circuits or even in the 5th Circuit, concerning which COGSA party bears the burden of persuasion (and the risk of non-persuasion) with respect to the enumerated exemptions set forth in §1304(2) (a)–(p), once the shipper makes out a prima facie case.

The court then turned to the defenses raised by the carriers, principally insufficiency of packaging. The court found it was not compelled to decide whether the carriers' rebuttable burden with respect to this defense was one of production or persuasion as it found the carriers failed to produce competent evidence to meet either standard with respect to this defense. It found that there had to be more than the offer of mere speculation as to the cause of loss or damaged cargo. The carriers had relied solely upon survey reports prepared at discharge and while the reports documented the quantity and compromised quality of lost or damaged cargo with some precision, three of five survey reports failed to provide even a speculative assessment with regard to the cause of the missing and damaged cargo. Thus it found there was a failure to offer any probative evidence whatsoever with respect to the insufficiency of packaging defense as it relates to those three shipments. As to the other reports, they included a list of five causes which might have contributed in some way to the loss. The court found the reports to include speculation and insufficient to satisfy the carrier's burden on rebuttal, without regard to whether that burden was one of production or persuasion. The court also found the record established negligence was at least a concurrent cause and the carriers bore the burden of establishing which portion was not attributable to such negligence. No evidence was submitted on this point and the plaintiff was therefore entitled to recover for the particular damages involved.

The carriers had also raised the catch-all exception with respect to damages to the shipments which were alleged to have occurred through careless discharge, pilferage, either from the vessel or from the docks and environs during discharge. As to stevedore negligence, the court found the carriers bore, not only the burden of production but the burden of persuasion under § 1304(2) (q).

The court found the carriers had failed to rebut the prima facie case presented and, even if they had carried such burden, it had been established that at least some of the loss and

damage was attributable to the carriers' negligence. The carriers had failed to respond with evidence as to what portion of the claimed loss or damage was attributable to another concurrent cause.

The court vacated the judgment below and rendered judgment in favor of The United States in the amount of damages claimed plus pre-judgment interest.

The United States of America v. Ocean Bulk Ships, Inc., No. 00-20117 (5th Cir. April 10, 2001).

Newsletter Editors' comment: It is only appropriate to give proper recognition to those who contributed to this newsletter by forwarding cases for consideration. The participants to be commended include David Mazaroli, Michael Marks Cohen, Bob Phillips, Susan Dorgan, Patricia Mino, Laslo Kormendi and Felicia Sandringham.