AFTER THE SUPREME COURT’S REGAL-BELOIT DECISION: HOW CAN MARINE INSURERS MAINTAIN THEIR RECOVERIES?

David T. Maloof, Esq.
Maloof Browne & Eagan LLC
411 Theodore Fremd Ave, Suite 190
Rye, New York 10580-1411
Phone (914) 921-1200
E-mail: dmaloof@maloofandbrowne.com

NOTE: ©2011 Information herein is simplified and provided for discussion purposes only—not to be construed or utilized as legal advice. Counsel shall be consulted for specific claims.
THE FIRST REVOLUTION - 1995


The U.S. Supreme Court ruled for the first time that foreign forum selection clauses are enforceable.
The U.S. Supreme Court ruled for the first time that it was permissible to treat a form bill of lading like a negotiated contract.
PRIOR CONTEXT: 1962-1974

- *Isthmian S.S. Co. v. California Spray-Chemical Corp.*, 300 F.2d 41 (9th Cir. 1962).

“The presence of this standardized clause in the contract does not represent an agreement between appellant and the shipper. It is simply a condition unilaterally imposed by the carrier upon the shipper...[the law] prevent[s] the use of just such false agreements which make ‘freedom of contract’ an illusion.”
“We recognize that the content of ocean bills of lading is for all practical purposes completely within the carrier’s power...”
THE THIRD REVOLUTION - 2010


The U.S. Supreme Court implies for the first time that public policy arguments about bill of lading provisions being too draconian will not be supported.
THE FOURTH REVOLUTION - 2011


- *Sompo Japan Ins. Co. v. Norfolk Southern Railway Co.*, 07 Civ. 2735 (DC) (Decision pending)

TWO CIRCUIT COURTS RULE FOR THE FIRST TIME THAT COVENANTS NOT TO SUE ARE ENFORCEABLE BY SUB-CONTRACTORS.

THIRD CASE IS PENDING/WILL LIKELY GO TO SECOND CIRCUIT
UNITED STATES RECOVERY LAW: SUMMARY OF TRADITIONAL CLAIMS WE STILL LITIGATE HERE

1. Liner claims with U.S. jurisdiction clauses
2. Charter party disputes
3. Barge claims
4. Air claims including pre and post-air movements (subject to federal common law)
5. Inland rail and truck claims under export bills of lading must be venued in United States (Carmack Amendment Applies)
6. Domestic truck and rail claims must be venued in United States (Carmack Amendment Applies)
## THE COUNTER-REVOLUTION: NOVEL AREAS WHERE RECOVERY SUCCESS HAS OPENED UP

### PRE-1995

1. Few lawsuits against ship managers
2. Few lawsuits against truck brokers
3. No lawsuits against truckstops
4. Truckers fully liable if:
   1. Tariff not on file with ICC

### AS OF 2011

1. Ship managers can be sued in the United States with no COGSA limitation
2. Truckstops have a duty to secure cargo and are liable if theft is “foreseeable”
3. Truck brokers liable if control or manage truckers
4. Truckers fully liable if:
   1. Does not offer 2 rates
   2. Offers only insurance
   3. Bill of lading does not match tariff
5. Export intermodal inland claims usually now have no limitation of liability (*Sompo* doctrine)
FORTIS CORPORATE INSURANCE v. VIKEN SHIP MANAGEMENT, 597 F.3d 784 (6TH CIR. 2010)

SHIP MANAGERS CAN BE SUED IN THE UNITED STATES WITH NO COGSA LIMITATION.
GREAT AMERICAN INSURANCE CO. OF NEW YORK V. TA OPERATING CORP., 2008 WL 5335317 (S.D.N.Y. 2008)

TRUCKSTOPS HAVE A DUTY TO SECURE CARGO IF PRIOR THEFTS MAKE THEFTS “FORESEEABLE.”
TRUCKERS FULLY LIABLE IF:
1) DOES NOT OFFER TWO RATES
2) BILL OF LADING DOES NOT MATCH TARIFF

TRUCK BROKERS LIABLE IF PRESENT THEMSELVES AS PROVIDING TRANSPORTATION FOR COMPENSATION OR CONTROL OR MANAGE TRUCKERS

- USUALLY NO LIMITATION OF LIABILITY FOR INLAND INTERMODAL LOSSES IN THE UNITED STATES (Sompo Doctrine)
2011-2012
WHAT PRUDENT CARGO
UNDERWRITERS SHOULD BE DOING:

Insist that shippers stamp international bills of lading to protect US jurisdiction and COGSA

Example:

ALL CARGO CLAIMS ARISING UNDER THIS BILL OF LADING AGAINST ANY PARTY INCLUDING THE CARRIER’S SUB-CONTRACTORS OR AGENTS ARE SUBJECT TO U.S. JURISDICTION AND AT A MINIMUM TO THE RIGHTS PROVIDED BY U.S. COGSA, WHICH IS INCORPORATED HEREIN BY AGREEMENT, INCLUDING ITS LIMIT OF LIABILITY, NOTWITHSTANDING ANY OTHER TERMS HEREIN TO THE CONTRARY. THE CONTAINER SHALL NOT BE DEEMED A COGSA PACKAGE.
CONTINUED:

2011-2012

WHAT PRUDENT CARGO UNDERWRITERS SHOULD BE DOING:

Example:

CARGO CLAIMS ARISING UNDER THIS BILL OF LADING AGAINST ANY PARTY INCLUDING THE CARRIER’S SUB-CONTRACTORS OR AGENTS ARE SUBJECT TO U.S. JURISDICTION AND AT A MINIMUM TO THE RIGHTS PROVIDED BY THE ROTTERDAM RULES, WHICH ARE INCORPORATED HEREIN BY AGREEMENT, INCLUDING THEIR LIMIT OF LIABILITY, NOTWITHSTANDING ANY OTHER TERMS HEREIN TO THE CONTRARY.
WHAT PRUDENT CARGO UNDERWRITERS SHOULD BE DOING

Write gross negligence clauses or security terms and conditions into domestic trucking contracts.

Example:

IF THE LOSS OR DAMAGE WAS THE RESULT OF CARRIER’S WILLFUL MISCONDUCT OR INTENTIONAL OR GROSSLY NEGLIGENT ACTS OR OMISSIONS...[IT] WILL NOT BE SUBJECT TO THE LIMITATIONS OF LIABILITY STATED ABOVE.

Or Require:

- Point-to-Point Movements
- Secure truck yards
<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. DID YOU MAKE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECOVERIES FROM</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SHIP MANAGERS?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. DID YOU MAKE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECOVERIES FROM</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TRUCKSTOPS?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
CONTINUED:
US RECOVERY DEPARTMENT
2011-2012 CHECKLIST

<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. DID YOU MAKE ANY RECOVERIES FROM TRUCK BROKERS?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. DID YOU MAKE RECOVERIES BECAUSE TRUCKERS ALLOW A FULL RECOVERY FOR GROSS NEGLIGENCE?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## CONTINUED:
### US RECOVERY DEPARTMENT
#### 2011-2012 CHECKLIST

<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. DID YOU MAKE FULL RECOVERIES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BECAUSE TRUCKERS HAVE REQUIRED SECURITY PROCEDURES, SUCH AS POINT TO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>POINT TO POINT MOVEMENTS?</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. DID YOU MAKE FULL RECOVERIES FOR INLAND INTERMODAL US LOSSES?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. DID YOU MAKE FULL RECOVERIES FROM TRUCKERS WHOSE BILL OF LADING OR TARIFF OFFER ONLY ONE LIMITATION OR RATE?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. DOES YOUR ASSURED STAMP INTERMODAL BILLS OF LADING WITH A PROVISION ENFORCING U.S. COGSA AS A MINIMUM RECOVERY?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SUBJECT</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>---------</td>
<td>-----</td>
<td>----</td>
</tr>
<tr>
<td>9. DOES YOUR ASSURED STAMP BILLS OF LADING WITH A PROVISION PREVENTING THE CONTAINER FROM BEING A PACKAGE?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. DID YOU SUPPORT LEGAL EFFORTS TO MAKE THE LAW MORE SUPPORTIVE OF RECOVERIES?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>