



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

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THE FIRST REVOLUTION - 1995

- *Vimar Seguros Y Reaseguros S.A. v. M/V Sky Reefer*, 515 US 528 (1995)

The U.S. Supreme Court ruled for the first time that foreign forum selection clauses are enforceable.



THE SECOND REVOLUTION - 2004

- *Norfolk S. Ry. Co. v. Kirby*, 543 US 14 (2004).
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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.”

PRIOR CONTEXT: 1974-1995

- *Tessler Bros. (B.C.) Ltd. v. Itaipacific Line*, 494 F.2d 438 (9th Cir. 1974).

“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

- *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S.Ct. 2433 (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

- *St. Paul Travelers Ins. Co. Ltd. v. Wallenius Wilhelmsen Logistics A/S*, 2011 WL 1901738 (2d Cir. 2011) (Summary order with no precedential effect)
 - *Fed. Ins. Co. v. Union Pac. R. Co.*, 2011 WL 2711314 (9th Cir. 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

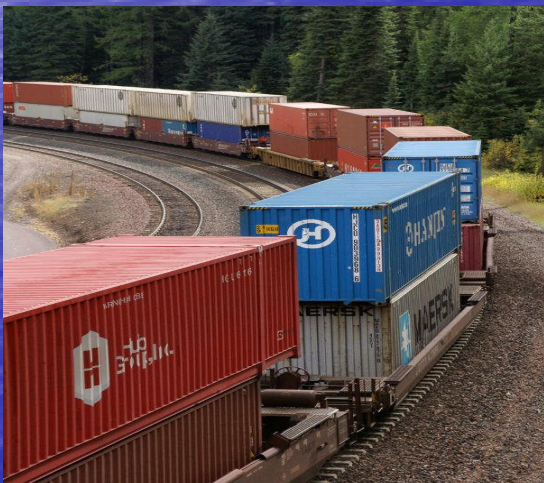
UNITED STATES RECOVERY LAW: SUMMARY OF TRADITIONAL CLAIMS WE STILL LITIGATE HERE

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:
 - i. 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:
 - i. Does not offer 2 rates
 - ii. Offers only insurance
 - iii. 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."

***NIPPONKOA INSURANCE COMPANY
LTD. V. TOWNE AIR FREIGHT, LLC,
2009 WL 3257868 (E.D. MO 2009)***

TRUCKERS FULLY LIABLE IF:

- 1) DOES NOT OFFER TWO RATES**
- 2) BILL OF LADING DOES NOT MATCH TARIFF**

***NIPPONKOA INSURANCE CO., LTD. v.
C.H. ROBINSON WORLDWIDE, INC.,
2011 WL 671747 (S.D.N.Y. 2011)***

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



*American Home
Assurance Co. v. Panalpina, Inc.,
2011 WL 666388 (S.D.N.Y. 2011)*

- 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.

2011-2012
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

US RECOVERY DEPARTMENT 2011-2012 CHECKLIST

<u>SUBJECT</u>	<u>YES</u>	<u>NO</u>
1. DID YOU MAKE RECOVERIES FROM SHIP MANAGERS?	_____	_____
2. DID YOU MAKE RECOVERIES FROM TRUCKSTOPS?	_____	_____

CONTINUED: US RECOVERY DEPARTMENT 2011-2012 CHECKLIST

	<u>SUBJECT</u>	<u>YES</u>	<u>NO</u>
3.	DID YOU MAKE ANY RECOVERIES FROM TRUCK BROKERS?	_____	_____
4.	DID YOU MAKE RECOVERIES BECAUSE TRUCKERS ALLOW A FULL RECOVERY FOR GROSS NEGLIGENCE?	_____	_____

CONTINUED: US RECOVERY DEPARTMENT 2011-2012 CHECKLIST

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

CONTINUED: US RECOVERY DEPARTMENT 2011-2012 CHECKLIST

<u>SUBJECT</u>	<u>YES</u>	<u>NO</u>
7. DID YOU MAKE FULL RECOVERIES FROM TRUCKERS WHOSE BILL OF LADING OR TARIFF OFFER ONLY ONE LIMITATION OR RATE?	_____	_____
8. DOES YOUR ASSURED STAMP INTERMODAL BILLS OF LADING WITH A PROVISION ENFORCING U.S. COGSA AS A MINIMUM RECOVERY?	_____	_____

CONTINUED: US RECOVERY DEPARTMENT 2011-2012 CHECKLIST

	<u>SUBJECT</u>	<u>YES</u>	<u>NO</u>
9.	DOES YOUR ASSURED STAMP BILLS OF LADING WITH A PROVISION PREVENTING THE CONTAINER FROM BEING A PACKAGE?	_____	_____
10.	DID YOU SUPPORT LEGAL EFFORTS TO MAKE THE LAW MORE SUPPORTIVE OF RECOVERIES?	_____	_____