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INTERCIRCUIT CONFLICT WITH RESPECT TO THE BURDEN OF PROOF STANDARD UNDER THE FIRE STATUTE AND THE FIRE EXEMPTION CLAUSE OF THE CARRIAGE OF GOODS BY SEA ACT (COGSA)

I. INTRODUCTION

Historically, United States courts refused to accept any means of limiting shipowner/carrier liability.¹ This resulted in the failure of American carriers to effectively compete with foreign shippers. In order to remedy this grave disadvantage and to encourage investment in American shipping, Congress, in 1851, enacted the Limitation of Shipowners' Liability Act.² Under this act, a separate exemption known as the Fire Statute provided for exoneration of the carrier from liability in fire losses:

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, unless such fire is caused by the design or neglect of such owner.³

The Limitation Act did not resolve the ongoing tensions between shippers and carriers with respect to their respective legal rights. Therefore in 1893, Congress passed the Harter Act,⁴ which laid down the general principle of exonerating the carrier from certain causes if the carrier exercised due diligence to provide a seaworthy vessel.⁵ The effectiveness of the Harter Act's ability to fully address the legal relationship between carriers and shippers was limited at best.

In response to growing tensions among nations with respect to the legal relationship between shippers and carriers, international maritime conferences in the early 20th century established the Hague Rules.⁶ These Rules were based on the Harter Act principle and included a fire exemption clause, although nothing was mentioned regarding allocation of the burden of proof.

In 1936 Congress enacted the Carriage of Goods By Sea Act (COGSA), which is the American enactment of the international Hague Rules.⁷ Section 1304(2)(b) of

1. Joseph A. Calamari, *The Eternal Conflict Between Cargo and Hull: The Fire Statute—A Shifting Scene*, 55 ST. JOHN'S L. REV. 417 (1981).

2. Act of March 3, 1851, ch. 43, 9 Stat. 635 (current version at 46 U.S.C. app. §§ 181-196 (1988)).

3. 46 U.S.C. app. § 182 (1988).

4. Act of Feb. 13, 1893, ch. 105, 27 Stat. 445 (current version at 46 U.S.C. app. §§ 190-196 (1988)).

5. James H. Hohenstein, *The Allocation of the Burden of Proof in Marine Fire Damage Cases*, 50 U. CHI. L. REV. 1146 (1983).

6. International Convention for the Unification of Certain Rules Relating to Bills of Lading, opened for signature Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 (U.S. ratification proclaimed Nov. 6, 1937).

7. Act of April 16, 1936, ch. 229, 49 Stat. 1207 (current version at 46 U.S.C. app. §§ 1300-

COGSA, the fire exemption clause, also provides for exoneration of the carrier from liability due to fire:

- (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —
 (b) Fire, unless caused by the actual fault or privity of the carrier;⁸

This section of COGSA is interrelated with 46 U.S.C. § 182 through the language of 46 U.S.C. § 1308, which preserves the carrier's rights and obligations under 46 U.S.C. § 182:

The provisions of [the Carriage of Goods by Sea Act] shall not affect the rights and obligations of the carrier under the [Fire Statute]⁹

The "design or neglect" language in the Fire Statute has been held to be synonymous with the "actual fault or privity" language in 46 U.S.C. § 1304(2)(b).¹⁰ Furthermore, "privity" emphasizes some fault or act attributable to the carrier while "design or neglect" was said in the United States Supreme Court case of *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*¹¹ to connote the same meaning.¹²

The relevant controversy and circuit split center around application of the burden of proof to apply under 46 U.S.C. § 1304(2)(b) and 46 U.S.C. § 182. The Second Circuit, in *Asbestos Corp. Ltd. v. Compagnie De Navigation Fraissinet et Cyprien Fabre*,¹³ places the burden of proof on the shipper to show the carrier's negligence, after the carrier first establishes that fire is the cause of the damage.¹⁴ In contrast, the Ninth Circuit in *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*¹⁵ claims that the burden of proof is on the carrier to first show he exercised "due diligence" to make his ship seaworthy; only after he demonstrates such proof can he then claim exoneration from liability under 46 U.S.C. § 1304(2)(b).¹⁶

The crux of the circuit split lies in the fact that while COGSA is silent as to the allocation of the burden of proof under the fire exemption clause, it explicitly places the burden on the carrier to prove the exercise of due diligence to provide a seaworthy vessel.¹⁷ This duty of due diligence is non-delegable and encompasses not only the carrier's personal negligence but also the negligence of high-ranked members of the carrier's crew—agents, managerial/supervisory employees—which is imputed to the carrier.

On the other hand, cases such as *Asbestos Corp. Ltd.* require the shipper to prove the damage was caused by the carrier's design or neglect/actual fault or privity.¹⁸ To prevail, the shipper must show personal negligence on the part of the carrier by showing the negligence occurred while the vessel was in the carrier's control at the start of

1315 (1988)).

8. 46 U.S.C. app. § 1304(2)(b) (1988).
 9. 46 U.S.C. app. § 1308 (1988).
 10. Calamari, *supra* note 1, at 418.
 11. 287 U.S. 420 (1932).
 12. Calamari, *supra* note 1, at 427.
 13. 480 F.2d 669 (2d Cir. 1973).
 14. *Id.* at 673.
 15. 603 F.2d 1327 (9th Cir. 1979).
 16. *Id.* at 1336.
 17. 46 U.S.C. app. § 1303(1)(a) (1988).
 18. 480 F.2d at 672.

the voyage, and a connection between such negligence and the carrier. This burden of proof is inconsistent with and contrary to the carrier's burden to prove due diligence under COGSA 46 U.S.C. § 1303(1)(a), because it is a negation of the carrier's duty to exercise due diligence.

Such intercircuit conflicts falling under the realm of COGSA have been termed "intolerable" because they undermine the very purpose that COGSA aims to achieve, i.e., the implementation of the Hague Rules through "unification of certain rules of law relating to bills of lading."¹⁹ The effect of such unification is to be generated not only within the United States but also throughout the world. As only the Supreme Court can provide national uniformity, resolving these intercircuit conflicts of international scope is crucial to accomplishing the goals of COGSA and achieving international uniformity of interpretation.

Failure to arrive at a resolution is likely to have pernicious consequences. Litigants can exploit COGSA conflicts such as the one presented through forum shopping.²⁰ First, a shipper can file an in rem action in any district where the ship is located, regardless of the relationship (or lack thereof) between the forum and the suit.²¹ Second, a shipper can file an in personam action in any location where he can serve the defendant carrier or attach the latter's property.²² Third, there is a great potential for forum shopping in the international arena; litigation may take place in any of the countries involved as well as in a country having no connection with the suit, as long as a shipper obtains jurisdiction over the ship. The possibility of exempting this option contractually is doubtful by virtue of 46 U.S.C. § 1303(8) of COGSA, which declares all contractual exception clauses to be "null and void and of no effect."²³ Section 1303(8) developed as a result of the growth of contractual exception clauses that prevented shippers from recovery because of their lack of access to evidence against carriers.²⁴ Finally, as the Ninth Circuit (as seen in *Sunkist Growers, Inc.*) is more favorable to shipper plaintiffs, it is likely to see a dramatic increase in the number of such suits on its docket.²⁵ This not only poses administrative problems for the Ninth Circuit, but it is also unfair to litigants who properly bring other types of lawsuits in this jurisdiction.

Given the destructive consequences of the failure to come to a resolution of this circuit split, it has been suggested that the Supreme Court has not taken any action because COGSA conflicts such as the one presented are not as easily identifiable as other types of conflicts.²⁶ Additionally, the Supreme Court has been faulted for permitting COGSA conflicts to remain unresolved while it burdens its workload with cases whose importance do not parallel that of COGSA cases.²⁷ As a result of COGSA conflicts suspending in a state of uncertainty, the Supreme Court has also been accused of ham-

19. Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1271 (1989).

20. *Id.* at 1268.

21. *Id.*

22. *Id.*

23. 46 U.S.C. app. § 1303(8) (1988).

24. Hohenstein, *supra* note 5, at 1153.

25. Sturley, *supra* note 19, at 1268.

26. *Id.* at 1265.

27. *Id.* at 1275.

pering the quality of justice via its self-imposed workload crisis.²⁸

II. SECOND V. NINTH CIRCUITS

A. *Asbestos Corp. Ltd. v. Compagnie De Navigation Fraissinet et Cyprien Fabre*

In *Asbestos Corp.*, a fire which broke out in the engine room of the defendant's ship was caused by a defective oil pump.²⁹ The ship was crossing the North Atlantic en route from the United States and Canadian ports on the Great Lakes to European ports. All of the ship's firefighting equipment was either located in or needed to be operated from the engine room; usage of such equipment was thus impossible. As a result, the fire spread to the ship's cargo.³⁰

The District Court concluded that the defendant carrier did not exercise due diligence before and at the beginning of the trip to make the ship seaworthy.³¹ The court reasoned that the fire would not have spread to the cargo if the firefighting equipment had not been located in the engine room. Additionally, the court found the lack of firefighting equipment was a "design or neglect" and "privity or knowledge," which amounted to a showing of personal negligence on the part of the defendant.³² Therefore, the defendant was not exonerated under 46 U.S.C. § 1304(2)(b) and 46 U.S.C. § 182.

The Second Circuit affirmed, but its decision was not based on the defendant's failure to exercise due diligence to make the ship seaworthy. While it recognized due diligence and "design or neglect"/"actual fault or privity" as two different standards, the Second Circuit based its decision on the rationale that the defendant was not exempt from liability only because of his own personal negligence. Therefore the *Asbestos* court did not incorporate the due diligence standard into 46 U.S.C. § 1304(2)(b) and 46 U.S.C. § 182, as neither statute expressly nor implicitly requires such a standard.

Support of the Second Circuit's interpretation came from the Fifth Circuit in *Westinghouse Elec. Corp. v. M/V "LESLIE LYKES"*.³³ The *Westinghouse* court held that the burden of proof under the fire exemption clause was such that the carrier first needs to show the damage was caused by fire.³⁴ The burden then shifts to the shipper to prove the fire was caused by the "design or neglect"/"actual fault or privity" of the carrier.³⁵ In its decision, the *Westinghouse* court referred to *Earle and Stoddart v. Ellerman's Wilson Line*, a United States Supreme Court case which defined "neglect of . . . owner" as personal negligence of the owner.³⁶

B. *Sunkist Growers Inc. v. Adelaide Shipping Lines, Ltd.*

In this Ninth Circuit case, a cargo of the plaintiff shipper's fresh lemons was

28. *Id.*

29. 480 F.2d at 670.

30. *Id.* at 671.

31. *Id.*

32. *Id.*

33. 734 F.2d 199 (5th Cir. 1984).

34. *Id.* at 206.

35. *Id.*

36. 603 F.2d at 1329.

loaded aboard the "Gladiola" for refrigerated transportation to Poland.³⁷ Before departure, the plaintiff was informed the ship would stop in Ecuador to load bananas. The plaintiff did not object. When the ship arrived in Ecuador, a fire broke out in the engine room. The fire was caused by the separation of a fitting and ferrule in the low pressure diesel fuel line; the result was the spraying of fuel oil onto the hot surfaces of two generators.³⁸ An extra third engineer tried to stop the flow of oil but failed. The second engineer was also unsuccessful. The flow of oil, however, could have been easily stopped by turning a valve or pulling a nearby pin.³⁹ The fire was not extinguished until three days later. Although the lemons were not damaged, the refrigeration system was destroyed. Local refrigeration storage or markets could not be found, which resulted in the distribution of the lemons to the people.⁴⁰

The District Court found the shipowner was exonerated from liability under 46 U.S.C. § 182 and 46 U.S.C. § 1304(2)(b).⁴¹ The court held that while modifications of existing equipment could have been undertaken, even a prudent carrier would not have made such modifications.⁴² Furthermore, the court placed the blame on the ship's crew rather than on the shipowner.

The Ninth Circuit reversed and held the shipowner was required to use due diligence to make his ship seaworthy before he could claim exoneration under 46 U.S.C. § 182 and 46 U.S.C. § 1304(2)(b). The shipowner failed the due diligence standard by failing to use a crew properly trained in fire fighting.⁴³ Therefore the Ninth Circuit incorporated a due diligence standard under 46 U.S.C. § 182 that must be satisfied before exemption could be obtained.

To date there is no case that supports the Ninth Circuit's interpretation. Furthermore, no case prior to *Sunkist* has ever incorporated a due diligence standard.⁴⁴ The Ninth Circuit's decision, additionally, has generated scholarly criticism. For example, it has been argued that due diligence has no applicability to 46 U.S.C. § 182.⁴⁵ The Fire Statute's only exception is limited by the words "design or neglect." If due diligence is to be incorporated, it must be done through COGSA, which leaves 46 U.S.C. § 182 intact through the language in 46 U.S.C. § 1308. Even if due diligence is incorporated into 46 U.S.C. § 182 via COGSA, it would still be uncertain as to whether 46 U.S.C. § 1304(2)(b) itself incorporates due diligence as currently there is no such language in this section.

Additionally, the Ninth Circuit has been claimed to have erroneously relied on a Canadian case, *Maxine Footwear Co. v. Canadian Government Merchant Marine Ltd.*,⁴⁶ as persuasive authority.⁴⁷ Canada has no Fire Statute but a fire exemption clause in the Canadian counterpart to COGSA.⁴⁸ Therefore, *Maxine Footwear* would

37. 603 F.2d 1327 (9th Cir. 1979).

38. *Id.*

39. *Id.*

40. *Id.* at 1330.

41. *Id.*

42. *Id.* at 1331.

43. *Id.* at 1332.

44. Calamari, *supra* note 1, at 435.

45. *Id.* at 442.

46. [1959] A.C. 589 (P.C.) (Can.).

47. Calamari, *supra* note 1, at 442.

48. *Id.*

be persuasive authority only with respect to 46 U.S.C. § 1304(2)(b).⁴⁹ This makes *Sunkist* incomplete and unsound.

III. STATUTORY REVISIONS TO SUPPORT A BETTER INTERPRETATION

It has been recommended that the seaworthiness/due diligence requirement of COGSA and the personal aspect of the fire exemption clause (showing that the negligence occurred while the vessel was in the carrier's control; carrier's actual fault or privity) may be balanced against one another without subordinating one to the other. This may be achieved by limiting the due diligence requirement such that the carrier would have the burden of proving the due diligence of those whose conduct would be imputed to the carrier, i.e., directors, managing agents, and shoreside supervisors,⁵⁰ as the exercise of due diligence is non-delegable. Therefore, the carrier would need only show the lack of a connection between unseaworthiness and the carrier's top personnel.⁵¹ The shipper would bear the burden of proving negligence leading to fire while the vessel was in the carrier's control.⁵² By allocating the burden of proof in this manner, the positions of both the carrier and shipper are given equal weight and credence.

To reflect this balanced allocation of proof and to avoid future inconsistencies in statutory interpretation, the fire exemption clause as it now appears should be taken out of 46 U.S.C. § 1304(2)(b). A statutory revision would distinguish this fire exemption by placing it into its own category, after 46 U.S.C § 1304(6) "Inflammable, explosive or dangerous cargo":

46 U.S.C § 1304(7) Fire. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from fire, unless

- a) the shipper shows such loss or damage arising or resulting from fire was caused by the actual fault or privity of the carrier by proving that the carrier's negligence leading to the fire occurred while the vessel was in the carrier's control, and
- b) the carrier fails to prove the exercise of due diligence to provide a seaworthy vessel by failing to prove the absence of a direct connection between the fire damage and the carrier's top-level personnel, such as supervisors, directors, managers, and agents.

Therefore, the shipper will prevail if he proves negligence leading to fire occurred while the ship was under the carrier's control *and* if the carrier fails to prove absence of a connection between the fire and the carrier's personnel. In contrast, the carrier will prevail if the shipper fails to prove negligence leading to fire occurred while the ship was under the carrier's control *and* if the carrier proves absence of a connection between the fire and the carrier's personnel. Each party has his own burden of proof to bear, and failure to carry such burden will result in liability.

In the interest of COGSA's purpose to achieve and maintain competitiveness between the United States and foreign shipping industries, the above statutory revision will probably encourage investment in shipping and promote more contractual relationships between United States shippers and carriers, as shippers will no longer be the

49. *Id.*

50. Hohenstein, *supra* note 5, at 1166.

51. *Id.*

52. *Id.*

only party to bear the burden of proof, and fairness is dictated in the interest of resolving shipper-carrier disputes. The economic consequences that will ensue from this increased investment will be universal. Furthermore, as this revision represents a unification of rules in United States commercial maritime transactions, such unification may have far-reaching and significant global effects in the effort to achieve uniformity of interpretation in maritime law liability.

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