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The Intermodal Lead

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

The Politics of Piracy: Contemporary U.S. Law Addresses a Timeless Issue

By Steve Block

Amidst news-grabbing assaults on cargo vessels near Somalia over the past couple years, many U.S. maritime lawyers have found themselves fielding cocktail party inquiries about law governing "piracy" from friends and colleagues. America's romanticized notion of yesteryear's swashbuckling folk heroes has long since transcended mythological proportions and has been ingrained in our sense of daring and adventure. What better way to lull a wide-eyed child's bedtime imagination than to read stories of bandana-headed, patch-eyed, hook-armed, peg-legged buccaneers? And what's really been in the headlines since Blackbeard's day to change that notion?

The fact is that only in the rarest situation will a maritime attorney ever encounter a piracy issue in contemporary practice. Few of us have ever needed to learn the topic's specifics and what legal recourses are available when it is encountered. That's not to say incidents of piracy are rare or inconsequential. To the contrary, ocean muggings have been around forever. It's just that few instances produce civil or even much criminal litigation in the United States. Roving sea bandits just don't make good defendants from which to try to collect court judgments.

But when significant trades, life and limb of crewmembers, and regional stability are assaulted on an ongoing basis, the topic becomes newsworthy, even if an understanding of its legal underpinnings has minimal utility to legal practitioners and the actual movement of freight by our industry. And besides, transportation law commentators like this one like to have fun every once in a while. Thus, this article.

The U.S. District Court for the Eastern District of Virginia recently issued a fascinating opinion that explains the law of piracy, presenting the history of how America and the international community treat this perennial crime from the jurisprudential perspective. The effects of rampant piracy off Somalia's coast on commerce and security is well known, but the incident at issue here involved not the deftest of sea-going bad guys the millennia have seen. In this case, a group of thugs, firing assault rifles from their skiff, approached what they believed to be a cargo-laden merchant vessel fit for looting. Imagine their surprise when they learned their intended prey was the USS NICHOLAS, a heavily armed U.S. Navy frigate. They soon found themselves stateside represented by counsel tasked to defeat Uncle Sam's charge of piracy.

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The Politics of Piracy: Contemporary U.S. Law Addresses a Timeless Issue

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Piracy clearly is on the U.S. books as a federal crime punishable by life imprisonment. But was this an act of piracy? Does a failed attempt by hapless hooligans who mistakenly target a warship with intentions of plundering a commercial vessel count as an act placing its perpetrators within the ranks of some of the world's most despised criminals, or as the court phrased it, "*hostis humani generis*-enemies of all mankind?" To answer that, one must first define what piracy is.

Those U.S. law books state that the "crime of piracy" is one "defined by the law of nations …," or what's known as "general piracy." Actually, there's a second species called "municipal piracy," which involves violations of a country's specific domestic laws, but that hasn't come up much in the last couple centuries. Congress has enjoyed power since 1787 under the "Define and Punish Clause" of the U.S. Constitution's Article I to characterize the crime and penalize those who commit it. Statutory wording places international understanding, consensus and application of piracy concepts at the heart of what constitutes a piratical act. Uncle Sam is empowered to enforce violations of such law committed by or against his citizen subjects anywhere on Earth based on the internationally recognized doctrine of "universal jurisdiction."

Federal case law narrows the jurisdictional doctrine's applicability to events including "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." But that restriction alone doesn't make the extent of the U.S.'s jurisdictional grasp crystal clear. How far does it go, and what constitutes an act of "piracy" that would implicate it? To answer that, the court started with Congress's first piracy legislation, the Act of 1790, which defined "piracy" to include an act of robbery, which most attacks did and still do. A couple subsequent legislative pronouncements through 1820 (broadening enforcement and encompassing slave trade activities), and codification of the law at 18 USC §1651, *et seq*, followed.

This crime's nearly unique feature is that its definition derives from what the international community considers "piracy." In 1958, the United Nations adopted the Geneva Convention on the High Seas which broadly includes any "acts of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft …" with certain qualifiers. In 1982, the U.N. adopted the United Nations Convention on the Law of the Sea (UNCLOS) which amended the 1958 treaty. While the U.S. has not signed or ratified UNCLOS because of disagreement with its deep seabed regime, it has accepted and applied most of the treaty's other provisions as international law.

In this context, the defendants asked the court to dismiss the charges of piracy against them on the ground that traditional and historic notions of the crime require a "robbery" at sea. While they may have intended to loot a merchant ship, the misguided perpetrators urged their innocence because, hey, we didn't steal anything! U.S. case law since the early 19th Century has included an unlawful taking of property as a definitional element of piracy, and unchanged law remains in force. The government responded by pointing to a new era whose evolved understanding of "piracy" doesn't necessary include plunder.

In resolving this question, the court asked whether the definition of "piracy" can "evolve" over time without legislative action in a way that would empower the U.S. to punish violators for acts that essentially "have become" piracy. The defendants pointed out that U.S. criminal statutes must be interpreted according to their meaning *when written*, and we can't have that meaning, and therefore what constitutes a crime potentially punishable by death, changing willy-nilly based on amorphous international trends.

Whenever you affix "international norms," which are subject to, if not defined by, the vicissitudes of progressively developing human nature to a term's meaning, you almost necessarily embrace an evolving understanding. For better or worse, technologies, societies, cultural interrelationships, international treaties and the law itself are fluid. True, a precept of law, especially criminal law, is that society should enjoy the benefit of clearly enunciated rules which a particular court or jury can't easily alter based on divergent attitudes, understandings and passions. That's a big reason why most laws aren't crafted to be subject to circumstances not discernible to potentially affected players at the time they consider how to behave.

But piracy is different, if not altogether unique. U.S. law is specifically designed to interpret was constitutes piracy based on evolving world views for a reason. This crime isn't conceivably subject to unwitting commission by a well-meaning innocent. You don't accidentally attack, illicitly board, or certainly fire upon a vessel not knowing that your behavior is abhorrent. Like most all nations, the U.S. has historically chosen to side with mankind's disdain for ocean banditry, and for centuries we've been prepared to defer to the community of nations to determine our legal application of this crime's parameters.

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A review of hundreds of years of federal case law supports this determination. For instance, it used to be that the slave trade was business as usual throughout the world, and carriers of human cargo enjoyed the same legal protection as any. Precedents and common sense show that such trends can be universally rejected by the law of nations, and thus become illegal acts of piracy without promulgation of specific new law or treaties.

Yes, the definition of piracy can and does evolve based on what the world perceives it to be, and the court ruled accordingly. Courts must interpret, perhaps on an *ad hoc* basis, whether a particular event constitutes a piratical act. That doesn't mean judges get to create new law as they go along, a notion the law rejects. As the Eastern District of Virginia put it, "[i]nstead, it means only that courts are recognizing that which has already been accepted by an overwhelming majority of countries as the definition of piracy, and courts must be careful to do so only when it is, in fact, clear that an overwhelming majority of countries have definitively accepted such a definition." This is embodied in the somewhat nebulous concept of "customary international law," which includes rules and precepts the world must "universally abide by, or accede to, out of a sense of legal obligation and mutual concern." Trends in treaties (such as UNCLOS), as well as the activities of courts and other tribunals the world over, suggest the world wants a vessel assault with intent to commit robbery to be an act of piracy even if nothing is taken. UNCLOS's adoption by Somalia and all countries bordering it strongly supports this conclusion in the context of the alleged act at issue here.

These defendants will stand trial in the U.S. They should not expect to find the court's solace in any romanticized American notions of adventurous pirates. They would not likely fare better anywhere else. ♦

Ref: United States v. Hasan, et al., 2010 WL 4281892 (E.D. Va. 2010).

Recent Developments in Motor Carrier Law

By Steve Block

No vicarious liability for broker who did nothing more than hire trucker and provide a trailer.

Brown v. Temain, et al., 2010 WL 5391578 (N.D. Ind. 2010)

A shipper booked interstate transit of freight through broker CDN Logistics, which engaged motor carrier Sunny Express. While Sunny Express's driver, Ionu Temain, was en route, he collided with another combo driven by Jason Brown. Brown suffered personal injuries and sued Temain, Sunny Express and its owner, Temain, and the shipper in the Northern District of Indiana. CDN moved for summary judgment.

The court granted CDN's motion. CDN simply had no control over or other connection with Temain, including selection of him as a driver. While CDN provided the trailer, Temain used his own tractor, and nothing implicated the trailer as a cause of the accident.

Brown tried to argue negligent entrustment, but, as CDN argued and the court agreed, nothing suggested that Temain "was incapacitated or incapable of using due care. … [E]ven assuming Temain was somehow incapacitated or incapable of using due care, there is no evidence that CDN had any knowledge … of any incapacity." Brown also tried to argue that CDN had an obligation to insure the trailer since it provided it for interstate transportation. But so what? That doesn't implicate CDN as a potentially liable party, and deficiency of insurance coverage wasn't at issue. Courts have gone in different directions regarding intermediary liability for carrier accidents, but this case presented the court with nothing as a basis to hold the broker liable. Dismissal here was appropriate under even the most expansive broker liability analysis.

Notwithstanding legislative history and case law, Carmack doesn't provide for attorney fee awards to shippers of commercial freight.

Osman v. International Freight Logistics, Ltd., et al., 2011 WL 10058 (6th Cir. 2011)

Michael Osman bought a ceiling lamp made of opaline glass and brass for his New York office and engaged surface freight forwarder International Freight Logistics ("IFL") to arrange transit of it from

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Miami. IFL retained motor carrier Towne Air Freight ("TAF") to make the haul. The lamp was destroyed in transit.

Osman sued IFL and TAF in Michigan state court and the defendants removed the action to the Eastern District of Michigan. TAF was dismissed out, but IFL was found liable to Osman for the lamp's value. However, the trial court denied Osman's motion for an attorney fee award.

Osman appealed to the Sixth Circuit, arguing that 49 USC §14708(d) authorizes fee awards to successful cargo claimants. IFL pointed out that this statute's own terms, as well as a legislative note affixed to it, limit its application exclusively to household goods shippers.

But a 2001 Sixth Circuit decision held that "the legislative history does not clearly indicate that Congress intended the fee-shifting provision of section 11711(d) to apply solely to the household goods moving industry." The trial court had asked for additional briefing on that issue and concluded it didn't change the result. The Sixth Circuit agreed and affirmed. Section 11711(d) was moved to §14708(d) as part of the Interstate Commerce Commission Termination Act in 1995. In 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act which defined in detail "household goods motor carrier" and specified that provisions of Title 49 "that relate to the transportation of household goods apply only to a household goods motor carrier …" While this provision didn't specifically abrogate the earlier Sixth Circuit decision, it's pretty darn clear.

Additionally, IFL was a freight forwarder and not a motor carrier. While forwarders can be liable as carriers, IFL would have to have forwarded households goods to be liable for Osman's attorneys' fees.

… and neither a state's insurance bad-faith law nor 49 USC §14704 authorizes attorneys' fees in cargo litigation (but 49 CFR §370 does provide a private right of action).

Viasystems Technologies Corporation, LLC v. Landstar Ranger, Inc. et al., 2010 WL 5173163 (E.D. Wis. 2010)

Shipper Viasystems sued a series of intermediaries and carriers to recover damages related to a damaged press shipped in interstate transit. Viasystems also apparently took umbrage at a lax investigation Landstar allegedly performed of the loss. The matter was removed to the Eastern District of Wisconsin. There, the defendants moved to dismiss Viasystems's claims for attorneys' fees and for defendants' failure to undertake an investigation and respond to the shipper as mandated by 49 CFR §370.

Carmack, codified within ICCTA's provisions governing cargo liability at 49 USC §14706, axiomatically preempts state and common law causes of action. It contains no provision for the award of attorneys' fees. Another ICCTA provision at 49 USC §14704 does allow for fee awards when a carrier or broker "does not obey an order of the Secretary [of Transportation] or the [Surface Transportation] Board." Viasystems argued that its fee request was pursuant to §14704. Huh? The court politely agreed with Landstar that this argument was "misplaced."

But Wisconsin, like many states, socks insurers pretty hard when they fail to adequately investigate and respond to claims from their policyholders. Citing the Badger State's insurance bad faith statute and the U.S. Supreme Court's 1914 ruling in Missouri, Kansas & Texas Railway Co. of Texas v. Harris, Viasystems (mistakenly) argued that state law claims for attorneys' fees are allowed in Carmack claims when state statutes authorize them. The court easily dismissed that one too. Hey, Landstar's not an insurance company.

But Viasystems did carry the day in surviving summary judgment on its claim that 49 CFR §370 does indeed provide a private right of action. While the feds can come down on a carrier that shirks its investigation responsibilities, that reg, like others in its part, is interpretational and supportive of Carmack. Because Carmack provides private rights of action, it must follow that its implementation regs do as well.

You have to be a carrier for Carmack to apply, even if you're a carrier.

Daily Express, Inc. v. Maverick Transportation, LLC, 2010 WL 5464452 (M.D. Pa. 2010)

Shipper PPG Industries wished to have a cargo of glass products transported from Pennsylvania to Massachusetts. Maverick Transportation, a licensed motor carrier, was engaged to load and secure the glass product onto carrier Daily Express's truck. But that's all Maverick apparently did, even though it contended it issued a bill of lading to PPG. Daily Express made the haul. During transit, the glass fell within Daily Express's truck and broke. Both Maverick and Daily Express claimed that PPG engaged them to make the haul.

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Daily Express sued Maverick in Pennsylvania state court and Maverick removed to the U.S. District Court for the Middle District of Pennsylvania. It then moved to dismiss Daily Express's state and common law claims as preempted by Carmack. The motion was denied.

Only motor carriers and forwarders are shielded by Carmack. All Maverick did, and apparently contemplated doing, was load the glass. A bill of lading and alleged direct relationship with the shipper notwithstanding, cargo loading does not rise to the level of motor carrier activity as defined by 49 USC §13102. True, had Maverick actually hauled the load, its loading activities may have been covered by Carmack as "related to the movement of property." The allegations against Maverick, however, did not include Maverick actually making a transport, and evidence in the record didn't suggest otherwise. Even though Maverick is a carrier, it wasn't acting as one in this transaction. Carmack doesn't apply to it here.

Carmack encompasses claim against carrier for failure to collect COD charges.

Tran Enterprises, LLC v. DHL Express (USA), Inc., 2010 WL 5064376 (5th Cir. 2010)

The Fifth Circuit recently affirmed a summary judgment order from the Southern District of Texas dismissing state and common law claims against motor carrier DHL based on its alleged failure to collect and remit COD charges for 21 shipments by its customer Nutrition Depot. The carrier asserted that Carmack governed the claim and preempted Nutrition Depot's theories of liability. DHL's Carmack-blessed, 100-buck-a-pop, limitation of liability was held effective as well.

The shipper argued that Carmack was predicated on harm to or loss of the cargo itself, which didn't happen here. Citing U.S. Supreme Court and other Fifth Circuit precedents, the court ruled that Carmack kicks in with respect to "any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination." One earlier case even addressed failure to collect COD charges in applying Carmack. This claim clearly involved such a failure. While the vast majority of case decisions address lost/damaged/delayed cargo, Carmack's language and interpretational precedents don't limit its applicability to such claims.

Nutrition Depot tried to argue that its claims are outside Carmack because they derive from "separate harms" apart from the contract of carriage, and pointed to how conversion claims have been allowed despite Carmack's preemptive grasp when separate harms are alleged. However, there was no evidence of conversion by DHL in the record. The shipper only alleged it didn't receive payment.

Failure to name real party in interest as plaintiff is easily correctible.

Fireman's Fund Insurance Co. v. CRST Van Expedited, Inc., 2010 WL 4682367 (D. Kan. 2010)

Here's one that might be useful when a named plaintiff hasn't quite jumped through all hoops needed to gain the right to pursue alleged claims in a federal lawsuit. Fireman's Fund insured a cargo of handsets that were stolen en route. The insurer paid its shipper policyholder and received a "loan receipt" before proceeding with a subrogation action against a carrier. The loan receipt provided that it could be "converted to a subrogation receipt at any time," which would empower Fireman's Fund to go after an ultimately responsible party, but the insurer never effected the conversion.

The carrier moved to dismiss on that ground, as well as limitation of liability arguments. The court denied the motion. Even though Fireman's Fund was not yet the real party in interest, Fed.R.Civ.P. 17(a)(3) mandates that a court must allow the party a reasonable time "to ratify, join, or be substituted into the action." Thus, summary judgment was not the appropriate remedy, at least not until Fireman's Fund had a reasonable opportunity to correct its paperwork. The limitation of liability arguments required additional briefing for the court to consider. ♦

Independent Contractor Status Remains a Hot Topic in 2011

By Janelle Milodragovich

The battle over proper classification of owner-operators continues on multiple fronts nationwide. First, the Ninth Circuit will consider the "employee-only" mandate in the ongoing battle between the American Trucking Associations (ATA) and the Port of Los Angeles. Although the embattled port truck program originally was developed as a means to bar older polluting trucks, Los Angeles port officials also mandated that hauling companies assign employees for their port work rather than independent contractors. The ATA continues to challenge the "employee-only" mandate, with the Ninth Circuit expected to issue a decision on the matter later this year.

Litigation involving independent contractor classification continues in various state courts as well. In a case involving independent contractor drivers, a Washington state appeals court recently held that the FLSA's "economic realities" test was properly applied to claims under the Washington Minimum Wage Act. In a decision issued on January 31, 2011, a California state appellate court held that port truck drivers operating as independent contractors might properly be classified as "employees" where the drivers were employed pursuant to a collective bargaining agreement (CBA) between the defendant trucking company and the Teamsters.

Outside the courtroom, employee advocacy groups continue to press for wide-scale reclassification of independent contractors. A recent study of the U.S. port trucking industry found that the 110,000-plus drivers at the nation's ports are highly vulnerable to misclassification as "independent contractors." The widely publicized pro-union study – conducted by union advocacy coalition Change to Win, the National Employment Law Project, and Rutgers University – comes as the Obama administration continues to utilize independent contractor misclassification as a means to boost federal revenue.

The study surveyed more than 2,000 drivers at seven major ports, and found that over 80 percent of port drivers are classified as independent contractors. The highly-concentrated number of independent contractors makes port hauling one of the most contractor-intensive industries in the U.S., and the authors of the study claim that the model results in lost tax revenue, unsafe operations, and environmental hazards.

Consistent with the authors' pro-labor message, the study recommends that ports adopt uniform rules requiring trucking companies to employ drivers and take ownership responsibility for the trucks they operate. The study also calls on regulatory agencies, such as the IRS and Department of Labor, to implement comprehensive, multi-agency enforcement strategies.

So what can you do to make sure your owner-operators are properly classified? Enforcement agencies and courts – both state and federal – use different tests to determine whether independent contractors are properly classified. Given the increasing scrutiny and the potentially disastrous penalties that could result from state and federal enforcement tools, employers should consider conducting their own compliance audits with the assistance of legal counsel. ♦

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