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Couthino, Caro and Company, Inc. and Fireman's Fund Insurance Co. v. M/V SAVA et. al., United States Court of Appeals, Fifth Circuit, 28 June 1988, 849 F.2d 166

COUTHINO, CARO AND COMPANY, INC. AND FIREMAN'S FUND INSURANCE CO. v. M/V SAVA ET. AL.
United States Court of Appeals, Fifth Circuit, 28 June 1988
849 F.2d 166

A provision in the bill of lading referring to COGSA does not provide constructive notice of the $500 per package limitation of liability to a shipper.

FACTS: In December of 1983, Couthino, Caro and Company, Inc. (Couthino), a steel importer, purchased 420 coils of steel from a manufacturer in Spain for shipment to New Orleans, Louisiana. The steel was loaded aboard the M/V Sava in Spain and stowed in holds four and six. Two marine surveyors observed and recorded the loading.

During the voyage, inclement weather conditions necessitated ventilation of the cargo by opening the holds as the M/V Sava lacked a forced ventilation system to control the dewpoint in the holds.

When the cargo was discharged in New Orleans in February, the coils evidenced varying degrees of rusting. A clearly defined waterline on the coils from hold four and standing water in hold six, indicated the presence of seawater in both holds. After two of Couthino's buyers received their portion of the shipment and complained of heavy rust damage, Couthino collected the coils at a warehouse in Chicago. Examination of the coils suggested flooding of the holds during the voyage and carriage of the cargo in a moisture saturated environment. Subsequently, the damaged coils were either sold at salvage or subject to depreciation allowances.

Couthino and its insurer, Fireman's Fund, brought suit against M/V Sava for the damaged cargo in the United States District Court for the Eastern District of Louisiana. The district court ruled in favor of the shipper, Couthino, but limited the vessel's liability to $500 per coil. Couthino appealed the order regarding the limitation of liability. The owner of the M/V Sava cross-appeals, challenging the lower court's finding concerning the condition of the cargo.

ISSUE: Did M/V Sava afford the cargo shipper a fair opportunity to avoid the $500/package limitation of liability by merely adducing a provision in the bill of lading that referred to COGSA?

ANALYSIS: The Court of Appeals of the Fifth Circuit determined that the clause in the bill of lading did not provide constructive notice to Couthino of the content of COGSA's limitation of liability provision.

The court noted that the case hinged on the carrier's and shipper's respective burden of prooof under Title 46 USC §1304 (5) (COGSA). This section limits the liability of a carrier to $500 per package for loss or damages in connection with the transportation of goods unless the shipper specifies a desire to increase the cargo's valuation in excess of that amount.

In order to benefit from this limitation provision, the courts have held that the carrier bears the initial burden of showing that it offered the shipper a fair opportunity to avoid the limitation, *General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022 (2d Cir. 1987), *cert denied*, —— U.S. ——, 108 S. Ct. 710, 98 L.Ed.2d 661 (1988). Yet, the circuits differ as to what evidence establishes a carrier's prima facie case of fair opportunity, *Wuerttembergische v. M/V Stuttgart Express*, 711 F.2d 621 (5th Cir. 1983). The district court cited prior court rulings which stated that mere incorporation of COGSA by reference is insufficient evidence of fair notice. However, the district court relied upon the erroneous premise that the Fifth Circuit had rejected the rationale of these cases. In so doing, the district court concluded that the bill of lading, which only mentioned COGSA, provided the shipper with adequate notice of §1304 (5), thereby constituting sufficient evidence of fair opportunity actually existed. The Court of Appeals for the Fifth Circuit pointed out that, in those cases cited, inclusion of COGSA was not the determinative factor. Instead, this court relied on evidence that the carrier clearly afforded the shipper the option to declare a valuation of its cargo after reviewing the various shipping rates.

In the case at bar, the bill of lading contained no such alternative. Therefore, since the carrier did not make its threshold showing, the shipper has no burden of proof and the M/V Sava is not entitled to limited liability.

The owner of the M/V Sava contended that the coils were not delivered to the ship in good condition. Couthino conversely argued that it sought damages due to the extensive rusting of the steel while aboard the M/V Sava and not for minor manufacturing defects. In *Camemint Food Inc. v. Brasileiro*, 647 F.2d 347, 355 (2d Cir. 1981) the court stated that "Plaintiff must show that the goods were delivered to the carrier free of the damages for which recovery is sought."

In this instance, expert testimony indicated that the steel was free of corrosive rust when delivered to the M/V Sava. The district court correctly reasoned that the coils were in good condition when the carrier received them and rejected the owner of the M/V Sava's claim.

The Court of Appeals affirmed the judgment of the district court as to finding the M/V Sava liable, reversed the judgment as to the limitation of liability and remanded the case for a determination of damages. This decision thus brings the Second and Fifth Circuit into agreement on this issue.

Susan Lysaght '91

FLOYD v. LYKES BROS. STEAMSHIP CO., INC.
United States Court of Appeals, Third Circuit, 9 March 1988
844 F.2d 1044

Absent embalming and mortuary facilities, the burial at sea of a deceased seaman rests in the discretion of the ship's captain.

FACTS: James H. Floyd (Floyd) was a seaman aboard the S.S. Shirley Lykes, owned and operated by Lykes Steamship Company of New Orleans, Louisiana (hereinafter "Lykes"). On August 19, 1983, while the vessel was passing through the Straits of Gibraltar enroute to Canada and the United States, Floyd met his demise by heart attack. At sea and eight days from port, the captain ordered and the crew made ready a burial at sea. On the following morning, August 20th, a message was sent to Lykes in New Orleans informing management of the death and pending burial of the deceased. That afternoon the crew positioned the flag draped remains at the ships stern and, after a brief service and eulogy by the captain, Floyd slid to his watery grave. The captain informed Lykes that the burial had been completed. Prior to the burial, neither the ship nor Lykes had notified Floyd's next-of-kin of the death.

Suit was initiated by Maria Floyd (Maria), daughter of the deceased, in the District Court for the Eastern District of Pennsylvania, alleging wrongful death and improper disposition of the remains, against Lykes. The district court granted defendant's summary judgment motion and dismissed the wrongful death count for lack of evidence. As to Count two, improper disposition of the body, the district court dismissed the claim as to Maria's brothers, sisters and mother, also plaintiffs, on the grounds that only the next-of-kin may properly bring such action. Thereafter, the district court granted Lykes summary motion and dismissed the complaint. Maria appeals the dismissal of Count two as to herself only.

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