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Recovering Your Attorneys' Fees Under the Warsaw Convention

So I won my cargo claim case. Do I get to recover my attorney fees?

Our sense of fair dealing might lead us to believe that parties go into litigation on an equal footing regarding recoverability of attorney fees. The State of California certainly believes they should:

> "In any action on a contract, where the contract specifically provides that attorney's fees and costs which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the part prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."
>
> California Civil Code § 1717

Not necessarily so, according to the U.S. District Court for the Northern District of California. In *Nissan Fire and Marine Insurance Company Ltd.; Hitachi Data Systems Corp., v. BAX Global, Inc.; Cathay Pacific Airways, Ltd*, 2006 WL 1305217, May 11, 2006, the judge ruled that even though BAX may have been entitled to attorney fees if it had won, Nissan (who did win) did not have the same right of recovery.

Nissan involved a shipment damaged in transit somewhere between Plainfield, Indiana and Hong Kong. Nissan paid their insured, Hitachi, $122,645.33 for the value of the damaged cargo less a deductible of $10,000.00. Cathay Pacific settled by a contribution of $15,000.00.

The court first found that at the time of shipment, the United States had not yet ratified Montreal Protocol No. 4 to the Warsaw Convention and therefore The Hague Protocol did not apply. In other words, the original Warsaw Convention applied, with strict requirements under Article 8 for application of limitations of liability. One of the requirements was that the air waybill contain the agreed stopping places. The court ruled the air waybill failed to name the agreed stopping places, so BAX was not entitled to any limitation of liability.

The court awarded Nissan $117,645.33 in damages, plus prejudgment interest for a total of $156,184.17.

Having prevailed on the main issue in the lawsuit, Nissan of course wanted to recover its attorney fees.

The Warsaw Convention is silent with respect to attorneys' fees. Federal law provides that attorneys' fees may be awarded only if they are authorized by contract, applicable statute, or other exceptional circumstances.

The shipment moved under a BAX air waybill containing clauses giving BAX the right to recover attorney fees if it prevailed in litigation and applying California law to interpretation of the contract. Nissan argued that California Civil Code § 1717 made the right to recover attorney fees mutual. If BAX was entitled to attorney fees if it had prevailed, then Nissan should have the same right of recovery.

The court ruled, however, that Nissan's reliance on California state law was misplaced. Because federal law addresses when attorneys' fees may be awarded, the California Civil Code may not be applied to convert the attorneys' fees provision to one that is mutual. Accordingly, Nissan was not entitled to attorneys' fees.

This case is a good reminder that anticipated attorney fees—and who might end up paying them—should be considered in any settlement negotiation.

For more information on this topic, contact Martha Payne at mpayne@bfca.com or 541.764.2859.

IN THIS ISSUE:

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Transporting A Freight Claim From State To Federal Court: A Primer

One of the very first questions that any defendant should ask itself upon being served with a state court complaint arising from a freight claim is whether the case can be removed to federal court. This determination must be made promptly in light of the fact that federal law requires that such removal must take place within 30 days of being served with (or receiving notice of) a complaint.

While the issue may seem academic, removing a freight claim to federal court provides several practical defense advantages including, but not limited to, the following:

While the issue may seem academic, removing a freight claim to federal court provides several practical defense advantages…

- federal courts tend to have more extensive experience and familiarity with transportation-related disputes;
- federal courts often offer a higher quality of scholarship, particularly with respect to critical motions (often due to larger staffs of law clerks);
- the plaintiff's counsel is presumably more comfortable in state court since that is where he or she filed the action; and
- a federal jury trial requires a unanimous verdict, whereas state court juries often require less than unanimity.

As a general rule, a defendant may remove a case to federal court if a federal court would have had *original jurisdiction* over the matter. The two most common bases for original federal jurisdiction are known as "diversity jurisdiction" and "federal question jurisdiction." *Diversity jurisdiction* in federal court generally exists when the amount in controversy exceeds $75,000 and the parties to the dispute are "citizens" of different states.

Federal question jurisdiction in federal court exists when the dispute "arises under" a federal law, the U.S. Constitution, or a treaty regardless of the dollar amount involved.

While determining whether diversity jurisdiction is present is often straightforward, determining whether a plaintiff's claim "arises under" a federal law, the U.S. Constitution, or a treaty is often not nearly as clear-cut. Not every case that could have been filed in federal court is removable. As a result, determining the removability of a case based on federal question jurisdiction often turns on the mode of transportation involved in the case at hand.

Surface Carriage - Solid Ground For Removal

A motor carrier, rail carrier, or surface freight forwarder may generally remove to federal court a complaint for loss or damage to goods being transported in interstate commerce by a motor carrier or freight forwarder even when the plaintiff's complaint is merely for negligence, breach of contract, or fraud under state law. This follows from the fact that Congress intended the Carmack Amendment (specifically, 49 U.S.C. § 11706 and § 14706), which governs rail carriers and interstate motor carriers, to be the *exclusive* remedy for such claims. In other words, the fact that a federal statute, the Carmack Amendment, provides the exclusive remedy to a plaintiff claiming loss or damage to goods being transported in interstate commerce by a motor carrier or freight forwarder necessarily means that the plaintiff's claim - no matter how it is styled - "arises under" federal law. As a result, federal question jurisdiction is present, and the case is removable to federal court.

Nonetheless, Congress did carve out an exception to this general rule of removability. Recognizing that cargo claims might flood federal courts if all small shipping disputes provided federal jurisdiction, Congress enacted a statute (28 U.S.C. § 1337(a)) that provides that federal courts only have federal jurisdiction over such claims if the matter in controversy for each receipt or bill of lading exceeds $10,000 exclusive of interest and costs. While cases involving less than $10,000 are still governed exclusively by the Carmack Amendment, these cases must be litigated in a state court forum rather than federal court.

Ocean Carriage - Floating Into Federal Court

Courts are split regarding the extent to which an entity playing some role in the transportation of goods may remove to federal court a complaint for loss or damage to cargo being transported by ocean. Many courts have concluded that the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1304(5), provides the exclusive remedy to parties claiming loss or damage to cargo being transported by international water. In effect, these courts conclude that COGSA is to ocean transportation what the Carmack Amendment is to surface transportation. *See, e.g., Joe Boxer Corp. v. Fritz Transportation International*, 33 F.Supp.2d 851, 854 (C.D. Cal. 1998) (finding that removal was proper despite the fact that the complaint did not refer to COGSA or any other federal law since COGSA completely preempts the field). However, less unanimity exists on this point than with respect to the Carmack Amendment. *See, e.g., Greenridge v. Mundo Shipping Corporation* (E.D. N.Y. 1999), 41 F.Supp.2d 354 (remanding a case to state court on the

basis that Congress had not clearly manifested an intent for COGSA to completely preempt state law as to ocean carriage).

International Air Carriage - Flying To Federal Court

An entity engaged in the transportation of goods by international air carriage may remove a cargo claim to federal court even when the plaintiff's complaint is merely for negligence, breach of contract, or fraud under state law. The United States is a party to the Warsaw Convention, governing claims for loss or damage to property being transported through international airspace. Like ocean carriage, courts are divided regarding the extent to which an entity playing some role in the transportation of goods may remove to federal court a complaint for loss or damage to cargo being transported through international airspace. *Compare Shah v. Pan American World Serv. Inc.* (2nd Cir. 1998), 148 F.3d 84, 97-98 ("It is now well-established that '[a]ll state law claims that fall within the scope of the Convention are preempted.'") *with Air Express Int'l, Inc. v. Aerouias de Mexico, S.A. De C.V.*, 977 F.Supp 1191 (S. D. Fla. 1997) (remanding international air freight claim to state court because only state law claims were alleged).

In summary, do not overlook the significant advantages and availability of trying to remove a freight claim action to federal court.

For more information on this topic, contact Marc Blubaugh at mblubaugh@bfca.com or 614.223.9382.

Martha Payne Joins the Transportation and Logistics Group

Martha Payne recently joined the firm as Of Counsel in the Transportation and Logistics Practice Group and will be practicing in Lincoln City, Oregon, outside of Portland.

She represents and assists North American transportation and logistics service providers on a wide variety of transportation issues. She has extensive experience in drafting and negotiating domestic and international transportation, logistics, and supply chain management contracts. She also advises transportation providers and users of all sizes regarding cargo liability, risk management, and collection issues.

Prior to joining Benesch, Ms. Payne spent 20 years as an in-house senior attorney at Consolidated Freightways, the parent company to CF Motor Freight, one of the nation's largest less-than truck load motor carriers at the time. Consolidated was also parent company to an airfreight forwarder, a surface freight forwarder, an ocean transportation intermediary, a truck load motor carrier, and domestic and international logistics companies. At Consolidated Freightways, she was responsible for all transportation-related legal issues, including transportation contracts, cargo claims, regulatory matters and litigation management for all of the company's various entities.

Ms. Payne represented U.S. carriers on the National Law Center for Inter-American Free Trade's Sub-Committee on Uniform Liability Regime, which involved negotiations with Canadian, Mexican, and U.S. shippers, carriers, and government representatives.

She earned her B.S. from Portland State University and her J.D. from Lewis & Clark Law School.

On the Horizon

Association of Transportation Law Professionals Annual Meeting

June 11-13, 2006 | Seattle, WA

Bob Spira participated in a panel discussion on "SAFETEA: How it will Impact the FMCSA Licensing of Brokers and Forwarders." Eric Zalud delivered a presentation on "Recent Developments in Logistics and Logistics Management."

Conference of Freight Counsel

June 25-26, 2006 | Kansas City, MO

Eric Zalud and Martha Payne attended.

Eye For Transport's "Outsourcing Logistics USA 2006"

June 26-28, 2006 | Atlanta, GA

Bob Spira attended.

American Trucking Association's "Forum for Motor Carrier General Counsel"

August 6-9, 2006 | Santa Fe, NM

Eric Zalud and Marc Blubaugh will be attending.

Northeast Ohio Trade & Economic Consortium (NEOTEC) Logistics Conference

August 7, 2006 | Akron, OH

Bob Spira will speak on "Avoiding the Pitfalls in Logistics Contracting."

American Trucking Association's "Freight Claims and Loss Prevention Annual National Conference"

September 26, 2006 | Las Vegas, NV

Marc Blubaugh will be presenting "Drop Deliveries: Who's Liable For Loss and Damage?"

39th Annual Transportation Law Institute

October 27, 2006 | Denver, CO

Marc Blubaugh is serving as the Program Chair for the institute and will also be moderating a panel entitled: "After Dubai: Ports 101 for Transportation Lawyers."

For more information about the Transportation and Logistics Group, please contact one of the following:

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