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2nd Circ. Affirms Railroads' Win In Wreck Coverage Suit

By Kira Lerner

Law360, New York (August 6, 2014, 4:13 PM EDT) -- The Second Circuit on Wednesday affirmed a lower court's ruling in coverage litigation brought by two insurers seeking to hold two railroad companies liable for damaged freight from an April 2006 train derailment in Texas, finding the railroads are entitled to pass liability on to their insurers.

Hearing the cases for the second time, the appeals court panel said Nipponkoa Insurance Co. Ltd. and Sompo Japan Insurance Co. of America can't escape coverage for the cargo, which included tractors and auto parts, but also found that Nipponkoa can maintain its claim for contractual indemnification against the companies, Norfolk Southern Railway Co. and the Kansas City Southern Railway Co.

"The defendants are entitled to enforce the liability-limiting provision in the upstream carrier's bill of lading against the plaintiffs," the Second Circuit said. "However, the judgment in favor of Nipponkoa is sustained because the defendants' challenges to that judgment were waived."

The coverage dispute arises out of an April 2006 train crash near Dallas that destroyed much of the train's cargo. The insurers sued the two railway companies to recover the damages, alleging they were liable under the Carmack Amendment and saying the shipments at issue originated overseas and were governed by "through" bills of lading.

But in June 2010, the U.S. Supreme Court set a precedent for maritime law by ruling that the Carmack Amendment was inapplicable to an intermodal shipment originating outside the U.S. and performed pursuant to a single through bill of lading.

The high court's decision **made it clear** that the Carmack Amendment didn't apply to the insurers' claims, so only the state law claims moved forward. In September 2012, a New York federal judge **partially rejected** the insurers' attempts to hold the railroad companies liable because the railroads were not parties to billing documents between the freight's shipper and the insured sellers in Japan.

The federal court judge said liability limitations in the bill of lading for the shipments barred the insurers from suing any entity other than Yang Ming Marine Transport Corp., the carrier responsible for transporting the equipment. The judge held that the insurers could not assert that the railroads — which did not have a contract directly with the insured companies — met the definition of "carrier" in that bill of lading, according to the order.

When it reconsidered the case, the court then granted the railroads' motions for summary judgment on all counts except Nipponkoa's claim for damage to one shipment, for which it ruled for Nipponkoa.

The insurers appealed that decision to the Second Circuit and the railroads appealed the decision on the claim that Nipponkoa won, but on Wednesday the appeals court affirmed all of the district court's findings.

"We conclude that the district court did not violate the mandate rule when it considered the

railroads' defenses based on the exoneration clauses in the pertinent bills of lading," the Second Circuit said.

The court also rejected the insurers' arguments that the two railroads waived some of their defenses by failing to plead them in the initial rounds of summary judgment and shot down Sampo's argument that the clause that prevents the railroads from being held liable is ambiguous and unenforceable.

David Maloof, counsel for the insurers, said this opinion is based on outdated U.S. ocean shipping laws that have not been updated since 1936.

"Unfortunately it sets back the rights of shippers, because for many years railroads could not exonerate themselves from damaging cargo, and this now allows them to be exonerated from a direct claim by a shipper in connection with an intermodal shipment, by contract," he told Law360.

Chris Merrick, who represented the railroads, said the decision is positive for the entire shipping industry.

"It stands for the idea that everybody gets what they bargained for, and this way the shipper, when it contracts with an ocean carrier or an intermediary, it gets the terms of that contract," he said. "Similarly, when a rail carrier is negotiating with its customer, the rail carrier gets the benefit of those terms too."

Nipponkoa and Sampo are represented by David T. Maloof and Thomas M. Eagan of Maloof Browne & Eagan LLC.

The railroads are represented by Paul D. Keenan of Keenan Cohen & Howard PC.

The cases are Nipponkoa Insurance Co. Ltd. v. Norfolk Southern Railway Co. et al., case number 13-3501-cv, and Sampo Japan Insurance Co. of America et al. v. Norfolk Southern Railway Co. et al., case number 13-3416-cv, both in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Linda Chiem. Editing by Brian Baresch.