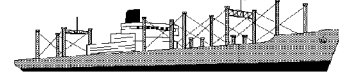




Rollin' On



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US SUP CT GOES TO MTNS TO FIND BOATS; ATTY FEES

Overland boats and trains

"This is a maritime case about a train wreck." That is the opening sentence of Justice Sandra Day O'Connor's unanimous opinion of the U.S. Supreme Court earlier this month in a case involving a shipment by sea, followed by overland carriage by train. The movement was arranged by a freight forwarder which was hired by the shipper in Australia. The bill of lading designated Sydney, Australia as the port of loading, Savannah, Georgia as the port of discharge, and Huntsville, Alabama as the destination.

The bill of lading relied upon COGSA (Carriage of Goods by Sea Act) in providing a \$500 per package limitation. The parties were free to negotiate a higher level of liability but did not do so. The bill of lading also provided that its provisions applied to all downstream parties. The federal district court (trial court) ruled in favor of Norfolk Southern. The 11th Court of Appeals reversed in a split decision (sounds like boxing).

The Supremes reversed and ruled in favor of NS. The court said that although it's natural to think between the "tackles" (port to port), the shore is now an artificial place to draw the line. Applying the so-called Himalaya rule, the name from a prior case, the court held that the provisions of the bill of lading did in fact work to NS's benefit.

Attorney Fees: Always a favorite.

OK, let's get this out of the way, no one likes to pay attorneys fees. The only thing worse is to have to pay for not only your own attorneys fees, but the fees of your opponent as well. By

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law, the only time that a court will award attorneys fees is when there is an attorneys fees provision in a contract, or when there is a pertinent statute. If both of those things are missing, then you're out of luck if you're the one who is suing, or, conversely, you are in luck if you are being sued. Counterclaims can complicate the situation but for now we'll keep the scenario simple.

As a general rule, there is no statute that awards attorneys fees in contract disputes, which means that if there is no attorneys fees provision in the contract, then attorneys fees won't be awarded. However, a few years ago the legislature added a statute for smaller claims. First a little history.

Historically, in Oregon there has been a statute on the books regarding attorneys fees in small "tort" cases, such as traffic accidents. The current limit is \$5,500. The way it works is that if you have a claim for \$5,500 or less and you make a proper written demand, you can get attorneys fees if the opposing side does not make an offer that equals or exceeds the amount eventually awarded. For example, if you make a demand for \$4,000 and you are awarded \$3,000 and the other side either ignored your demand or offered you less than \$3,000, then you get attorneys fees.

The reverse is not true. If the other side offered you more than was awarded, the opposing side does not get attorneys fees. In that case no fees are awarded to either side.

Until recently, this remedy regarding attorneys fees was limited to tort

cases, usually where there is some negligence involved, as opposed to contract cases. A few years ago the guys and gals in the legislature added a new attorneys fees statute pertaining to contracts. It has the same \$5,500 limit, and the same notice provision. It applies if there is no attorneys fees provision in the agreement.

As an aside, there has always been a statute stating that if there is a one-sided attorneys fees provision, which applies only for the benefit of one side, then by law it applies to both sides.

The current situation for contracts, and for torts for that matter, is that you are in a better spot in some respects if your claim is for \$5,500 instead of, for example \$7,000, since it could cost you more than \$1,500 in attorneys fees to pursue your claim in court. In fact, you may want to waive off the portion above \$5,500 in order to take advantage of the statute.

There is no limit (other than "reasonableness") on the amount of attorneys fees that may be awarded, so you could be awarded more in attorneys fees than the amount of the claim. I once saw a \$2,800 attorneys fees award on a \$900 wage claim. The idea is to force people to evaluate their claims and act accordingly. If you're the one being sued and even if you believe strongly in your case, it is sometimes prudent to hedge your bet and make an offer that you believe protects you. After all, you are only required to make the offer (before the lawsuit is filed), not that it be accepted by the other side.

Of course, it helps if the other side actually has the money to pay the award.

That's all for now. Until next time, keep the cargo *rollin'!*

The Obligatory Disclaimer

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 25 years and emphasizing transportation law, business law and related litigation.