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Briefs and Other Related Documents

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
BORDEAUX WINE LOCATORS INCORPORATED, Plaintiff /Plaintiff-Appellant/Plaintiff-Appellee,
and
ALBANY INSURANCE COMPANY, Plaintiff,
v.
MATSON NAVIGATION COMPANY, Defendant-Appellee/ Defendant-Appellee/Cross-Defendant-Appellant,
v.
HAPAG-LLOYD AKTIENGESSELSCHAFT; Hapag-Lloyd (America), Incorporated, Defendants-Appellants/Defendants/D efendants-Cross-Claimants-Appellees.
Nos. 97-35581, 97-35587, 97-35643.
D.C. No. CV-95-01839-TSZ.

Argued and Submitted April 14, 1999.
Decided June 8, 1999.

Appeal from the United States District Court for the Western District of Washington, Thomas S. Zilly, District Judge, Presiding.

Before PREGERSON and THOMPSON, Circuit Judges, and KELLEHER, [FN2] District Judge.

FN2. The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

****1** Because the parties are familiar with the factual and procedural background of this case, we do not recount them here except as necessary to clarify our decision.

OVERVIEW

To decide this appeal, we address seven issues and conclude that:

1. The district court erred by denying Matson's January 18, 1996, motion for summary judgment against Bordeaux. [FN3]

FN3. Our resolution of this issue eliminates our need to consider other issues raised by the parties on appeal

because those issues are only relevant if Bordeaux is not precluded from suing Matson. Those issues are: (a) whether the district court erred by holding that COGSA applied to Bordeaux's loss; (b) whether the district court erred by holding that the bill of lading Hapag-Lloyd issued Bordeaux, rather than the bill of lading Matson issued Hapag-Lloyd, governed Matson's potential liability to Bordeaux; and (c) whether the district court erred by permitting Hapag-Lloyd to prosecute against Matson the claim Bordeaux had assigned to Hapag-Lloyd.

2. The district court did not err by finding that both Hapag-Lloyd and Matson proximately caused Bordeaux's loss.

3. The district court did not err by concluding that Matson was required to indemnify Hapag-Lloyd according to the terms of the Connecting Carrier Agreement.

4. The district court did not err by holding that Matson's liability to indemnify Hapag-Lloyd was limited to $500 per package plus 70% of the attorney's fees and costs that Hapag-Lloyd incurred defending against Bordeaux's claim before the date that Bordeaux assigned its claim to Hapag-Lloyd.

5. The district court did not err by holding that the shipping container itself, and not each individual carton of wine, constituted a "package" for purposes of the $500 per package liability limitation contained in the bill of lading Matson issued Hapag-Lloyd.

6. The district court did not err by holding that Hapag-Lloyd's motion to have the court determine its recoverable fees and costs was timely.

7. The district court did not err by rejecting Matson's claim for indemnity against Hapag-Lloyd.

We discuss these seven issues in turn.

DISCUSSION

1. THE DISTRICT COURT ERRONEOUSLY DENIED MATSON'S MOTION FOR SUMMARY JUDGMENT AGAINST BORDEAUX

Matson moved for summary judgment against Bordeaux on the ground that Bordeaux's action violated a covenant not to sue Hapag-Lloyd's subcontractors.

The through bill of lading Hapag-Lloyd issued to Bordeaux states that "The Merchant [Bordeaux] undertakes that no claim or allegation shall be made against any Person whomsoever by whom the Carriage is performed or undertaken (*including all Sub-Contractors of the Carrier* [i.e., Matson]), other than the Carrier," and that "every such Person shall have the benefit of every right, defence, limitation and liberty of whatsoever nature herein contained or otherwise available to the Carrier *as if such provisions were expressly for his benefit."* (Emphasis added).

The district court denied Matson's motion for summary judgment because it believed that the covenant not to sue Hapag-Lloyd's subcontractors was unenforceable. Matson appeals. We reverse.

The plain meaning of the above quoted provision of the Hapag-Lloyd/Bordeaux bill of lading is that Bordeaux agreed not to bring claims against Hapag-Lloyd's subcontractors. The provision also makes clear that it is included expressly for the benefit of "Person[s]" such as Matson. Accordingly, Hapag-Lloyd's subcontractors were the intended beneficiaries of the covenant not to sue and could therefore enforce its terms, and the district court erred when it refused to enforce the covenant. [FN4]

FN4. After the district court incorrectly held that Bordeaux's covenant not to sue Hapag-Lloyd subcontractors was unenforceable, the court incorrectly determined that Matson's liability to Bordeaux was governed by the terms of the *through* bill of lading Hapag-Lloyd issued Bordeaux and not the bill of lading that Matson issued Hapag-Lloyd.
The district court should have held that a connecting carrier such as Matson can rely on liability limits

contained in the bill of lading it issues; and that a connecting carrier's liability is not governed by a *through* bill of lading to which the connecting carrier is not a party. *Cf.* Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897, 900-01 (9th Cir.1989) (allowing a carrier to rely on liability limits contained in its bill of lading in an action by a plaintiff not a party to the bill of lading "so long as the bill of lading, on its face, provides adequate notice of the liability limit and an opportunity to declare a higher value").

But we need not reach the issue whether Matson's liability to Bordeaux is governed by Hapag-Lloyd's *through* bill of lading because we hold that the *covenant not to sue* Hapag-Lloyd's subcontractors contained in the *through* bill of lading Hapag-Lloyd issued to Bordeaux precludes Bordeaux from bringing this action against Matson at all. *See* discussion of issue 1, *infra* .

2. HAPAG-LLOYD'S NEGLIGENCE WAS A CAUSE OF BORDEAUX'S LOSS

**2 The district court found that Hapag-Lloyd was 30% liable for Bordeaux's loss and that Matson was 70% liable for Bordeaux's loss. Hapag-Lloyd appeals and argues that the district court erred by finding that Matson's negligence was not the sole cause of Bordeaux's loss. We affirm.

The district court made specific findings as to the negligent conduct of Hapag-Lloyd's agents, even though the court did not specifically state why it believed this conduct was a proximate cause of Bordeaux's loss.

The district court found that Yusen Terminals, Hapag-Lloyd's agent, was negligent in using "000" as a computer designation for "no set temperature" because this practice is not an "industry standard and not widely understood by others that might have to deal with it." The court further found that Hapag-Lloyd's drayman, OK Trucking, compounded Yusen's error by filling out Matson's load plan with three zeroes.

Hapag-Lloyd argues that Bordeaux's loss "would not and could not have occurred" if "Matson had followed Hapag-Lloyd's express booking instructions," i.e., shipping the container as "dry cargo." But Hapag-Lloyd is not absolved of liability for its negligence simply because Matson's *subsequent* negligence in plugging in the container and lowering its temperature to 0<<degrees>> F, in the face of the "DO NOT PLUG IN" sign, was the immediate cause of Bordeaux's loss.

Matson's agent plugged in the container and lowered its internal temperature to 0<<degrees>> F because Hapag-Lloyd's agents Yusen Terminals and OK Trucking used the "000" code that Matson later translated as "0<<degrees>> F" and entered as such in its computer.

In light of these findings, the district court did not clearly err by finding Hapag-Lloyd 30% at fault for Bordeaux's loss.

3. MATSON MUST INDEMNIFY HAPAG-LLOYD TO THE EXTENT THAT BORDEAUX'S LOSS WAS "DIRECTLY ATTRIBUTABLE" TO MATSON'S NEGLGIENCEEEEEEEE

The district court ruled that Matson must indemnify Hapag-Lloyd "[p]ursuant to the terms of the Connecting Carrier Agreement." Matson appeals. We affirm.

Under the Connecting Carrier Agreement between Hapag-Lloyd and Matson, Matson must indemnify Hapag-Lloyd for all liabilities Hapag-Lloyd may incur which arise from damage to goods while in the possession Matson, "except such loss, damage, delay or misdelivery *which is directly attributable to the neglect or willful misconduct of [Hapag-Lloyd],* its agents, servants or employees." (Emphasis added).

The district court assigned 30% of the fault for the loss to Hapag-Lloyd because of the conduct of its agents Yusen Terminals and OK Trucking and 70% to Matson because of the conduct of its employee who plugged in the container's refrigeration unit and lowered its internal temperature to 0<<degrees>> F despite a conspicuous sign reading "DO NOT PLUG IN." Thirty percent of the loss is therefore "directly attributable" to Hapag-Lloyd, and 70% is "directly attributable" to Matson.

The district court did not err by ruling that Matson must indemnify Hapag-Lloyd for 70% of Bordeaux's loss.

4. MATSON'S LIABILITY IS LIMITED BY THE $500 PER PACKAGE LIMITATION CONTAINED IN THE BILL OF LADING IT ISSUED HAPAG-LLOYD

**3 The district court granted Matson's motion for summary judgment on the issue whether the bill of lading Matson issued Hapag-Lloyd limited Matson's liability to Hapag-Lloyd to $500 per package. Hapag-Lloyd appeals. We affirm.

Hapag-Lloyd argues that Matson did not provide it "a fair opportunity to opt out of [COGSA's $500 per package] limitation by declaring a higher value and paying a correspondingly higher freight rate." *Yang Mach. Tool Co.,* 58 F.3d at 1354.

"A carrier may limit its liability under COGSA only if the shipper is given a 'fair opportunity' to opt for a higher liability by paying a correspondingly greater charge." *Vision Air Flight Serv., Inc. v. M/V NATIONAL PRIDE,* 155 F.3d 1165, 1168 (9th Cir.1998) (internal quotation omitted).

Hapag-Lloyd argues that it did not have a fair opportunity to opt out because Matson did not issue its bill of lading until the goods arrived in Seattle. Accordingly, Hapag-Lloyd claims that Matson's liability was not limited. We disagree. "[A]ctual possession of the bill of lading with the $500 liability limit is not required before a party with an economic interest in the shipped goods can be held to the limitation." *Royal Ins. Co.,* 50 F.3d at 727; *see Carman Tool,* 871 F.2d at 900.

"So long as the bill of lading has all the necessary information, the shipper, or any other interested party, has the means of learning everything it may wish to know about the terms of the transaction." *Carman Tool,* 871 F.2d at 901 & n. 9. In both *Carman Tool* and *Royal Insurance Co.,* we refused to require actual possession of the bill of lading where "there has been a course of dealing between the parties using identical bills of lading." *Royal Ins. Co.,* 50 F.3d at 727; *see Carman Tool,* 871 F.2d at 901 n. 10.

Matson and Hapag-Lloyd entered into the Connecting Carrier Agreement in June 1994, a year before Matson shipped the cargo in this case. The Connecting Carrier Agreement contained a recital limiting Matson's liability to $500. During the ensuing year, Matson delivered numerous Hapag-Lloyd shipments between Los Angeles and Seattle. Each bill of lading Matson issued contained the $500 limitation.

Hapag-Lloyd has not raised a genuine issue of material fact with respect to being denied a fair opportunity to opt out, and we therefore affirm the district court's grant of summary judgment on this issue. *See Vessel SAM HOUSTON,* 26 F.3d at 899 (sophisticated shipper who had used carrier on previous occasions and was familiar with its bill of lading failed to raise question of material fact whether it was denied fair opportunity to opt out of limitation).

5. THE SHIPPING CONTAINER ITSELF CONSTITUTES A "PACKAGE" FOR PURPOSES OF THE $500 PER PACKAGE LIMIT ON MATSON'S LIABILITYYYYYYYY

Matson moved for summary judgment against Hapag-Lloyd on the grounds that the shipping container constituted one package for purposes of the $500 per package limitation contained in the bill of lading Matson issued Hapag-Lloyd. The district court granted the motion. Hapag-Lloyd appeals. We affirm.

**4 Hapag-Lloyd argues that each of the 1,115 cases of wine should be treated as separate "packages" for purposes of COGSA's $500 per package limit. "[W]hen the bill of lading does not clearly indicate an alternative number of packages, the container *must* be treated as a COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of 'goods not shipped in packages." ' *Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam,* 759 F.2d 1006, 1015-16 (2d Cir.1985) (emphasis added).

In the column "NO. PKGS," Matson's bill of lading indicates only the number of containers shipped and not the contents of the containers. The "NO. PKGS" column lists "3" as the number of containers. Only one of these containers is the subject of this action.

The district court did not err by granting summary judgment in favor of Matson on the issue that its liability to Hapag-Lloyd is limited to $500 for the one container Matson transshipped.

6. TIMELINESS OF HAPAG-LLOYD'S MOTION TO HAVE THE COURT DETERMINE THE AMOUNT OF ITS RECOVERABLE FEES

Matson opposed as untimely Hapag-Lloyd's motion to have the district court to determine the amount of its recoverable fees and costs. The district court held that "the Rule 54(d)(2)(B) requirement does not control fee requests that are part of a party's damages, 'such as when sought under the terms of a contract." ' Matson appeals. We affirm.

Advisory Committee Note to the 1993 Amendment to Rule 54(d)(2) states that the Rule's procedures for the recovery of attorney's fees by motion "does not ... apply to fees recoverable as an element of damages, as when sought under the terms of a contract." Fees sought under the terms of a contract "are to be claimed in a pleading," Fed.R.Civ.P. 54, advisory committee's note, and "are an element of damages to be proved at trial," Fed.R.Civ.P. 54(d)(2)(A). Hapag-Lloyd's motion for attorneys' fees, therefore, is not subject to the procedures set out in Rule 54(d)(2)(B).

The district court properly ruled that Hapag-Lloyd's motion to have the district court to determine the amount of its recoverable fees and costs was timely.

7. MATSON'S INDEMNITY CLAIM AGAINST HAPAG-LLOYD

The district court rejected Matson's indemnity claim without comment. Matson appeals. We affirm.

Matson argues that it is entitled to indemnity pursuant to Paragraph 10 of Appendix D to the Connecting Carrier Agreement between Hapag-Lloyd and Matson because Hapag-Lloyd failed to "make reasonable efforts," as required by the Connecting Carrier Agreement, "to ensure that (1) the cargo was properly described, (2) the cargo units could be handled in the usual and customary manner without damage to themselves or their contents, and (3) 'all particulars with regard to the cargo units and their contents were in all respects correct." '

But the district court found that the documents by which Hapag-Lloyd booked the shipment with Matson had nothing listed in the temperature box, and that "[t]his means the container is not to be operated." The district court further found that Hapag-Lloyd notified Matson that the cargo "was from the consignee Bordeaux Wine Locator," and that "Matson had information at the time it received the wine at its gate that the containers were listed as dry ." Finally, Hapag-Lloyd delivered the cargo to Matson with a conspicuous sign reading "DO NOT PLUG IN--NE PAS BRANCHER."

**5 Hapag-Lloyd made the "reasonable efforts" required by the Connecting Carrier Agreement. We affirm the district court's denial of Matson's claim for indemnity.

CONCLUSION

In sum, we:

1. REVERSE the district court's ruling that Bordeaux's covenant not to sue Matson was unenforceable;

2. AFFIRM the district court's ruling that Hapag-Lloyd's negligence was a proximate cause of Bordeaux's loss;

3. AFFIRM the district court's ruling that Matson was required to indemnify Hapag-Lloyd according to the terms of the Connecting Carrier Agreement even though Hapag-Lloyd was partially at fault for Bordeaux's loss;

4. AFFIRM the district court's ruling that Matson's liability to indemnify Hapag-Lloyd was limited to $500 per package plus 70% of the attorney's fees (i.e., $33,053.45) and costs Hapag-Lloyd incurred defending against Bordeaux's claim prior to the date Bordeaux assigned its claim to Hapag-Lloyd;

5. AFFIRM the district court's ruling that the shipping container itself, and not each individual carton of wine,

constituted a "package" for purposes of the $500 per package liability limitation contained in the bill of lading Matson issued Hapag-Lloyd;

6. AFFIRM the district court's ruling that Hapag-Lloyd's motion to have the court determine its recoverable fees and costs was timely; and

7. AFFIRM the district court's ruling that Matson is not entitled to indemnity from Hapag-Lloyd.

AFFIRMED in part; REVERSED in part; and REMANDED.

185 F.3d 865 (Table), 1999 WL 401658 (9th Cir.(Wash.)) Unpublished Disposition

Briefs and Other Related Documents (Back to top)

. 1998 WL 34104848 (Appellate Brief) Reply Brief of Appellee/Cross-Appellant Matson Navigation Company (May. 08, 1998)Original Image of this Document (PDF)

. 1998 WL 34104824 (Appellate Brief) Bordeaux's Combined Answering and Reply Brief (Apr. 16, 1998)Original Image of this Document (PDF)

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. 1997 WL 33551894 (Appellate Brief) Brief of Appellee/Cross-Appellant Matson Navigation Company (Dec. 12, 1997)Original Image of this Document (PDF)

. 1997 WL 33551909 (Appellate Brief) Appellant's Opening Brief (Oct. 13, 1997)Original Image of this Document with Appendix (PDF)

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. 97-35587 (Docket) (Jun. 20, 1997)

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