



**AFTER THE SUPREME COURT'S  
*REGAL-BELOIT* DECISION:  
HOW CAN MARINE INSURERS  
MAINTAIN THEIR RECOVERIES?**

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# THE FIRST REVOLUTION - 1995

- *Vimar Seguros Y Reaseguros S.A. v. M/V Sky Reefer*, 515 US 528 (1995)

The U.S. Supreme Court ruled for the first time that foreign forum selection clauses are enforceable.



# THE SECOND REVOLUTION - 2004

- *Norfolk S. Ry. Co. v. Kirby*, 543 US 14 (2004).
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The U.S. Supreme Court ruled for the first time that it was permissible to treat a form bill of lading like a negotiated contract.



# PRIOR CONTEXT: 1962-1974

- *Isthmian S.S. Co. v. California Spray-Chemical Corp.*, 300 F.2d 41 (9th Cir. 1962).

"The presence of this standardized clause in the contract does not represent an agreement between appellant and the shipper. It is simply a condition unilaterally imposed by the carrier upon the shipper...[the law] prevent[s] the use of just such false agreements which make 'freedom of contract' an illusion."

# PRIOR CONTEXT: 1974-1995

- *Tessler Bros. (B.C.) Ltd. v. Itaipacific Line*,  
494 F.2d 438 (9th Cir. 1974).

"We recognize that the content of ocean bills of lading is for all practical purposes completely within the carrier's power..."

# THE THIRD REVOLUTION - 2010

- *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S.Ct. 2433 (2010).

The U.S. Supreme Court implies for the first time that public policy arguments about bill of lading provisions being too draconian will not be supported.



# THE FOURTH REVOLUTION – 2011-2012

- *St. Paul Travelers Ins. Co. Ltd. v. Wallenius Wilhelmsen Logistics A/S*, 2011 WL 1901738 (2d Cir. 2011) (Summary order with no precedential effect)
- *Fed. Ins. Co. v. Union Pac. R. Co.*, 2011 WL 2711314 (9th Cir. 2011)
- *Sompo Japan Ins. Co. of America v. Norfolk Southern Railway Co.*, 2012 WL 3838162 (S.D.N.Y. 2012)

TWO CIRCUIT COURTS RULE FOR THE FIRST TIME THAT COVENANTS NOT TO SUE ARE ENFORCEABLE BY SUB-CONTRACTORS.

THIRD CASE WILL LIKELY GO TO SECOND CIRCUIT

# UNITED STATES RECOVERY LAW: SUMMARY OF TRADITIONAL CLAIMS WE STILL LITIGATE HERE

1. Liner claims with U.S. jurisdiction clauses
2. Charter party disputes
3. Barge claims
4. Air claims including pre and post-air movements (subject to federal common law)
5. Inland rail and truck claims under export bills of lading arguably must be venued in United States (Carmack Amendment may apply)
6. Domestic truck and rail claims must be venued in United States (Carmack Amendment applies)



## THE COUNTER-REVOLUTION: NOVEL AREAS WHERE RECOVERY SUCCESS HAS OPENED UP

1. Ship managers can be sued in the United States with no COGSA limitation
2. Truckstops have a duty to secure cargo and are liable if theft is "foreseeable"
3. Truck brokers liable if control or manage truckers

## THE COUNTER-REVOLUTION: NOVEL AREAS WHERE RECOVERY SUCCESS HAS OPENED UP

4. Truck sub-contractors (without Himalaya clause)
5. Truckers fully liable if:
  - i. Does not offer 2 rates
  - ii. Offers only insurance
  - iii. Bill of lading does not match tariff
6. Export intermodal inland claims may now have no limitation of liability (*Sompo* doctrine)

***FORTIS CORPORATE INSURANCE  
v. VIKEN SHIP MANAGEMENT,  
597 F.3d 784 (6TH CIR. 2010)***

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**SHIP MANAGERS CAN BE SUED IN THE  
UNITED STATES WITH NO COGSA  
LIMITATION.**



*GREAT AMERICAN INSURANCE CO. OF NEW YORK V. TA OPERATING CORP., 2008 WL 5335317 (S.D.N.Y. 2008)*

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TRUCKSTOPS HAVE A DUTY TO SECURE CARGO IF PRIOR THEFTS MAKE THEFTS "FORESEEABLE."

***NIPPONKOA INSURANCE COMPANY  
LTD. V. TOWNE AIR FREIGHT, LLC,  
2009 WL 3257868 (E.D. MO 2009)***

**TRUCKERS FULLY LIABLE IF:**

- 1) DOES NOT OFFER TWO RATES**
- 2) BILL OF LADING DOES NOT MATCH TARIFF**

***NIPPONKOA INSURANCE CO., LTD. v.  
C.H. ROBINSON WORLDWIDE, INC.,  
2011 WL 671747 (S.D.N.Y. 2011)***

TRUCK BROKERS LIABLE IF PRESENT THEMSELVES AS  
PROVIDING TRANSPORTATION FOR COMPENSATION  
OR CONTROL OR MANAGE TRUCKERS



*Royal & Sun Alliance Ins., PLC v.  
UPS Supply Chain Solutions, Inc.,  
2013 WL 57847 (2d Cir. 2013)*

- NO LIMITATION OF LIABILITY FOR TRUCKER'S THIRD-PARTY SUBCONTRACTORS WITHOUT HIMALAYA CLAUSE

*American Home  
Assurance Co. v. Panalpina, Inc.,  
2011 WL 666388 (S.D.N.Y. 2011)*

- USUALLY NO LIMITATION OF LIABILITY FOR INLAND INTERMODAL LOSSES ON EXPORT RAIL SHIPMENTS FROM THE UNITED STATES (POSSIBLY TRUCKING AS WELL) (*Sompo* Doctrine)
- But see *Royal & Sun Alliance Ins., PLC v. Service Transfer, Inc.*, 2012 WL 6028991 (S.D.N.Y. 2012) (COGSA applies)



2013  
**WHAT PRUDENT CARGO  
UNDERWRITERS SHOULD BE DOING:**

Insist that shippers stamp international bills of lading to protect US jurisdiction and COGSA

Example:

ALL CARGO CLAIMS ARISING UNDER THIS BILL OF LADING AGAINST ANY PARTY INCLUDING THE CARRIER'S SUB-CONTRACTORS OR AGENTS ARE SUBJECT TO U.S. JURISDICTION AND AT A MINIMUM TO THE RIGHTS PROVIDED BY U.S. COGSA, WHICH IS INCORPORATED HEREIN BY AGREEMENT, INCLUDING ITS LIMIT OF LIABILITY, NOTWITHSTANDING ANY OTHER TERMS HEREIN TO THE CONTRARY. THE CONTAINER SHALL NOT BE DEEMED A COGSA PACKAGE.

CONTINUED:  
2013  
WHAT PRUDENT CARGO  
UNDERWRITERS SHOULD BE DOING:

Example:

CARGO CLAIMS ARISING UNDER THIS BILL OF LADING AGAINST ANY PARTY INCLUDING THE CARRIER'S SUB-CONTRACTORS OR AGENTS ARE SUBJECT TO U.S. JURISDICTION AND AT A MINIMUM TO THE RIGHTS PROVIDED BY THE ROTTERDAM RULES, WHICH ARE INCORPORATED HEREIN BY AGREEMENT, INCLUDING THEIR LIMIT OF LIABILITY, NOTWITHSTANDING ANY OTHER TERMS HEREIN TO THE CONTRARY.

# 2013 WHAT PRUDENT CARGO UNDERWRITERS SHOULD BE DOING

Write gross negligence clauses or security terms and conditions into domestic trucking contracts

Example:

IF THE LOSS OR DAMAGE WAS THE RESULT OF CARRIER'S WILLFUL MISCONDUCT OR INTENTIONAL OR GROSSLY NEGLIGENT ACTS OR OMISSIONS...[IT] WILL NOT BE SUBJECT TO THE LIMITATIONS OF LIABILITY STATED ABOVE.

Or Require:

- Point-to-Point Movements
- Secure truck yards

# US RECOVERY DEPARTMENT 2013 CHECKLIST

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SUBJECT

YES

NO

1. DID YOU MAKE  
RECOVERIES FROM  
SHIP MANAGERS?

\_\_\_\_\_

\_\_\_\_\_

2. DID YOU MAKE  
RECOVERIES FROM  
TRUCKSTOPS?

\_\_\_\_\_

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# CONTINUED: US RECOVERY DEPARTMENT 2013 CHECKLIST

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<u>SUBJECT</u>	<u>YES</u>	<u>NO</u>
3. DID YOU MAKE ANY RECOVERIES FROM TRUCK BROKERS?	_____	_____
4. DID YOU MAKE RECOVERIES FROM TRUCKER'S SUBCONTRACTORS?	_____	_____
5. DID YOU MAKE RECOVERIES BECAUSE OF TRUCKERS' GROSS NEGLIGENCE OR DEVIATION?	_____	_____

# CONTINUED: US RECOVERY DEPARTMENT 2013 CHECKLIST

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<u>SUBJECT</u>	<u>YES</u>	<u>NO</u>
6. DID YOU MAKE FULL RECOVERIES FOR INLAND EXPORT INTERMODAL US RAIL LOSSES?	_____	_____
7. DID YOU MAKE FULL RECOVERIES FROM TRUCKERS WHOSE BILL OF LADING OR TARIFF OFFER ONLY ONE LIMITATION OR RATE?	_____	_____