DeOrchis, Wiener & Partners, LLP

Attorneys at Law and Proctors in Admiralty

61 Broadway, 26th Floor
New York, New York 10006-2802

Telephone: (212) 344-4700
Facsimile: (212) 422-5299
www.marinelex.com

Florida Office:
8751 W. Broward Blvd., Ste. 203
Ft. Lauderdale, FL 33324
(954) 652-0100

Connecticut Office:
24 Hoyt Street
Stamford, CT 06905
(203) 323-9120

New Jersey Office:
1495 Morris Avenue
Union, NJ 07083
(973) 467-4740

Massachusetts Office:
2355 Main Street, P.O. 186
S. Chatham, MA 02659
(508) 432-2121

THIRD PARTY PRACTICE UNDER UNITED STATES LAW

Vincent M. DeOrchis
Managing Partner

Third party practice, especially in maritime matters, has long been a tradition of the American law and has been welcomed by American courts. Third party practice is very much in line with the practical thinking of Americans, and is seen by our jurists as allowing for judicial economy and more predictable outcome of disputes by placing all of the “concerned parties” in the same courtroom before the same judge.

My comments on third party practice will be limited to the U.S. federal courts which handle most, but not all maritime litigations. Each state has its own rules on third party practice, and while they are somewhat similar to those of the federal courts, they are not identical.

From the viewpoint of shipowners, charterers and Clubs, third party practice in the United States is generally a good thing. Most third party claims involve an effort to recover indemnity or contribution from a third party who at the very least contributed to the cause of plaintiff’s damages. This can include, in my own experience, a stevedore who delayed loading operations causing demurrage, a trucker who froze a cargo of expensive antibiotics, a tug which contributed to an allision, and a manufacturer of a defective chair that collapsed while a passenger was dining on a cruise ship. By impleading the third party who exposed the defendant to what we call “vicarious liability,” the vessel operator, for example, is often able to “pass the buck” down the chain to the third party defendant, such as the stevedore or trucker. Alternatively, if there is a viable defense, the third party defendant who caused or contributed to the loss is there in the proceeding supporting the ocean carrier, and often it is in a much better position to provide documents or witnesses necessary to mount a successful defense.

Indeed, the maritime rules under U.S. federal practice contain a special provision under Rule 14C by which a defendant who brings in a third party is permitted to require the new third party defendant to respond directly to the complaint, or writ, of the original plaintiff. The defendant can even bring in someone as a third party defendant who has no liability to the defendant, but who does have liability directly to the plaintiff. For example, if a shipowner’s container being hauled by an independent trucker is involved in a traffic collision on the road,

that other vehicle operator can be made a third party on the basis that it may be wholly liable to the plaintiff. The result is that the plaintiff has a 'direct' cause of action against the third party defendant under US federal law, and that allows the plaintiff to recover directly from the third party defendant even if the defendant is ultimately released from the case, or settles out directly with the plaintiff. By the same token, it may make it possible for the defendant to work out its own settlement with the plaintiff and be discharged from the case, while the plaintiff has the option to pursue the third party defendant for additional damages.

Furthermore, the third party claim need not be a maritime claim, and could conceivably fall outside of the normal jurisdiction of the federal court. However, so long as the third party claim is part of the "same case or controversy", the court will exercise what is called "supplemental jurisdiction", albeit with discretion. This makes it much easier for a vessel operator who is sued to bring in as a third party some vendor or sub contractor who was engaged under a contract subject to local state law.

There is no limit to the number of third party defendants that a defendant can join to a case. And indeed, third party defendants are permitted to bring in fourth party defendants, fifth party defendants, and so on. In my own experience I have not seen it go beyond sixth party defendants, but it is conceivable. Of course, some plaintiff attorneys lick their lips with so many "deep pockets" in a lawsuit and smell an easy settlement. Other plaintiff attorneys dread multiple third and fourth parties, because it means that a package deal with all of the defendants may be very difficult. And it takes only one obstinate third-party defendant to perhaps force a trial.

The time restriction to add a third party is technically 10 days after the answer is filed by a defendant, but in real practice the amount of time to add third parties is usually agreed upon by the plaintiff and defendant at the beginning of the case, and the judge adopts that time limit into a scheduling order. In the federal court in New York, I usually see at least 3 to 5 months allowed after the case begins, because there is a recognition that the identity of a third party may not be discovered until after the parties begin to exchange information or an independent investigation is completed.

I should add that even where the time to bring in a third party has expired, we have successfully initiated indemnity or contribution suits separately against those third parties and then advised the Clerk of the Court that the matter is related to an ongoing case between the plaintiff and defendant in the same courthouse. The rules require that the new matter be assigned to the same judge. Hopefully the judge is amused by the tactic, and, based on my experience, the judge at least allows discovery under the American rules to go forward jointly and on the same time table in both cases, so that depositions or document production does not have to be repeated. The judge also has the power to consolidate both cases for trial, so that the result is the same as if a third party had been originally joined. Again, I emphasize, that the attraction of third party practice is to resolve as many disputes before one judge at one time so as not to tie up several courtrooms with essentially the same dispute. The key words by the court are that third party actions allow 'acceleration' and 'concurrent determination' of related factual disputes.

An interesting development over the past 10 years, at least in the federal court in New York, is that the judges are willing to even "consolidate" lawsuits that do not involve parties that have claims against each other, but the disputes arise out of the same underlying facts. The best example of this is the m/v DG HARMONY case involving an explosion of calcium hypochlorite cargo being carried aboard that vessel in the Caribbean sea about 5 years ago. Dozens of lawsuits were filed between combinations of the shipowner, time charterer, several slot charterers, freight forwarders and NVO's, container owners, cargo interests, and the manufacturer of the chemical. Ultimately, all of the lawsuits ended up in one consolidated lawsuit, even though many of the parties had no contracts or claims against some of the other parties. There was a recognition not only by the court, but by the parties, that the technical explanation for the explosion was so complicated that a single forum for the "event" made more sense than multiple lawsuits which could have had disparate outcomes. By the way, in the end the manufacturer of the chemical, a company called PPG, was found responsible for the explosion both in negligence and strict liability. The case is now up on appeal.

One problem with third party practice in the United States federal courts is that the third party must be located within the jurisdiction of the particular federal court. For the federal court in New York, that involves essentially the lower half of New York State. There is a unique 100 mile or 180 kilometer "bulge" rule that allows a defendant in New York to bring in a third party defendant in, say, New Jersey or Pennsylvania or Connecticut who would otherwise be outside the jurisdiction of the federal court in New York. But if the third party defendant is located only in, say, Texas, a separate lawsuit will need to be filed there unless some asset of that third party defendant can be located in New York. Bear in mind that a third party claim can even be an *in rem* admiralty claim against a ship. In short, and NVO or Charterer could arrest a third party vessel owner's ship calling within the jurisdiction of the federal court in order to pursue an indemnity claim.

One of the benefits of third party practice in the United States is that it provides an opportunity for the defendant to recovery attorneys fees, if the defendant succeeds in its indemnity action against the third party defendant. As you know, the rule in the United States is that normally legal fees are not recoverable, unless the contract between the parties specifically provides for recovery of legal fees or, in some rare instances, the statute provides for recovery of legal fees. Although parties normally bear their own costs in the US, the exception is in maritime indemnity cases where the defendant becomes vicariously liable. With reference to my earlier scenarios, the shipowner can recover legal fees from a stevedore who dropped the container on the pier during discharge operations, or a trucker who froze the cargo of pharmaceuticals, since those acts made the ocean carrier liable to the cargo owner. You should note that the amount of legal fees are limited to the cost of the defense mounted against the plaintiff, and do not include the legal expenses involved in seeking indemnity from the third party. But this can still be a substantial recovery. Obviously, the judges do have some discretion as to the award of legal fees, and if the defendant contributed to the cause of the damage, legal fees will not be permitted.

I should also note that indemnity claims are generally subject to their own time bar period which starts from the day that the defendant pays a settlement or judgment to the plaintiff. The consequence is that an NVO or forwarder who seeks indemnity from an ocean

carrier is entitled to sue the carrier even though the NVO or forwarder is identified as the shipper on COGSA has expired.

Lastly, I have been asked to provide you with an update on American law. Well that could take years, so I am going to limit my brief comment to the recent conflicting rulings by the US Supreme Court in *Kirby* and the Second Circuit's decision in *Sompo Japan* concerning whether a railroad, engaged as a subcontractor land carrier by an ocean carrier, who, in turn, is engaged by an NVO, is entitled to the limits of liability under the US COGSA (our enactment of the Hague Rules). Railroads are very found of the $500 package limit under COGSA, since their own limitation is bogged down in tariffs and circulars.

The Supreme Court, realizing that something had to be done to free international commerce with the U.S.A. from the maze of multiple and conflicting legal regimes that might impinge on modern intermodal carriage, took a "conceptual" rather than technical approach seizing upon what it believed is its authority over maritime jurisdiction given to it by the Constitution. It ruled that, "The fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." It therefore focused in *Kirby* on whether the principal objective of an intermodal bill of lading was substantially maritime commerce.

The Circuit Court, however, in *Sompo Japan* felt bound to apply to U.S.A. land segments the confusing and inconsistent federal statutes called "Carmack Amendments," that it believes are compulsorily applicable to rail carriers and motor carriers in the U.S.A., even when they are hired to carry out on intermodal carrier's obligations specified in a "maritime" bill of lading.

The Circuit Court saw the conflict as not between COGSA and Carmack but rather "between one federal law (Carmack) and a contract that, although incorporating the terms of another statute (COGSA), nevertheless lacks statute-like status." When the bill of lading extended COGSA beyond ship's tackles, "the statute does not apply of its own force, as *ex proprio vigore*; but rather as a contractual term." The court ruled that the contractual application of COGSA could not supersede the application of Carmack and other statutes because the two regimes of law were opposite and in conflict.

COGSA is based upon negligence while Carmack is rooted more upon strict liability. COGSA, as interpreted by most courts, requires that the carrier give the shipper a "fair opportunity" to declare a higher value, otherwise the $500 limitation will apply by default. The Staggers Amendment, a supplement to Carmack, requires that the carrier offer the shipper a rate based upon "full coverage under a strict liability rule" before offering alternative rates based upon limited liability.

Whether the Second Circuit's decision will stand up is questionable. The court sensed this as it noted that, "Without further guidance from the Supreme Court or from Congress, we must rely on precedent and the plain language of the statutory scheme.

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