

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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LAND O'LAKES,

Plaintiff,

v.

JOSLIN TRUCKING, INC.;  
BLUE THUNDER TRUCK BROKERAGE, INC.;  
GREAT WEST CASUALTY COMPANY;  
THOSE CERTAIN UNDERWRITERS AT  
LLOYD'S LONDON WHO SUBSCRIBE  
TO CERTIFICATE NUMBER IRPI-CL-06-025,

Defendants.  
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OPINION and ORDER

08-cv-355-bbc

This is a dispute between a shipper and two carriers over a cargo shipment lost in interstate travel. On June 6, 2008, plaintiff Land O'Lakes brought suit under the Carmack Amendment, 49 U.S.C. § 14706, against defendants Joslin Trucking and Blue Thunder Truck Brokerage, Inc., for a lost shipment of butter worth \$65,425.60. In addition, plaintiff brought claims against defendants Great West Casualty Company, which insures Joslin Trucking, and defendant Those Certain Underwriters at Lloyd's London Who Subscribe to Certificate Number IRPI-CL-06-025, which insures defendant Blue Thunder Truck

Brokerage, Inc., for losses arising out of lost or damaged shipments.

In an order issued on October 24, 2008, I denied the motion by defendant Lloyd's London to dismiss plaintiff's claims against it, holding that plaintiff could not sue defendant Lloyd's London under Wisconsin's direct action statute, Wis. Stat. § 632.24, because plaintiff's suit was brought under a federal statute, 49 U.S.C. § 14706, that preempts inconsistent state remedies. Plaintiff could maintain its claim against defendant Lloyd's London only if it could show that the Carmack Amendment authorized direct suits by shippers against defendant insurers. The parties had not addressed this issue, so I ordered plaintiff to show cause why its claims against defendants Lloyd's London, and Great West as well, should not be dismissed for failure to state a claim against them under the Carmack Amendment.

From the parties' responses, I conclude that plaintiff cannot maintain a direct action suit against defendants Lloyd's London or Great West under either the Carmack Amendment or 28 U.S.C. § 1367(a). Therefore, plaintiff's Carmack Amendment claims against defendants Lloyd's London or Great West will be dismissed and defendants Lloyd's London and Great West will be dismissed from this case. If they wish, defendants Joslin Trucking and Blue Thunder may file third-party claims against the defendant insurers for issues arising out of this case, including any claim with respect to the insurers' duty to defend or indemnify.

## OPINION

Plaintiff concedes that the Carmack Amendment does not authorize direct action suits but it contends that this court should retain jurisdiction over its claims against the insurers. First, plaintiff asks this court to reach the same result as the Northern District of Illinois in Air Plus Limited v. Transportation Services, Inc., 2004 WL 2359256 (N.D. Ill. Oct. 19, 2004). Second, plaintiff requests this court for leave to amend its complaint to allege its direct action claims under 28 U.S.C. § 1367(a). Both of plaintiff's arguments fail because this court does not have jurisdiction over plaintiff's claims against the defendant insurers.

With respect to plaintiff's request to follow the approach of the district court in Air Plus, that case is inapposite. In Air Plus, the district court dismissed a direct action claim against an insurer because Illinois law did not allow direct action suits against insurers until after liability had been established. Id. at \*2. Wisconsin law allows direct action suits against insurers from the outset, provided that the underlying claim against the insurer is for negligence, Estate of Otto v. Physicians Insurance Co. of Wisconsin, Inc., 751 N.W. 2d 805, 812-13 (Wis. 2008), and if the insurance policy was issued within this state, or if not, if the insured is also a party. Kenison v. Wellington Insurance Co., 218 Wis. 2d 700, 710-11, 582 N.W. 2d 69, 73 (Ct. App. 1998).

Plaintiff cannot assert a direct action suit under Wisconsin law against an insurer

unless it is suing on a state law negligence claim. Rich Products Corp. v. Zurich American Ins. Co., 293 F.3d 981, 983 (7th Cir. 2002) (Wisconsin’s direct action statute is “unambiguously . . . limited to damage claims caused by negligence.”); Mombourquette v. Wisconsin Counties Mutual Insurance Corp., 2006 WL 1236732 \*3 (W.D. Wis. 2006) (“Wis. Stat. § 632.24 allows a direct action against an insurer when the underlying claim against the insured is for negligence. . .”). Plaintiff has asserted a federal statutory claim, not a state law negligence claim. It has no grounds on which to maintain a direct action suit against the defendant insurers.

Perhaps anticipating this result, plaintiff seeks to amend its complaint in order to “allege that the court has supplemental jurisdiction over the direct action claims.” Plaintiff has neither explained how the complaint would be amended to cure the deficiencies nor submitted a proposed amended complaint. Instead, plaintiff discusses the standard for the exercise of supplemental jurisdiction over state law claims and argues that allowing amendments would be convenient and promote efficiency.

Because plaintiff has not submitted a proposed amended complaint, its motion will be denied. The result would be the same even if it had submitted the proposed amendment. It is well established that “[s]tate law claims for losses or damage to the cargo . . . whether described under a contract theory or a tort theory, are preempted by the Carmack Amendment.” Gordon v. United Van Lines, Inc., 130 F.3d 282, 289 (7th Cir. 1997);

Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1415 (7th Cir.1987) (Carmack Amendment preempts “state and common law remedies . . . where goods are damaged or lost in interstate commerce”); see also Hughes Aircraft Co. v. North American Van Lines, 970 F.2d 609, 613 (9th Cir. 1992); American Synthetic Rubber Corp. v. Louisville & N. R. R. Co., 422 F.2d 462, 466 (6th Cir. 1970) (“The cases make it clear that when damages are sought against a common carrier for failure to properly perform, or for negligent performance of, an interstate contract of carriage, the Carmack Amendment governs.”). Therefore, plaintiff cannot bring a direct action suit against defendants Lloyd’s London and Great West by trying to tack on a state law negligence claim.

Defendant Joslin Trucking asks this court to construe plaintiff’s Carmack claim as a “negligence action” in order to bypass the preemption issue. Dft.’s Br. In Supp., dkt. #71, at 4. However, Wisconsin’s direct action statute is a state procedural rule that allows a plaintiff to join insurers under state substantive law and not federal law. In other words, state procedural rules cannot govern federal causes of action. Because plaintiff cannot state a state law negligence claim against the defendant insurers, it would be futile to allow it to amend its complaint to state a claim under Wisconsin’s direct action statute.

Last, defendant Joslin Trucking argues that there is “federal question jurisdiction” over the insurers because 49 U.S.C. § 13906(a)(4) authorizes the Secretary of Transportation to require motor carriers to carry insurance for property lost in interstate

transportation. However, defendant has not shown that plaintiff could bring a cause of action under § 13906. Unlike 49 U.S.C. § 14706, which provides a right of action for shippers, § 13906 does not provide a right of action for shippers to bring claims with respect to the insurance contracts required by the statute. In any event, there is no claim that either motor carrier did not carry liability insurance and therefore no dispute about whether the statute was violated.

Because plaintiff's joinder of Great West and Lloyd's London as defendants in this case was improper, the insurers will be dismissed from this case. Fed. R. Civ. P. 21. However, the insurers can be joined under Fed. R. Civ. P. 14. Rule 14(a) permits a defendant to implead a party who may be liable for all or part of the plaintiff's claim against defendant. Fed. R. Civ. P. 14(a); Rodd v. Region Construction Co., 783 F. 2d 89, 92 (7th Cir. 1986); see also 16 Moore's Federal Practice, § 106.25[2] at 106-52 (2008). As insurers, defendants Great West and Lloyd's London fit this description. If defendants Joslin Trucking and Blue Thunder wish to join the defendant insurers as third-party defendants to this case, I will give them ten days in which to do so.

#### ORDER

IT IS ORDERED that:

1. Plaintiff Land O'Lakes's motion to file a second amended complaint, dkt #66, is

DENIED.

2. Plaintiff's complaint is DISMISSED as to the claims against defendants Great West Casualty Company and Those Certain Underwriters at Lloyd's London Who Subscribe to Certificate Number IRPI-CL-06-025 for plaintiff's failure to state a claim against these defendants under the Carmack Amendment.

3. Defendants Great West Casualty Company and Those Certain Underwriters at Lloyd's London Who Subscribe to Certificate Number IRPI-CL-06-025 are DISMISSED from this case.

4. Defendants Joslin Trucking, Inc., and Blue Thunder Truck Brokerage, Inc., may have until December 24, 2008, to file any third-party claims against defendants Great West Casualty and Those Certain Underwriters at Lloyd's London Who Subscribe to Certificate Number IRPI-CL-06-025.

Entered this 11<sup>th</sup> day of December, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge