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## **“A Maritime Case About a Train Wreck”- Multi- Modal Carrier Liability Limits post *Kirby***

*by*  
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### **INTRODUCTION**

The rapid development of containerization and multi-modal transportation in recent decades has led to the common use of “through” bills of lading, often issued by freight forwarders. Typically, shippers purchase multi-modal transportation from a freight forwarder at low freight rates in exchange for liability limits, electing to depend on their cargo insurance to cover the full value of any loss during shipment.

However, the courts in the United States have created much confusion over the years about the rules relating to the respective liabilities of ocean carriers and surface carriers, in particular, whether so called Himalaya Clauses in ocean bills of lading effectively extend the United States Carriage of Goods by Sea Act’s (“COGSA,” 46 U.S.C. app. §§ 1300-1315) defenses and package limitation to inland carriers such as railroads for shipments originating in a foreign country.

For example, the Seventh and Eleventh Circuits had previously ruled that the Carmack Amendment (49 U.S.C. § 11706) was *not* applicable to through bills of lading issued in a foreign country to govern a shipment throughout its transportation from abroad to its final destination in the United States, where no separate bill of lading was issued for the inland shipment. *Capitol Converting Equip. v. LEP Transp., Inc.*, 965 F.2d 391 (7<sup>th</sup> Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11<sup>th</sup> Cir. 1986). However, the Ninth Circuit had ruled that the Carmack amendment *was* applicable to the inland portion of a shipment, even when the shipment was covered by a through bill of lading. *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9<sup>th</sup> Cir. 2000).

The confusion was seemingly resolved by the U.S. Supreme Court in *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004). The *Kirby* court pronounced that a through bill of lading's terms can control a surface carrier's liability via the standard U.S. Clause Paramount and Himalaya Clause that are found in most ocean bills of lading. Therefore the Supreme Court held that COGSA governed the liability of a rail carrier, thereby achieving a streamlined and predictable set of liability rules for multi-modal shipments to or from the United States.

However, a recent decision by the U.S. Court of Appeals for the Second Circuit in *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.*, 456 F.3d 54, 2006 A.M.C. 1817 (2d Cir. 2006) has seemingly undercut the effect of the *Kirby* decision regarding a connecting surface carrier's liability.

**KIRBY – “A MARITIME CASE ABOUT A TRAIN WRECK”**

In its decision issued on November 9, 2004, the U.S. Supreme Court held in a 9-0 decision that federal maritime law, rather than state law, governed disputes arising under an

ocean bill of lading calling for multi-modal transportation if the transport included a “substantial” maritime leg, even though it may have also included a substantial land leg, and regardless of where the accident occurred.

As Justice Sandra Day O’Connor observed, this was “a maritime case about a train wreck,” *Id.* at 18. The Supreme Court concluded that Union Pacific Railroad was covered by a Himalaya Clause in the subject through bill of lading and benefited from the contractually incorporated provisions of COGSA regarding all sub-contractors of the ocean carrier. Therefore, the Court held that the defendant railroad was entitled to COGSA’s \$500 per package limitation in connection with a cargo of machinery that was damaged as a result of a derailed train on the last surface leg of the voyage.

Briefly, the facts in *Kirby* were that Australian based James N. Kirby Pty Ltd. sold 10 containers of machinery to General Motors. Kirby hired ICC, a freight forwarder, to arrange the shipment and ICC issued a through bill of lading to Kirby designating Sydney as the port of loading, Savannah, Georgia as the port of discharge and Huntsville, Alabama as the place of delivery. The ICC bill of lading incorporated COGSA for the sea leg and Hague-Visby for the land leg. ICC then engaged Hamburg Sud for the entire transport. Hamburg Sud issued its own bill of lading to ICC which incorporated COGSA’s package limitation for both the sea and land legs and it also contained a Himalaya Clause extending the COGSA limits to all agents, expressly including “independent contractors,” among others. In turn, Hamburg Sud contracted with Norfolk Southern Railroad to transport the machinery from Savannah to Huntsville.

Norfolk Southern moved successfully in the District Court for partial summary judgment on the COGSA \$500 package limitation issue. The Eleventh Circuit Court of Appeals reversed, holding that the Himalaya Clause in the ICC bill of lading did not extend to the railroad because

it was not in privity of contract with ICC and because the clause was not broad enough to cover inland carriers. It further found that ICC was not acting as an agent for Kirby when it negotiated the Hamburg Sud bill of lading. It concluded that state law governed the rail carrier's liability (Kirby did not contend that the Carmack Amendment should apply).

The Supreme Court, in reversing the Eleventh Circuit's decision, found that the claim was governed by federal maritime law because the bills of lading were maritime contracts whose primary purpose was to transport the goods by sea from Australia to the United States and so the case was not "inherently local" in nature. The Court specifically expressed concern for the uniform meaning of maritime contracts such as the bills of lading at issue, stating:

Here, our touchstone is a concern for the uniform meaning of maritime contracts like the ICC and Hamburg Sud bills. We have explained that Article III's grant of admiralty jurisdiction "must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states" (citations omitted).

*Norfolk Southern v. Kirby*, 543 U.S. at 28.

The Supreme Court disagreed with the Eleventh Circuit's narrow interpretation of the Himalaya Clause in the ICC bill of lading and concluded that the logical meaning and intent of the clause was to cover any party whose services contributed to the transportation of the goods from the port of loading to the place of delivery.

Lastly, the *Kirby* Court found that regarding the issue of contracting for liability limitations with surface carriers in multi-modal transport, it was appropriate to hold that an intermediary, such as a freight forwarder like ICC, can bind a cargo owner to limitations of liability set forth in bills of lading between the intermediary and the ultimate carrier because (1)

this tracks industry practice; (2) if limitations negotiated with intermediaries were not reliable (i.e. enforceable), then carriers would likely charge higher freight rates to intermediaries; and (3) this result is fair because Kirby could sue ICC for any liability that exceeds the limitation to which they agreed. The Court held that Norfolk Southern could limit its liability to the \$500 per package limitation as per the Hamburg Sud bill of lading issued to ICC.

### **THE SECOND CIRCUIT CLOUDS THE ISSUE**

The *Kirby* decision was applauded in many circles in the maritime industry for seeming to establish a coherent policy for dealing with claims arising from multi-modal shipments in international commerce.

However, the U.S. Court of Appeals for the Second Circuit may have undone all of this in one stroke with its decision in *Sompo Japan Ins. Co., supra*, wherein the Court limited the effect of the *Kirby* decision by concluding that a rail carrier's attempt to fall within COGSA's package limitation was not justified. Basically, the *Sompo* Court held that the liability of a domestic railroad engaged in multi-modal transport in international commerce was governed by the Carmack Amendment and not by the contractual extension of COGSA to sub-contractors or inland carriers under typical Himalaya Clauses in ocean bills of lading. The Second Circuit includes the Southern District of New York, which is a very busy and influential trial court for cargo litigation in the United States, and so if the *Sompo* decision stands, it will have far reaching impact.

### **THE CARMACK AMENDMENT**

The so-called Carmack Amendment is federal legislation designed to provide a uniform system of liability for interstate transportation carriers, and is set forth at 49 U.S.C. § 11706. It is well settled that the Carmack Amendment preempts all state and common law claims and

provides the sole and exclusive remedy to shippers for loss or damage during interstate transit. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913).

The Carmack Amendment provides that a carrier may limit its liability “to a value established by written declaration of the shipper or by a written agreement.” 49 U.S.C. §11706(c)(3)(A). Under the Carmack Amendment, in order to effectively limit its liability, the carrier must:

1. Maintain a tariff in compliance with the requirements of the Interstate Commerce Commission;
2. Give the shipper a reasonable opportunity to choose between two or more levels of liability;
3. Obtain the shipper’s agreement as to his choice of carrier liability limit; and
4. Issue a bill of lading prior to moving the shipment that reflects any such agreement.

*Hughes Aircraft Co. v. North American Van Lines, Inc.*, 970 F.2d 609, 611-612 (9<sup>th</sup> Cir. 1992) (footnotes omitted).

Although the filing of a tariff alone will not limit a carrier’s liability, the above requirements are satisfied when a shipper is given a “reasonable opportunity” to accept or alter the carrier’s proposed limitation. *Hughes Aircraft*, 970 F.2d at 612. A “reasonable opportunity” means that the shipper had both reasonable notice of the liability limitation and the opportunity to obtain information necessary to make a deliberate and well-informed choice. *Id.*

### **THE SOMPO DECISION**

The *Sompo* case involved a shipment of 32 tractors from Japan to Georgia, with the cargo carried by ship to Los Angeles and then by rail to Georgia. The train derailed in Texas, damaging most of the goods.

Mitsui OSK Line Ltd. (“MOL”) had issued to the shipper through bills of lading containing the usual Clause Paramount extending COGSA to cover the entire multi-modal transport and a Himalaya Clause giving all contractors, such as the railroad, the same defenses as were available to the ocean carrier. MOL contracted with Union Pacific to complete the carriage by rail from Los Angeles to Georgia. The District Court (trial court) held that Union Pacific was entitled to COGSA’s \$500 package limitation.

However, the Second Circuit, on appeal, held that a federal statute, such as the Carmack Amendment, trumped the contractual provision in the bill of lading that extended COGSA’s limits of liability to the railroad. The Court noted that because the ocean bills of lading did not expressly reference the Carmack Amendment, they could not give a package limitation to the rail carrier and thus concluded that the railroad was fully liable for all of the damage it caused to the cargo.

The Second Circuit did note that there was a split of the circuits on this issue and carefully summarized the legislative history of the Carmack Amendment. It concluded that it was the intent of Congress that Carmack should apply to the domestic inland leg of a foreign shipment regardless of the shipment’s point of origin. The Court reasoned:

To apply COGSA here to the exclusion of Carmack would be to contradict well-established circuit precedent holding that the period of responsibility provisions do not have statute-like status and would undermine the text of the statute itself, which explicitly states that COGSA does not affect laws covering the carriage of goods prior to loading and after discharge. 49 U.S.C. app. § 1311 (footnote omitted). We cannot interpret the *Kirby* Court’s language concerning the policy underlying COGSA – language that at most merely supported, but was far from central, to the Court’s holding that federal law should apply instead of *state* law – as implying that a contract extending COGSA inland should supersede an otherwise applicable *federal* law. Without further guidance from the Supreme Court or Congress, we must rely on precedent and the plain language of the statutory scheme.

*Sompo*, 456 F. 3d. at 74-75.

The *Sompo* court made a somewhat unpersuasive attempt to distinguish the *Kirby* decision by contending that the Supreme Court was concerned with the lack of uniformity that would result if state laws were applied to through bills of lading extending COGSA to inland transportation and that the issue of Carmack's applicability was never raised in that case.

In short, the *Sompo* Court held that since COGSA only applied to the inland rail carriage as a matter of contract, it did not have the force of statute and must yield to the Carmack Amendment. The case was remanded to the trial court to determine whether the railroad, in its own waybill, had provided the shipper with adequate notice of its liability limit and an opportunity to declare "full value" protection in exchange for a higher freight rate. A decision is pending, but it is doubtful that the shipper ever received the rail carrier's waybill, since the cargo was shipped pursuant to the ocean carrier's bill of lading.

#### **THE CIRCUITS SPLIT ON THIS ISSUE AGAIN**

In *Altadis USA, Inc .v. Sea Star Line, LLC*, 458 F. 3d 1288, 2006 A.M.C. 1846 (11 Cir. 2006), which came down just one month after the Second Circuit decided *Sompo*, the Eleventh Circuit followed the Supreme Court's lead in *Kirby* and held that in a case involving a through bill of lading covering a shipment from Puerto Rico to Tampa via Jacksonville (with the loss occurring with the rail carrier on the land leg), COGSA's one year statute of limitations in the bill of lading applied and not the Carmack Amendment's prohibition of statutes of limitations of less than two years. The court said:

[Plaintiff's] position in this case is in tension with Norfolk Southern in that it would introduce uncertainty and lack of uniformity into the process of contracting for carriage by sea, upsetting contractual expectations expressed in

through bills of lading. Given the holding [of] *Norfolk Southern*, which recognizes that a rail carrier on the inland leg of a maritime contract is protected by the limitations in a through bill of lading, [Plaintiff's] position would introduce a different result if the inland carrier were a motor carrier. The purpose of COGSA to "facilitate efficient contracting in contracts for carriage by sea" would be undermined. *Norfolk Southern*, 543 U.S. at 29, 125 S. Ct. at 396.

Altadis USA, Inc. v. Sea Star Line, LLC, 458 F.3d 1288, 1294, 2006 A.M.C. 1846 (11th Cir. 2006) (footnote omitted).

This effectively puts the industry back to square one, as the split of authority has resumed regarding the applicable liability rules for through bills of lading on inter-modal transportation to or from the United States.

### **CONCLUSION**

As a result of the *Sompo* decision, in order for surface carriers to maintain their liability limitations, many multi-modal bills of lading involving shipments to or from the United States may have to be rewritten to incorporate Carmack Amendment requirements. However, if the U.S. Supreme Court is eventually petitioned to review the *Sompo* decision, it will give our highest court the opportunity to restore order and resolve the split among the circuits that is developing again by definitively answering the question of whether the Carmack Amendment applies to domestic legs of international multi-modal shipments or whether, instead, COGSA may be extended by contract to cover such shipments. Although it is beyond the scope of this paper, it should also be noted that reforms to legislation governing multi-modal common carriage of goods liability regimes have been under consideration for many years on both the domestic level in the United States (see the Sixth Senate Draft of the Carriage of Goods by Sea Act, or "COGSA 99") and the international level (see the Preliminary Draft Instrument on the Carriage of Goods by Sea, U.N. Commission on International Trade Working Group III, 9<sup>th</sup> Session, or

“UNCITRAL Draft”). If either of these initiatives are enacted in the United States, it may resolve the issue of liability of multi-modal common carriers in this country once and for all.