

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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This Issue of Surf & Turf Contains  
Part II of Kirby's Wake. To read Part I  
see the August Edition of Surf & Turf at:

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## KIRBY'S WAKE? PART II— HOW THE CALM WATERS OF OCEAN TRANSPORTATION INTERMEDIARY AND SUBCONTRACTOR LIABILITY SUDDENLY BECAME UNPREDICTABLE

By Steve Block

### *Legal Crosscurrents, or Somo Japan derails Kirby*

In March 2006, shipper Kubota Tractor Corporation ("Kubota") booked with ocean carrier Mitsui OSK Line, Ltd. ("MOL") through transit of a cargo of tractors from Japan to Suwanee, Georgia via the Port of Long Beach, California. MOL issued to Kubota through bills of lading, and "subcontracted" surface carriage from Long Beach to Georgia with the Union Pacific Railroad ("the UP"). The UP, in keeping with industry practice, offered MOL surface transportation pursuant to its electronic waybills.<sup>[28]</sup> The UP train derailed in Texas, damaging the subject freight.<sup>[29]</sup>

The MOL through bills of lading provided for \$500/package limited liability as sanctioned by COGSA, and a Himalaya Clause extending this protection to MOL's agents and subcontractors. It also provided Kubota an opportunity to opt for full

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carrier liability, which was declined. Not surprisingly, MOL's through ocean bills of lading did not offer the shipper an option of "full Carmack Liability." Lastly, the MOL bill of lading included a "clause paramount" and a "period of responsibility clause" which extended COGSA beyond its "tackle to tackle" statutory applicability.<sup>[30]</sup>

Sompo Japan Insurance Company ("Sompo Japan") insured the damaged freight, and sued the UP in subrogation in the Southern District of New York. Sompo Japan also insured a second

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<sup>[28]</sup> The UP argues that its electronic data interchange receipts, or "waybills" are not separate domestic bills of lading. Brief and Special Appendix for Defendant-Appellant, Sompo Japan Ins. Co. of America v. Union Pacific Railroad Co., at 45-46.

<sup>[29]</sup> *Sompo Japan Ins. Co. of America v. Union Pacific R. Co.* 456 F.3d 54, 56 (2nd Cir. 2006).

<sup>[30]</sup> COGSA itself accommodates such extensions: "Nothing contained in [COGSA] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. 46 USC 30701(7).

## KIRBY'S WAKE?... (CONTINUED)

shipper, Olympus Optical Company ("Olympus"), whose freight was damaged in the same rail accident, after water carriage by Kawasaki Kisen Kaisha. This produced a rather complex procedural history. Two separate actions were filed, the first on behalf of Olympus, which became known as "*Sompo I*." The Kubota action was billed "*Sompo II*." Confusion developed as to which decision is *Sompo I* and which is *Sompo II*, when presiding judges changed and the Southern District of New York decided the latter-filed action first. Both are on appeal to the Second Circuit with virtually identical briefing. References herein to "*Sompo Japan*" are to *Sompo II*, which is the Second Circuit's published opinion.

The district court found the railroad's liability limited to \$500/package per the extended MOL bill of lading. It rejected *Sompo Japan*'s contention that Carmack and the Staggers Rail Act of 1980<sup>[31]</sup> (the "Staggers Act") governed the UP's liability.<sup>[32]</sup>

The Second Circuit reversed and remanded the Southern District of New York's decision in a thoughtful analysis of transportation law principles and history. Its public policy concerns have merit and, at least to a large degree, are justified by statutory language, legislative history and public policy. The court concludes that COGSA's contractual extension to connecting rail carriers in intermodal transit cannot dislodge Carmack as the statutorily-intended cargo liability regime for surface transportation. This is because "COGSA only applies to 'the period from the time when the goods are loaded on to the time when they are discharged from the ship,' . . . , [and] courts have consistently held that when COGSA is extended by contract beyond the tackles . . . , the statute does not apply of its own force, or *ex proprio vigore*, but rather as a contractual term."<sup>[33]</sup> Carmack, on the other hand, does apply *ex proprio vigore*, and therefore must take precedence.

Railroads indisputably may limit their liability. "However, the combined effect of § 10502(e)

[Staggers] and § 11706(a) [Carmack] is that rail carriers that wish to limit their liability must offer the shipper the option of full Carmack coverage, which includes both the Carmack version of strict liability and full coverage for loss."<sup>[34]</sup> The court, having concluded that Carmack governs the railroad's liability, reversed and remanded to the district court "one question":

[W]hen Union Pacific negotiated the applicable terms of carriage of Kubota's tractors, did it provide the shipper an opportunity, consistent with Staggers . . . to receive full Carmack liability

coverage as well as "alternative terms"? If so, then under Carmack and Staggers . . . , such alternative terms would circumscribe Union Pacific's liability. If not, and in the absence of any other defense, then Union Pacific, having failed to comply with the Carmack and Staggers requirements, would be liable for the full value of the tractors.<sup>[35]</sup>

While the UP's waybills adopted MOL's bill of lading,<sup>[36]</sup> and the latter offered Kubota a full opportunity to declare full value, "it does not provide the option of full coverage under Carmack. . . . [Because] COGSA liability is

<sup>[31]</sup> Pub.L. No. 96-448, 94 Stat. 1895 (codified at 49 USC § 11706).

<sup>[32]</sup> The Second Circuit's opinion in *Sompo Japan* reviews the Staggers Act in some detail in connection with the requirement that railroads offer their shippers full liability options to enjoy limited liability under Carmack. *Sompo Japan* at 59.

<sup>[33]</sup> *Id.* at 69.

<sup>[34]</sup> *Id.* at 60.

<sup>[35]</sup> *Id.* at 75.

<sup>[36]</sup> In the current appeal, the UP argues that its waybills had been "succeeded by UP Exempt Circular 20-B at the time of the shipment at issue," and that Circular 20-B adopts the limitation of liability contained in the ocean carrier's bill of lading. Brief and Special Appendix for Defendant-Appellant, *Sompo Japan Ins. Co. of America v. Union Pacific Railroad Co.* (hereinafter "*Sompo Japan's Appellate Brief*"), at 12-13.

## KIRBY'S WAKE?... (CONTINUED)

grounded in negligence while Carmack liability is rooted in strict liability, . . . [the court] cannot assume that the shipper contracting with Union Pacific had the opportunity to choose among several types of liability coverage and opted not to pay a higher freight rate for full coverage under a strict liability rule."<sup>[37]</sup>

Despite *Sompo Japan's* attempts to distinguish *Kirby*, the two decisions are fundamentally at odds. While there are differences between the *Kirby* and *Sompo Japan* fact patterns, the policy and precedent both cases pronounce are substantially divergent. Per *Kirby*, a uniform policy of federal maritime law governs freight claims if a through ocean bill of lading's terms are extended to connecting carriers. The High Court pronounced this as desirable from both industry and legal perspectives, recognizing that parties may retain some element of control if they disfavor the "default rule" it was establishing. *Sompo Japan* stands for the principle that ocean carriers may not extend COGSA and the limited liability terms of their through bills of lading to surface carriers, and that the latter must limit their own liability in accordance with Carmack and Staggers.

*Sompo Japan* seeks to distinguish the Supreme Court's analysis in *Kirby* on the ground that the plaintiff subrogated insurer in *Kirby* "failed to raise the issue of Carmack's applicability."<sup>[38]</sup> The Second Circuit asserted that *Kirby* was concerned exclusively with COGSA's preemption of state law. In its opinion, the Court of Appeals stated that Allianz Australia Insurance omitted a Carmack argument from its brief.<sup>[39]</sup>

However, the UP, in the pending appeal of *Sompo Japan*, points out that "[t]he Carmack Amendment was in fact referenced in no less than five briefs filed with the Supreme Court in *Kirby*."<sup>[40]</sup> Moreover, it is difficult to conceive that the Supreme Court was unaware of, or disregarded, such a significant component of an analysis that is largely *sua sponte* in the first instance.

Perhaps most importantly, however, is the notion that the Supreme Court's reasoning, intentions and goals apply whether or not the supplanted law is Carmack or state law. *Sompo Japan* asserts that:

In *Kirby*, the Court was primarily concerned with the lack of uniformity and consistency that would result if *state* law were applied to contracts extending COGSA's terms inland. That is a significant concern, especially for the myriad parties potentially responsible for an inland carrier's damage to goods who cannot know before the fact which state law might define the contours of their liability. The Supreme Court's decision that national law will govern the interpretation of an international bill of lading with a substantial sea component adroitly avoids that problem [emphasis in the original].<sup>[41]</sup>

However, while it is true that potentially applicable state law from multiple jurisdictions would be undesirable, *Kirby* quite clearly had far more in mind:

As COGSA permits, Hamburg Süd in its bill of lading chose to extend the default rule to the entire period in which the machinery would be under its responsibility, including the period of the inland transport. Hamburg Süd would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated.<sup>[42]</sup>

<sup>[37]</sup> *Id.* at 76.

<sup>[38]</sup> *Id.* at 74.

<sup>[39]</sup> *Id.* at 74.

<sup>[40]</sup> *Sompo Japan's* Appellate Brief at 19.

<sup>[41]</sup> *Sompo Japan* at 74.

<sup>[42]</sup> *Kirby* at 396. For additional discussion about the "default rule" see 398-99.

## KIRBY'S WAKE?... (CONTINUED)

By the Second Circuit's analysis, the Supreme Court intended to create a default rule creating uniform principles that supplant conflicting state law, but not conflicting federal law. Were that the case, no true default rule would exist, and the Supreme Court's analysis would be meaningless as a practical matter. Significantly, most connecting surface transportation is interstate (including the transit addressed in *Kirby*). By the Second Circuit's analysis, *Kirby* would apply only to intrastate surface transits which do not implicate Carmack.

In response to the Second Circuit's remand, the district court found that the UP had not given Kubota an opportunity to opt for "full Carmack liability," as its waybills were not that specific. The UP appealed that decision, which is now pending before the Second Circuit. Concurrently appealed is the *Sompo I* decision, which is substantially identical.

In its pending appeal to the Second Circuit, the UP reasserts most of the same arguments it submitted in its failed argument as the appellee of *Sompo Japan*'s earlier appeal, including citation to a number of federal appellate opinions that support *Kirby* in a manner incompatible with *Sompo Japan*.<sup>[43]</sup> The briefing reads almost like a motion for reconsideration. As *Sompo Japan* is quick to point out, the UP concedes that the Court of Appeals "would have to essentially have to [sic] reverse its prior decision in the earlier *Sompo* appeal in order for UP to succeed in the appeals at issue here."<sup>[44]</sup> While it always is possible the Second Circuit will reverse itself, it is important that the record submitted to the Supreme Court be as thorough as possible.

### ***Aftermath: Results of the uncertain waters Sompo Japan created***

*Sompo Japan* has been cited in no fewer than 22 opinions since it was issued in July 2006, mostly

from Second Circuit courts. Those Second Circuit courts, despite the uproar over the apparent conflict between *Kirby-Sompo Japan*, have necessarily applied and defended the *Sompo Japan* doctrine.<sup>[45]</sup> Analysis also has been given to whether or how *Sompo Japan*'s principles might be extended to slightly differing circumstances.<sup>[46]</sup> *Kirby* has been cited in at least 133 decisions throughout the country.

While forum shopping and refusal of surface carriers to operate under through bills of lading in the Northeast are potential complications of *Sompo Japan*, these are not likely to any significant extent. Business concerns are more likely to drive geographical selection, and the location of a loss is a controlling factor in the situs of litigation. International transportation, which is subject to the economic circumstances of supply and demand, contract bargaining power, and world economy, typically addresses legal concerns in the business context.

At a minimum, however, *Sompo Japan* will produce confusion. Railroads and truckers, sometimes at the insistence of their insurers, might prefer their own bills of lading or master contracts issued directly to shippers of intermodal freight. Rather than have a separate documentation procedure for the Northeast, some more liability-conscious carriers might adhere to that practice in any event.

<sup>[43]</sup> Most notably, *Altadis USA, Inc. v. Sea Star Line, LLC., et al*, 458 F.3d 1288 (11th Cir. 2006). The U.S. Supreme Court granted certiorari in *Altadis*, but the parties settled before argument. The fact that the High Court recognized a split in the circuits suggests it is likely grant certiorari in *Sompo Japan*.

<sup>[44]</sup> Appeal Court Docket Entry dated December 14, 2007, Memorandum in support of Motion to Consolidate and Expedite, at 18.

<sup>[45]</sup> See, e.g., *Swiss Nat. Ins. Co. v. Blue Anchor Line*, 2008 WL 2434124, 2 (SDNY 2008); *Federal Ins. Co. v. Great White Fleet (US) Ltd.*, 2008 WL 2980029, 9 (SDNY 2008); and *Amazon Produce Network, LLC v. M/V LYKES OSPREY*, 553 F.Supp.2d 502, 507 (E.D.Pa. 2008).

<sup>[46]</sup> *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 2007 WL 541958, 2 (SDNY 2007).

The current predicament is likely to remain in place at least through 2010, which is the soonest the Supreme Court might accept certiorari, hear an appeal of the Second Circuit's expected affirmation of the district court's decision regarding offer of full liability, and issue a decision potentially reversing *Sompo Japan*. The Second Circuit could reverse itself in the pending appeal, but this seems unlikely.

In any event, the significance of these conflicting precedents may be short lived. The United Nations Committee on International Trade Law may soon produce a uniform ocean cargo liability regime which would provide for connecting surface carrier limitation of liability. If the United States signs the expected treaty, the significance of *Kirby* and *Sompo Japan* may be diminished considerably.

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## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

**Trucker morphs into warehouseman after consignee refuses delivery.**

*Advantage Freight Network v. Sanchez, et al*, 2008 WL 4183987 (E.D. Cal. 2008)

Advantage Freight Network, apparently a broker, booked transit of a cargo of DVD players from a supplier in Washington State to a Best Buy store in Dinuba, California with carrier Javier Sanchez. Javier's truck broke down, so he handed the load off to trucker Carlos Ortiz. Javier didn't tell Advantage about that hand off.

Carlos arrived at Best Buy on November 13, 2006, only to learn the store couldn't accept delivery until the 15th. Best Buy wouldn't let

truckers store freight in its parking lot, so Carlos, unable to reach Advantage for alternate instructions, took it home with him. The half-million dollar load was stolen along with the truck from his driveway.

Advantage compensated Best Buy for the loss, and sued both truckers as the cargo owner's assignee in Eastern District of Washington. It alleged they were liable under Carmack, and that Javier was liable for breach of contract based on his hiring Carlos to make the haul.

On cross motions for summary judgment, the court ruled that Carlos ceased to be a motor carrier subject to Carmack when Best Buy refused his load. At that point, the trucker became a warehouseman subject to California state law governing warehouse liability (which is considerably less stringent than Carmack). This metamorphosis operates as a matter of law, even though it was not previously contemplated that storage services would be needed. Liability under the state law standard, as well as advance notice to the truckers about the cargo's value, involve questions of fact not properly decided on summary judgment. Javier lost his motion to dismiss the breach of contract claim, there being factual issues as to what was agreed upon as well.

**To provide adequate notice of a Carmack claim, shipper must state either "specified or determinable amount of money" lost - at least in the Third Circuit.**

*Lewis v. Atlas Van Lines*, 2008 WL 4138459 (3rd Cir. 2008)

The Lewises owned a home in Glen Rock, Pennsylvania that they had sold in order to move to New York. The sales agreement required that they vacate the Glen Rock home by August 27, 2004. To comply, the Lewises hired Atlas agent Warners Moving & Storage to pack up and transport their stuff, specifically advising Warners about the sales contract and deadline to vacate.

## HOT RECENT CASES (CONTINUED)

Despite its promises to do the move by August 27th, Atlas' agent failed to provide a rig and driver by the deadline. Consequently, the Lewises' home sale fell through, and the hapless shippers were stuck with additional taxes, mortgage payments, "miscellaneous expenses," and - most importantly - a lower home sales price to a new buyer that was effected more than nine months after the delayed haul.

The Lewises sued Atlas in a Keystone State court, and Atlas removed the action to the Middle District of Pennsylvania, asserting Carmack. Atlas then moved to dismiss, citing the nine-month notice provision in its bill of lading, and pointing to the absence of dollar figures in the Lewises' notice of claim. The district court dismissed the claim in response to Atlas' motion for summary judgment.

The Third Circuit reversed. Carmack, in coordination with 49 CFR § 370.3, does bless a carrier's right to require notice of claim within nine months. However, the reg (at 370.3(b)(3)) requires only that the claim be in writing for a "specified or determinable amount of money." The Lewises urged that they could not have known the exact dollar amount until they later sold their home to a new buyer. The court of appeals, notwithstanding other circuits that have gone the other way, agreed that the reg's language does not require an exact dollar amount at the time a claim is made. The term "determinable" just requires an assertion of how the exact amount might later be determined, and that would be enough to satisfy the reg's purpose of giving carriers notice for purposes of an investigation.

The Lewises' luck ran out with their "miscellaneous expenses," losses, as not enough information about the nature of such expenses was included. The court dismissed that aspect of their claim.

**Daisy chain of providers complicates liability issues.**

*Trans-Pro Logistics, Inc. v. Coby Electronics Corp. v. CSX Intermodal, et al*, 2008 WL 4163992 (EDNY 2008)

Take out your notepad if you want to get to the bottom of this multi-party, he-said-she-said mess. Shipper Coby Electronics booked transit of a cargo with Trans-Pro Logistics from its California warehouse to consignee Brands Mart in Florida. The two have differing recollections as to whether Trans-Pro said it would use its own trucks or broker the load to a carrier.

In any event, Trans-Pro engaged TRT Carriers to arrange the transit. TRT is a division of NYK Logistics (although Coby denies this), and had a low-cost rate agreement with CSXI Intermodal, which bills itself as a "shipper's agent." It offers services through its "Service Directory No. 1," which provides terms for filing freight claims. These include a 24-hour notice of loss provision for shortages, and an eight-month written notice of claim.

CSXI booked with motor carrier American Railroad Line ("ARL") to dray the freight from Coby's facility to the Union Pacific Railroad; the UP hauled the load to Chicago, and transferred it to railroad CSX; CSX moved the freight to Jacksonville, Florida, where it handed it off to railroad Florida East Coast for transit to Dade County; and ARL delivered the electronics from there to Brands Mart. Got all that?

Anyway, the load arrived short (to the tune of some 81 grand), Coby filed a claim with Trans-Pro, and Coby refused to pay freight charges. That prompted Trans-Pro to sue Coby, and Coby counterclaimed against Trans-Pro, and brought a third-party action against some of the carriers. On cross motions for summary judgment before the Eastern District of New York, CSXI asked for dismissal of claims against it because Coby failed to comply with terms of the Service Directory by giving untimely notice of claim.

## HOT RECENT CASES (CONTINUED)

CSXI argued that, per the U.S. Supreme Court's decision in *Norfolk Southern Railroad v. Kirby*, 543 U.S. 14 (2004) and other precedents, Coby's agent (well, agent's agent) TRT effectively bound Coby to the Service Directory. This would support the policy of disallowing carriers to distinguish between shippers and intermediaries in the services they offer and provide. The court distinguished those decisions on the ground that CSXI is a "shipper's agent," and not a carrier. Moreover, Coby was a shipper, and not a freight forwarder.

The motions were denied ultimately because of the confusing roles various players - especially Trans-Pro - agreed to play in this complicated transaction. Factual issues remain as to whether Trans-Pro held itself out as a carrier which would handle the entire job itself, or as a broker. Stay tuned.

**Illinois fuel tax refund is based on the purpose of fuel consumption, and not its location.**  
*US Xpress Leasing, Inc. v. Department of Revenue*, 2008 WL 4007426 (Ill.App. 1 Dist. 2008)

Illinois has a motor carrier fuel tax refund program whereby the Prairie State reimburses truckers taxes they pay for fuel used in stated circumstances. One of those circumstances is fuel consumed "for any purpose other than operating a motor vehicle upon [Illinois] public highways." Carrier US Xpress sought reimbursement for \$124 thousand in taxes related to fuel burned while its trucks were idling (perhaps for refueling, cargo loading/unloading, sustaining temperature, etc.). Another clause provided that "[n]o claim based upon idle time shall be allowed," but US Xpress felt this provision applied only to idle time on Illinois public highways. An administrative law judge refused US Xpress' application, and the carrier appealed to state court, which affirmed.

Despite the seemingly clear regulatory language, US Xpress' interpretation of Illinois legislative intent was too narrow. The enumerated purposes for which consumed fuel is exempt are based on purpose, and not location. Other code provisions require claimants to demonstrate how the fuel was used in order to obtain rebates. Comparable fuel tax rebate programs in Illinois apply similarly.

**State law claims survive Carmack-blessed statute of limitations.**

*Destination Products International, Ltd. v. Wilson Transportation, Inc.*, 2008 WL 2901611 (N.D. Tex. 2008)

At a minimum, this opinion is confusing, but it makes a point that might have precedential value. Destination Products International, Ltd. ("DPI") engaged AMC Warehouse to "properly store and load" a cargo of frozen enchiladas, and then to "properly instruct and communicate instructions" to two interstate carriers that appear to be related - Wilson Transportation and Wilson & Sons Trucking (call them "Wilson" collectively) - regarding temperature maintenance while hauling the load from Grand Prairie, Texas to Kansas City, Missouri.

For some reason, AMC assembled two bills of lading for the haul, one of which had the wrong temperature instruction. Both containing a nine-month notice of claim provision and a two-year contractual statute of limitations. The enchiladas thawed, resulting in a loss to DPI. Wilson denied liability on October 31, 2005, but recommended that DPI resubmit the claim using replacement cost instead of market value. Correspondence between DPI and the carrier ensued, and the carrier ultimately denied liability on August 27, 2007. DPI sued AMC and Wilson in the Northern District of Texas on November 27, 2007, Wilson cross-claimed against AMC, and the defendants moved to dismiss.

DPI's claims involved both federal (Carmack) and state causes of action. The court found that the Carmack-sanctioned two-year statute of limitations applied from Wilson's original denial of DPI's claim, and dismissed DPI's federal claims. However, the court allowed the state law claims to proceed (albeit in state court, now that there was no basis for federal jurisdiction). Why? No preemption discussion appears in the opinion, the court getting into an analysis of supplemental jurisdiction over state claims (which it declined). What kind of state law claim could survive the summary judgment ruling is a mystery. Shouldn't dismissal of the federal claims spell the end of the whole enchilada (sorry)?

#### Southern District of New York sides with Kirby over Sompo Japan in multimodal liability action.

*Royal & Sun Alliance Insurance, PLC v. Ocean World Lines, Inc., et al*, 2008 WL 3854556 (SDNY 2008)

This case presents one of the best written opinions we've seen in quite a while, and should be required reading for any student of transportation law. Take a look for that reason alone.

Here, we have one of those complex intermodal transportation scenarios that seem to be cropping up all over the place these days. German shipper White Horse Machinery, insured by Royal & Sun Alliance ("RSA"), engaged NVOCC Ocean World Lines ("OWL") to arrange transit of a cargo of printing equipment from Bremerhaven, Germany to Bourbon, Indiana. OWL issued a through bill of lading to White Horse, and booked the haul with ocean carrier Yang Ming, which issued a through bill to OWL. Both bills of lading adopted COGSA and contained \$500/package limitation of liability provisions, as well as Himalaya clauses and Clauses Paramount extending the limited liability to connecting carriers and other services providers. However, OWL's bill set jurisdiction in New York, while Yang Ming's mandated London as the situs for dispute resolution.

Yang Ming booked surface transit with railroad Norfolk & Southern, and motor carriage with Djuric Trucking. Everything went fine until a Djuric truck collided with an overpass, damaging the freight. RSA paid White Horse under a cargo policy, and sued OWL in subrogation. In turn, OWL impleaded Yang Ming and Djuric, and everyone filed motions for summary judgment on jurisdiction, limitation of liability, and related issues.

Long story short (really short, given the opinion's length), the court found OWL's liability limited per the "undistinguishable" rationale of *Kirby*. Put simply, RSA's subrogor chose limited liability in its direct dealings with the NVOCC. RSA pointed to the apparent disagreement of the Second Circuit (under which the Southern District of New York sits) with *Kirby* presented to us by *Sompo Japan Ins. Co. v. Union Pacific R.R.*, 456 F.3d 54 (2nd Cir. 2006). Hinting that such disagreement might be, uh, improper, this district court found *Sompo Japan* irrelevant under any analysis because the current claims were against an NVOCC, unlike the *Sompo Japan* claim against a railroad. Thus, COGSA, and not Carmack, governs this part of the claim.

But what about Yang Ming's jurisdiction clause? Should the matter be heard in London or the Big Apple? Here, the court had trouble, but its incisive analysis concluded that the ocean carrier and trucker were subject to Empire State jurisdiction notwithstanding the fact they never agreed to OWL's New York jurisdiction clause. Because the latter wasn't binding on the carriers, and Yang Ming's jurisdiction clause wasn't binding on the shipper, none of them had any effect, and RSA could sue wherever a basis for jurisdiction lied.

But the pivotal question was the two carriers' liability. Could they rely on Carmack *a la* Carmack, or should *Kirby*'s conceptual analysis of admiralty jurisdiction govern? This court sided with the High Court, observing that the trucker - engaged under these circumstances (and without a bill of lading of its own) - wasn't of a class Carmack was intended for. Thus, they're limited to 500 bucks a package.

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