

Hot Recent Cases in Motor Carrier Law

by *Steve Block* September 2006

Just when you thought it was safe to come out of the water: the Second Circuit weakens Kirby's effect on connecting surface carrier liability

Sompo Japan Insurance Company of America v. Union Pacific Railroad Company, 2006 U.S. App. LEXIS 17385 (2nd Cir. 2006)

We thought the issue had been cleared up once and for all. It seemed like the land's highest court had spelled out its intentions clearly in *Norfolk Southern Railway v. Kirby* that, hey, a maritime contract's terms can, by agreed terms, come ashore and control surface carrier liability. That's what the Carriage of Goods by Sea Act (COGSA) and its interpretative case law say happens when standardized Himalaya Clauses in ocean bills of lading extend limited liability to surface carriers and others who participate in through transit.

The *Kirby* decision was grounded in admiralty jurisdiction principles, but was the product of legal recognition that international transportation is now a multimodal, containerized concept, with surface carriers and other land-based service providers integrally involved in the process. Federal uniformity is the main goal, one that is designed to create a level playing field with our international trading partners. There were public policy and equitable justifications behind *Kirby*, and the case's fact pattern was so basic and encompassing that there seemed little ground to argue that *Kirby* was limited to its own facts.

So it seemed, anyway.

Well, the waters recently became muddied and the landscape darkened when it comes to shippers suing surface carriers and their intermediaries for damaging/losing/destroying freight. The U.S. Court of Appeals for the Second Circuit, encompassing the country's northeastern states, has taken a different view of the standard scenario *Kirby* addressed, and held that the Carmack Amendment could control railroad and trucker liability even if an ocean bill says otherwise. Carmack originally was attached to the Interstate Commerce Act to ensure national uniformity in the analysis of surface carrier liability, and was recodified as part of the Interstate Commerce Commission Termination Act of 1995. It serves many of the same purposes as does COGSA, yes, including authorization to carriers to limit their liability.

Sompo Japan Insurance Company of America v. Union Pacific Railroad Company addressed a shipment of tractors from Japan to Georgia that was damaged stateside after ocean transit pursuant to a through bill of lading. The shipper's subrogated insurer sued the Union Pacific Railroad (the UP), which promptly sought to limit its liability under the ocean carrier's Himalaya Clause-imbued bill of lading. The shipper resisted, claiming that Carmack, and not COGSA, governed. Advance notice of the limited liability with an

option to pay for full liability was given to the shipper per COGSA's \$500/package standard, but potentially not as to Carmack's value-per-pound approach.

The court sided with the shipper's insurer, disregarding (or as the decision's supporter's might say, "distinguishing") *Kirby*. Granted, *Sompo Japan* offers a fascinating history and overview of COGSA and Carmack. COGSA, per its own terms, extends "tackle to tackle" (basically, while freight is on a boat). Those spatial limits can be extended by contract, but when they are, the circumstances in which liability is limited no longer have "statute-like status." That's where Carmack comes in to reign supreme. While a COGSA-blessed Himalaya Clause can govern liability as a matter of contract, it bows down to another federal statute governing the same topic.

The court goes through a history of Carmack's and COGSA's intended scopes, federal statutory construction principles, and some other precedents that grappled with similar issues. Toward the end of the opinion, the Second Circuit gets around to the real issue: just how this all jibes with *Kirby*. The approach is less than convincing or satisfying. Ruling that the *Kirby* shipper "failed" to argue that Carmack applied, the Second Circuit held that the Supreme Court never considered that statute. But those who remember *Kirby* recall vividly that more than two thirds of that opinion addressed jurisdictional issues that also weren't submitted or urged by the parties. Could the Second Circuit have concluded the high court, oops, neglected to consider a prominent transportation liability statute in rendering a predominantly public-policy oriented decision?

The court also noted that *Kirby* only dealt with state versus federal law matters, and not with federal law versus contractually extended law. Hmm. What a tough day the *Kirby* court must have had when considering the issues! The court remanded the case to a district court for determination of factual questions surrounding whether notice and option for full liability had been satisfied under Carmack's standards.

At a minimum, *Sompo Japan* is at odds with the spirit of *Kirby*, and ignores the significant public policy considerations the Supreme Court enunciated in its recent decision. It creates confusion where long-awaited clarity had just arrived. While well thought out and convincingly written (except as to how it distinguishes *Kirby*!), the case is counterproductive to industry, as it removes some of the newly established comfort *Kirby* was designed to bring us.

Questions of fact about shipper's stated intentions defeat carrier's motion for summary judgment

Zolo Technologies, Inc. v. Roadway Express, Inc., 2006 WL 2092072 (D. Colo. 2006)

Shipper Zolo Technologies requested a rate quote from Roadway to haul a cargo of trade show items from Kansas to Colorado. Roadway submitted a series of quotes, one of which included a limited liability provision of \$25 per pound with a \$100,000 cap. Zolo thought it (verbally) agreed to a full liability term, having purchased an additional \$25,000 in "coverage" for a maximum of \$125,000. Zolo sent Roadway a fax confirming

this, but Roadway claimed in didn't receive the fax until after the freight arrived, yes, damaged.

Roadway had sent Zolo a written rate confirmation that didn't include the increased cap. Zolo sent back an electronic bill of lading whose increased declared value box was unchecked. The bill of lading also incorporated Roadway's tariff and provided for Carmack governance.

Zolo sued Roadway in Colorado's federal court, and the carrier promptly moved for partial summary judgment seeking to limit its liability to \$25 per pound. Finding numerous questions of fact as to what was intended, known and done, the court denied the motion. No evidence confirmed Zolo agreed to Roadway's limited liability in writing, a requirement *Hughes v. United Van Lines*, 829 F.2d 1407 (7th Cir.) imposes. While the carrier's tariff includes the limitation of liability, Zolo's request for additional coverage excepted (and therefore nixed) that term. Roadway also claimed Zolo failed to fill out the bill of lading properly, such that the shipper shouldn't enjoy an advantage. But the form was silent as to the purportedly agreed limitation amount. That same problem also defeats mere incorporation of Carmack. Questions of fact abounding, summary judgment was not warranted.

... and available procedures with an established course of dealing might not be enough to limit liability either

Shielding International, Inc. v. Oak Harbor Freight Lines, 2006 WL 2193481 (D. OR. 2006)

In a somewhat similar case, carrier Oak Harbor lost on cross motions for summary judgment on the limitation of liability issue. This time, the carrier sent pricing agreements to shipper Shielding, none of which mentioned limited liability. The rate quotes did incorporate Oak Harbor's tariff which included a limitation of liability provision, but the shipper never wrote or signed anything. Moreover, the parties apparently never discussed liability. When Shielding extended its opened palm seeking compensation for damaged freight, Oak Harbor offered only two bucks per pound. They went to the mat in Oregon's federal court.

Even if the tariff were properly incorporated, Shielding was never given the *Hughes*-mandated option of two freight rates. True, the carrier had "procedures" in place whereby different levels of liability could be selected. But rejecting Oak Harbor's position, the court found it's not the shipper's burden to inquire about and exercise those procedures. Without full explanation of its logic or the factual circumstances, the court also refused to recognize the parties' prior course of dealing as sufficient to put the shipper on notice (a concept other courts have recognized).

Shippers' association might be able to collect unpaid freight charges from consignee
Direct Shippers Association, Inc. v. Sanyo Automotive Parts, Ltd., et al, 2006 WL 2355089 (N.J. Super. A.D. 2006)

A New Jersey state appellate court has reversed and remanded for further proceedings summary judgment dismissal of a shippers' association's attempts to collect freight charges from one of its member's consignees. Shippers associations are nonprofit coterie of similarly situated shippers who pool their freight volumes to obtain lower freight rates and other business leverage. They typically enter into transportation contracts on behalf of their members based on the latter's minimum freight commitments. The shipment at issue here, booked pursuant to the association's contract, was documented by a shipping order that provided the shipper was responsible for freight charges, and were marked "pre-paid." The association alleged that neither the shipper nor its consignee paid the charges, leaving the association holding the bag.

The trial court dismissed the association's claim based on the freight prepaid clause and the fact that shippers' groups don't have standing to enforce bill of lading terms (hey, they're neither carriers nor actual shippers). But while it's true a "freight prepaid" clause can equitably estop a carrier from seeking freight charges from a consignee, that's not always the case, and fact questions govern the issue. Similarly, whether or not an entity is a motor carrier or forwarder are questions of fact a shippers association conceivably could prevail on. The order is not the most compelling, but one cannot dismiss the illogic and injustice that would result if the association's claim were dismissed.

More about an entity's status: is it a carrier, a forwarder or a broker?

Tokio Fire & Marine Ins. Co. v. Megatrux, Inc., 2006 WL 2291281 (Cal.App. 2 Dist. 2006)

Shipper TEAC hired licensed transportation broker Megatrux to arrange for a shipment from California to Texas. Because the selected carrier's trucks weren't available for a day or so, TEAC asked Megatrux to store the freight overnight. The broker's employees did so, using another carrier to haul the freight to a warehouse. TEAC's stuff disappeared, and its insurer paid up. The subrogated insurer sued Megatrux under Carmack in California state court, and was tossed out on summary judgment. Brokers aren't on the hook under Carmack, and no evidence on the record demonstrated Megatrux was negligent in its own right.

The insurer appealed, urging that material issues of fact remained as to whether Megatrux was really a broker. Documents and website postings made it look like the company was a forwarder or even a carrier, both of which might be liable under Carmack. Over 1,000 bills of lading prepared by TEAC for Megatrux apparently named the latter as a carrier. Affirming the trial court's dismissal, the Golden State court of appeals simply went through the list of activities forwarders and carriers statutorily undertake. There was no consolidation or transport under Megatrux's auspices here. True, the distinction between the various entities is "blurred," and how one holds itself out to the public is a consideration. But that consideration has become less compelling in the last 20 years

since Carmack and other federal statutes more specifically define carrier, forwarder and broker activities. The fact that TEAC named Megatrux as a carrier in the bill of lading resulted from the shipper not knowing who actually would haul its freight, and was not "acquiescence" on Megatrux's part.

Are tow-away warning signs a safety measure or cloaked economic tools?

VRC, LLC v. City of Dallas, 2006 WL 2268459 (5th Cir. 2006)

You know those signs that warn you not to park in certain spaces or areas, lest a tow truck haul you away and subject you to calling a handy-dandy telephone number to get your car back? Has it ever occurred to you that cities like Dallas post those signs out of concern for the public safety? Did it strike you as odd that a Texas court found a Dallas municipal ordinance regarding posted warning signage to be exempted from ICCTA preemption because the ordinance was a "safety measure" (see January 2005 Motor article addressing a 2004 Northern District of Texas decision).

Well, the Fifth Circuit has just blessed the district court's decision by affirming summary judgment dismissal of tow truck operator VRC's claims against Dallas. Mindful of the general concept that "Congress does not intend to supplant state law," the Court of Appeals' opinion goes into even more detail about how fights between angry motorists and tow truck drivers are reduced by warning signs (and how the cops have to spend time responding to such fights) than did the lower court. If signs like this are sufficiently safety related to activate ICCTA's exception to preemption for local safety concerns, could one argue that any economic issue might tick off someone enough to require police intervention?