



SURF & TURF

Legal News in Transportation & Logistics

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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

BY STEVEN W. BLOCK

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.

Ref: *Sompo Japan Insurance Company of America v. Union Pacific Railroad Company*, 2006 U.S. App. LEXIS 17385 (2nd Cir. 2006); *Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., d/b/a Kirby Engineering, and Allianz Australia Insurance Limited*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004).



Hot Recent Cases in Motor Carrier Law

BY STEVEN W. BLOCK

Tar Heel troopers may regulate tow trucks

Ramey v. Easley, 2006 WL 1675827 (NC App 2006)

North Carolina has in place a "service list" of tow trucks the state calls on to move stalled and accident-damaged vehicles. The State Patrol manages the list pursuant to a list of qualifications that includes such things as a 75% response rate; keeping a valid DOT inspection sticker; and having proper cables. Ramey Wrecker Service apparently was missing some of these qualifications, and got booted from the coveted and lucrative service list.

Ramey sued the Tar Heel State, alleging it was illegally regulating interstate commerce by imposing terms by which it selects wreckers. Claiming federal preemption and a host of damages, he also pointed to the North Carolina Constitution's prohibition of delegation of legislative authority for promulgation of its own responsibilities. Even if there was no federal preemption, urged Ramey, the Legislature may not let Smokies regulate the towage industry.

Affirming a trial court's summary judgment order, the state Court of Appeals found the "safety regulatory authority" exception of 49 USC § 14501(c)(2)(A) nixed federal preemption. North Carolina's enforcement of a qualification list was sufficiently safety oriented (notwithstanding some terms whose connection with safety was dubious at best) to fall under the federal reg's exclusion. Other jurisdictions have reached similar conclusions.

And the prohibition against delegation? The court recognized how impossible it would be for a

legislature to attend to operational details such as wrecker regulation. The State Patrol's involvement was "accompanied by guiding standards to govern the exercise of the delegated powers," which the court ruled was sufficient to satisfy the spirit of keeping legislative matters within the Legislature's province.

Mobile home manufacturing defects don't trigger Carmack

Hammond v. Cappaert Manufactured Housing, 2006 WL 1627809 (W.D. La 2006)

Mr. Hammond purchased a mobile home from Cappaerts Manufactured Housing, and arranged for interstate transport of his new digs to Louisiana. The shipper wasn't happy with the home, claiming a number of manufacturing defects. He filed suit in Louisiana state court, seeking damages based on allegedly shoddy construction. The defendant manufacturer removed the case to federal court, asserting that Carmack governed the claim.

The court found Carmack didn't apply. True, the home was shipped interstate, and the manufacturer's clever interpretation of the complaint's wording made the issue look like damage in interstate transit. But a review of the claim's facts and circumstances demonstrated that any liability was based on manufacturing, and not shipping damage. Moreover, Cappaert was not a carrier, a little detail Cappaert forgot (or was not aware of) that is essential to Carmack jurisdiction. This matter goes back to Pelican State court where it belongs.

Carmack bars claim for "increased risk of identity theft"

Walters v. DHL Express, 2006 WL 1314132 (CD.D. Ill 2006)

Shipper Walters booked with DHL shipment from South Carolina to Illinois of five boxes of his personal stuff. The freight arrived damaged, short and apparently blowing down the road. Walters sued the carrier in Illinois federal court based on Carmack, asserting the freight's lost value and seeking damages for increased risk of identity theft (the boxes contained the shipper's personal information).

DHL urged there was no federal jurisdiction because, believe it or not, Carmack applies only to rail carriers and not truckers. The court shrugged off that

argument with the short shrift it deserved ("Defendant's argument is, at best, mistaken"). Volumes of cases and Carmack's own language show the statute applies to motor carriers. Come on, DHL.

But Carmack doesn't allow recovery for damages based on increased likelihood of identity theft, whether or not state or common law does recognize such an animal. While no precedent specifies this, analogy with numerous other species of claims Carmack rejects led the court to an easy determination. Recognition of a "potential" future loss like this would undermine Carmack's goal of giving transportation players a clear and uniform picture of their risks. That claim was dismissed accordingly.

Offering different freight rates based on packaging doesn't satisfy Carmack's requirement of choice between full and limited liability

Emerson Electric Supply Co. v. Estes Express Lines Corp., 2006 WL 1660575 (3d Cir. 2006)

Shipper Emerson hired carrier Estes to haul some electrical equipment interstate (the opinion doesn't say from where to where). A fax quote came in with no mention of two alternative freight rates, one for full and one for limited liability. Emerson accepted the bid, and Estes came to fetch the freight. When doing so, Estes presented Emerson with a bill of lading that, again, offered no choice of rates. It did have box a shipper could check to declare full value, which Emerson left blank. Estes' driver affixed a pro sticker to the bill of lading which incorporated the carrier's tariff. Of course, the freight arrived damaged to the tune of some 140 grand.

The carrier asserted its liability was limited to 10¢ per pound as provided by its tariff. Affirming the Western District of Pennsylvania's granting of summary judgment in Emerson's favor, the U.S. Court of Appeals for the Third Circuit found that Estes had failed to satisfy the requirement of two offered freight rates for limited liability to apply. The court goes through a neat little history of Carmack and the freight rate issue in response to Estes argument that the requirement no longer applied, concluding that Congress and multiple courts throughout the country agree that informed selection by the shipper is essential.

The tariff, even if properly incorporated by a subsequently stuck-on pro sticker, didn't offer two alternative freight rates. Estes tried to argue it did

offer different limited liability for crated and uncrated cargo, but that doesn't do the trick any more than a box for declared value. Estes gets to pay the full tab.

Maintenance escrow account creates constructive trust that bank can't touch

OOIDA v. Comerica, Inc., 2006 WL 1339427 (S.D. Ohio 2006)

OOIDA rides again, this time suing to protect its owner operator members from a bank that drew down on a carrier's maintenance account to satisfy the carrier's loan debt. Carrier Arctic Express had set up an escrow account into which its independent drivers were required to make periodic deposits to cover truck maintenance costs. Any unused maintenance deposits were to be returned to the drivers. Arctic opened an account with bank Comerica to manage the escrow fund, and also secured a revolving credit loan with that bank by pledging – you guessed it – the fund. Comerica withdrew from the account to pay back Arctic's revolving loan debt.

OOIDA previously had obtained a judgment against Arctic for return of the unapplied maintenance costs. When it found out Comerica had dipped its ladle into the escrow, OOIDA sued the bank in the U.S. District Court for the Southern District of Ohio based on Truth in Leasing violations. The theory was that an escrow account like this is a constructive trust to be used only for designated purposes for the benefit of the owner operator.

The bank moved to dismiss for lack of federal jurisdiction. The court denied the motion, finding ancillary jurisdiction over a Truth in Leasing issue. True, that legislation provides for causes of action against carriers only, but Supreme Court law extends the relevant jurisdictional basis to any "subsequent holder" of escrow funds.

Comerica also sought to dismiss on the basis it had no duty to inquire about the nature of the collateralized account. Wrong again, said the court. Precedents hold the working relationship between a bank and motor carrier sufficient to put the bank on notice. Moreover, the bank cannot claim it was a *bona fide* purchaser for value of the funds (which might get it off the hook), as a transfer of trust assets is not "for value," even if it's intended to repay antecedent debt. The case continues for further determination of the circumstances.

A carrier's agents can get it into trouble

OOIDA v. Mayflower Transit, Inc., 2006 WL 1547084 (S.D. Ind. 2006)

This matter involves extensive, ongoing litigation between OOIDA and Mayflower. In fact, the litigation is so extensive and ongoing that the court stated it was sick of repeating the (undisputed) facts, and declined to do so here. Apparently, Mayflower's agents located in offices throughout the country enter into contracts with owner operators on behalf of the carrier. The dispute was over 49 CFR § 376.12(m)'s language requiring "owners who are not agents but whose equipment is used by an agent of an authorized carrier" to ensure owners get the benefit of their lease contracts.

Mayflower interpreted this to mean that its agents alone were liable for driver claims, at least for specific issues. The carrier believed the reg's language indicates an intent to prohibit only "system-wide policies" and "systematic deprivation of owners' rights" by carriers, and that more specific violations are the headaches of agents who sign the contracts. OOIDA disagreed, and so did the Southern District of Indiana. Nothing in the reg "even hints" at such concerns or intent, and Mayflower's reliance on legislative history (mainly of omitted terms) doesn't change that.

The court further ruled that Mayflower's position would require the court to bifurcate trucking regulatory law into points the carrier was responsible for, and points it could pawn off on "agents." Nothing demonstrated such intent. Truth in Leasing regulations are intended to protect owner operators by "fostering economic stability and to provide a more equitable division of bargaining power," concepts Mayflower's argument would defeat. Confirming the Interstate Commerce Commission's statutory authority (way back when) to promulgate such regs, the court granted OOIDA's dispositive motion.

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