

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

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## KIRBY'S WAKE? PART 1— HOW THE CALM WATERS OF OCEAN TRANSPORTATION INTERMEDIARY AND SUBCONTRACTOR LIABILITY SUDDENLY BECAME UNPREDICTABLE

By Steve Block

Uniformity and predictability are the premises and primary goals of U.S. maritime law. Federal admiralty jurisdiction definitionally obtains under Article III, § 2 of the U.S. Constitution, which grants judicial power to the federal courts to try "all Cases of Admiralty and Maritime Jurisdiction." Volumes have been litigated, legislated and academically examined about cognizability under this unique sub-arm of federal jurisdiction. Summarily, it may be said that admiralty jurisdiction lies for matters which satisfy the Supreme Court's "location and connection" test, which analyzes a cause of action's locale, "general features," whether it has "a potentially disruptive impact on maritime commerce," and whether it has a "substantial relationship to traditional maritime activity."<sup>[1]</sup>

Courts and the legislature<sup>[2]</sup> have expanded the scope of these concepts so that admiralty jurisdiction encompasses matters that have almost any possibility of impacting interstate or inter-national maritime commerce, however remote.<sup>[3]</sup> But the general character of an incident, i.e., its traditional maritime characteristics, is the foundation of the jurisdictional analysis. By providing industry and state governments a uniform body of law, inherently transient maritime commerce benefits tremendously from a stable legal environment. The rules and regulations remain static for shippers, carriers and other industry participants despite passage through numerous local jurisdictions which might otherwise impose divergent legal considerations on those traveling on their waters. This program allows the U.S. government to develop a single maritime policy

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that comports with national policy and the country's place in the international community.

The development of shipping technology, the advent of containerization and intermodalization, the greater role of ocean freight forwarders and non-vessel operating common carriers, modern shipping volumes and other factors has necessitated change in this primordial field of law. No longer can ocean shipping be viewed in a saltwater vacuum. No wonder that altering the course of a legal vessel accustomed to changing tack with extreme infrequency has proved confusing and uncertain. But no matter how stormy the dissent or how great the odds of collision with other legal concepts, the guiding precepts of admiralty law - uniformity and predictability - must remain

<sup>[1]</sup> The U.S. Supreme Court's analysis was summarized in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043 (1995).

<sup>[2]</sup> In 1948, Congress enacted the Admiralty Extension Act, now codified at 46 U.S.C.A. § 30101, to include "cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land."

<sup>[3]</sup> In *Sisson v. Ruby*, 497 U.S. 358, 363, 110 S.Ct. 2892, 2896 (1990), the Supreme Court ruled "The jurisdictional inquiry does not turn on the actual effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the Ulterior more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity."

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

paramount if U.S. law hopes to preserve its place as an effective foundation of our country's shipping industry.

This paper addresses recent U.S. case law which adjudicated admiralty jurisdiction - directly and indirectly - in the context of intermodal liability. It begins with a nostalgic glimpse of the jurisdictional seascape through the early 2000s, and then explains how the U.S. Supreme Court's 2004 landmark decision in *Norfolk Southern Railway Co. v. Kirby*<sup>[4]</sup> ("Kirby") was hailed as a much-needed rescue from the uncertainty of prevailing law governing liability of surface carriers which operate pursuant to through ocean bills of lading. The paper then analyzes how *Kirby* unexpectedly was distorted by subsequent case law, most notably *Sompo Japan Ins. Co. v. Norfolk Southern Ry. Co.*<sup>[5]</sup> ("*Sompo Japan*"). This includes a statement of *Sompo Japan's* current status and potential eventualities, and is followed by an explanation of the predicament recent case law has created.

### *The evolution of ocean shipping and law governing it: Kirby's course is charted*

There can be little debate that the worldwide shipping industry's adoption of containerization as a fundamental operational technique has been successful. In addition to the safety and expedience of cargo transportation on ocean-going vessels, containerized freight is more easily booked, tracked, transshipped, and conveyed to surface carriers than was the case some forty years ago. Industry, consumers and safety have all benefited tremendously.

Multimodal transportation documented by through bills of lading<sup>[6]</sup> is now the norm. Transportation intermediaries of every mode facilitate the process, offering their shipper customers their expertise, contacts and carrier contracts to expedite the process. It is difficult to conceive how modern shipping volumes could be processed without a standardized system of transportation packaging.

However, distinct bodies of law had developed for surface and ocean carriage. Jurisdiction over

ocean claims was subject to admiralty jurisdiction, with cargo liability governed by the U.S. Carriage of Goods by Sea Act<sup>[7]</sup> ("COGSA"). The liability of railroads and motor carriers, which developed as industries millennia after vessel operation, were subject to the Carmack Amendment to the Interstate Commerce Act ("Carmack").<sup>[8]</sup> While COGSA liability concepts are founded in negligence, and Carmack imposes more of a strict liability burden on carriers, the two liability regimes' principles and considerations are largely similar. COGSA was designed to accommodate ocean carriage "tackle to tackle,"<sup>[9]</sup> and some of its statutorily prescribed defenses are exclusively pertinent to water carriage (such as "dangers of the sea," and "saving or attempting to save life or property at sea. . ."). However, most could be applied to circumstances of losses occurring on land if broadly interpreted. Conversely, most Carmack defenses - which are fewer in number - could be applied to losses at sea.

Both statutes contain limitation of liability provisions, allowing carriers to limit their exposure for lost or damaged freight. COGSA specifies a minimum liability of \$500/package, defined as a "customary freight unit."<sup>[10]</sup> Carmack allows surface carriers to limit their

<sup>[4]</sup> 543 U.S. 14, 125 S.Ct. 385 (2004). Future citations are to the Supreme Court Reporter only.

<sup>[5]</sup> 456 F.3d 54 (2<sup>nd</sup> Cir. 2006).

<sup>[6]</sup> A through bill of lading is defined as "one by which a carrier agrees to transport goods from origin to destination, even though different carriers (such as a railroad, trucker, or air carrier) may perform a portion of the contracted shipment." *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 552 (2<sup>nd</sup> Cir. 2000) citing *Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587, 588 n. 3 (5<sup>th</sup> Cir. 2000).

<sup>[7]</sup> Recodified with Harter Act, which largely governs domestic shipping, on October 6, 2006 at 46 USC § 30701 *et seq.* Moreover, cases subject to admiralty jurisdiction were governed by separate rules until admiralty was merged into the general federal court system in 1966.

<sup>[8]</sup> Currently 49 USC § 11706 for railroad transit and § 14706 for motor carrier transit.

<sup>[9]</sup> I.e., from the point in time when cargo is loaded aboard a vessel until the time it is discharged.

<sup>[10]</sup> 46 USC § 30701. Specifically, "[n]either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency. . ."

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

liability to a "reasonable" extent, an ill-defined but largely unproblematic concept that may result in pennies-per-pound of freight recoveries against carriers.<sup>[11]</sup> Both statutes (and their interpretational case law) require demonstration that the shipper be afforded a reasonable opportunity to declare the full value of its freight, and obtain full carrier liability (typically for a higher freight charge).

With industry's development and the rise of intermodalism, collision between Carmack and COGSA was inevitable. "Himalaya clauses" had become standard terms in ocean bills of lading since the 1955 English case in which they were first recognized.<sup>[12]</sup> They extend the statutory and contractual of rights the issuing ocean carrier enjoys to the carrier's subcontractors, usually consisting of stevedores, warehousemen and other dockside service providers. The Himalaya clause at issue in *Kirby*, which is typical, provided as follows: "These conditions apply when-ever claims relating to the performance of the contract evidenced by this are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract."<sup>[13]</sup>

In other words, if a longshoreman engaged by the ocean carrier of record damaged a cargo, his/her employer's liability would be limited to \$500.00/package just as the carrier's would be. This system generally worked well until steamship lines undertook the lucrative practice of offering intermodal door-to-door service. Ocean carriers began issuing through bills of lading for transportation that inherently required one or two (i.e., rail and/or motor carrier) surface transits to destination. Their position was that a connecting surface carrier was a "servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract," and was entitled to COGSA's limitation of liability. This raised the question of whether COGSA or Carmack governed a claim for lost/damaged freight occasioned by the surface carrier.

The confusion in courts addressing this issue stemmed from whether cargo damage suffered

while freight was on a railroad track could be subject to COGSA, and therefore admiralty law. Surely such circumstances failed admiralty jurisdiction's locale and traditional maritime activity tests.<sup>[14]</sup> Thus, admiralty jurisdiction in the modern age became the stage for a dispute over whether ocean carriers could extend maritime law - by way of Himalaya clauses - to railroads and motor carriers.

### *Kirby modernizes the law*<sup>[15]</sup>

"This is a maritime case about a train wreck,"<sup>[16]</sup> begins the U.S. Supreme Court's landmark decision in *Kirby*. Two thirds of the opinion addresses the High Court's *sua sponte* attention to admiralty (the parties declared only diversity jurisdiction). The case's immediate impact, especially for its parties, was its holding that an ocean carrier's \$500/package limitation of liability applies to a connecting railroad. However, *Kirby's* jurisprudential significance is far broader.

*Kirby's* fact pattern is simple, and one wonders why decades were required for its issues to come to bear. Shipper Kirby engaged Australian freight

<sup>[11]</sup> Specifically, "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which-- (A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or (B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property. 49 U.S.C.A. § 11706 (c)(3). Motor carriers "may . . . establish rates for the transportation of property . . . under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 USC § 14706.

<sup>[12]</sup> *Adler v. Dickson*, 1955 1 Q.B. 158 (Eng.C.A.1954).

HIMALAYA was the name of the vessel at issue in that case.

<sup>[13]</sup> *Kirby* at 391.

<sup>[14]</sup> *Kirby* points to *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549 (2<sup>nd</sup> Cir. 2000); *Sea-Land Serv., Inc. v. Danzig*, 211 F.3d 1373 (Fed. Cir. 2000); and *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290 (5<sup>th</sup> Cir. 1989) as examples of courts struggling with this issue. *Kirby* at 394.

<sup>[15]</sup> For a more exhaustive treatment of *Kirby* and its impact, see Block, "Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., d/b/a Kirby Engineering, and Allianz Australia Insurance Limited: The U.S. Supreme Court Blesses Industry's Trend Toward Intermodalism, Vol. 7, No. 2 *The Transportation Lawyer* at 29 (Oct. 2005).

<sup>[16]</sup> *Kirby* at 385.

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

forwarder International Cargo Control ("ICC") to arrange transit of freight from Australia to Alabama. ICC issued a through bill of lading naming itself as carrier and Kirby as shipper, and limiting ICC's liability for lost or damaged freight. The bill of lading contained a standard Himalaya Clause extending its terms to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract [i.e., the bill of lading]."<sup>[17]</sup>

ICC<sup>[18]</sup> engaged ocean carrier Hamburg Süd for the ocean transit. Hamburg Süd issued its own through bill of lading to ICC, naming ICC as its shipper. Kirby was not a party to the Hamburg Süd/ICC bill of lading. The Hamburg Süd bill of lading also contained a Himalaya Clause and limitation of liability provision.

Hamburg Süd engaged the Norfolk Southern Railroad to transport the freight from the Port of Savannah (where the steamship line discharged it after successful ocean transit) to Huntsville, Alabama. The freight was damaged during railroad transit as the result of a derailment.<sup>[19]</sup>

Kirby's subrogated insurer sued the railroad. The U.S. District Court for the Northern District of Georgia found the railroad's liability limited to \$500/package per Hamburg Süd's bill of lading. The Eleventh Circuit reversed on the ground Kirby and the surface carrier were not in privity of contract.<sup>[20]</sup> The Court of Appeals determined that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya Clause to an inland carrier."<sup>[21]</sup> Lastly, the Eleventh Circuit concluded that Hamburg Süd's limitation of liability provision could apply to Kirby "only if ICC was acting as Kirby's agent when it received Hamburg Süd's bill."<sup>[22]</sup> This would hold the railroad fully liable for the cargo loss.

Because various circuits had adopted inconsistent positions, the U.S. Supreme Court granted Norfolk Southern's petition for *certiorari*. At the heart of the court's jurisdictional analysis was the "spatial versus conceptual" aspect of a maritime contract.<sup>[23]</sup>

Maritime contracts' definitional ambiguities, when scrutinized as sources of admiralty jurisdiction, must be considered in the context of transportation's evolving nature. The primary objectives of both maritime contracts at issue (i.e., both bills of lading) were "to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States."<sup>[24]</sup> While both contracts contemplated surface transit, the court proclaimed that "under a conceptual rather than spatial approach, this fact does not alter the essentially maritime nature of the contracts."<sup>[25]</sup>

*Kirby* established the principle that maritime contract's principal objective - ocean carriage - is not materially altered by non-ocean carriage components of through transit. A single bill of lading is convenient and advantageous to all concerned, including the shipper. Federal admiralty jurisdiction is designed to formulate and apply a uniform body of law to maritime disputes,<sup>[26]</sup> and "confusion and inefficiency<sup>[27]</sup>" will be avoided by a uniform body of law governing interpretation of Himalaya clauses.

Surely Kirby knew and understood that ICC would arrange surface transit for a transport ending in Huntsville, Alabama. Despite Norfolk Southern not being in contractual privity with Kirby, it enjoys the benefit of both ICC's and Hamburg Süd's bills of lading.

From insurers and carrier claims adjusters to lawyers and academics to federal judges, *Kirby* seemed to have clarified admiralty jurisdiction's applicability to losses occurring at most any point in an ocean through transit. It also appeared to unequivocally validate Himalaya clauses as a basis

<sup>[17]</sup> The ICC bill of lading assigned different package limitation values for sea-based and land-based losses. Although the differing values were minimal, they prompted separate analyses by the court.

<sup>[18]</sup> ICC probably would be deemed a non-vessel operating common carrier under U.S. law. See 46 CFR 515.2(l).

<sup>[19]</sup> The claimed damages were approximately \$1.5 million

<sup>[20]</sup> 300 F.3d 1300, 1308-09 (2002).

<sup>[21]</sup> *Id.* at 1310.

<sup>[22]</sup> *Id.* at 1305.

<sup>[23]</sup> *Id.* at 393.

<sup>[24]</sup> *Id.*

<sup>[25]</sup> *Id.*

<sup>[26]</sup> *Id.* at 395-96.

<sup>[27]</sup> *Id.* at 396.

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

for service providers to extent contractual terms - including limitation of liability - to their subcontractors.

But what about Carmack? Could the U.S. Supreme Court have been unaware of or ignored a federal statutory liability regime specifically designed to govern railroad liability? Does the absence of a Carmack analysis in *Kirby* demonstrate that the High Court intended *Kirby* to apply only when a shipper does not specifically invoke Carmack?

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**Part II of Kirby's Wake? will be published  
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## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

**An interstate haul doesn't necessarily create personal jurisdiction in transportation's state of origination over carrier located in destination state.**

*NII Brokerage, LLC v. Roadway Express, Inc., Yellow Transportation, Inc. and Aaction Freightways, Inc.*, 2008 WL 2810160 (D. NJ. 2008)

Shipper NII booked transit with Roadway of a cargo of printer/scanners from Fairfield, New Jersey to various destinations in New York. Roadway interlined with Yellow in New Jersey and carrier Aaction in New York. The cargo allegedly arrived severely damaged, and NII sued all three carriers in the District of New Jersey.

All three carriers moved to dismiss. Roadway and Yellow pointed to state and common causes of action in NII's complaint, all of which Carmack preempted. The opinion discusses the efficacy of an amended complaint's inclusion of a Carmack claim that seeks punitive damages, but NII should be able to get its pleadings amended to state a proper claim, and a Carmack action probably will continue against Roadway and Yellow.

New York-based Aaction's motion to dismiss asserted that New Jersey lacked personal jurisdiction over it. All of that carrier's activities took place in the Empire State, including contacts between it and Roadway (Aaction wasn't a party to the NII-Roadway agreement). Reviewing long arm statute concepts, the court found that Aaction hadn't "purposely availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Aaction's mere knowledge that this was an interstate haul that originated in the Garden State didn't suffice. The court also lacked "general personal jurisdiction" over Aaction, as the latter apparently had absolutely nothing going on in Jersey.

**Carmack and freight charge disputes: state law claims aren't preempted, but ICCTA's statute of limitations applies.**

*Lear Corporation v. LH Trucking, Inc.*, 2008 WL 2781457 (E.D. Mich. 2008)

Shipper Lear and carrier LH Trucking entered into a long-term contract that provided for certain set routes to be charged at a fixed freight rate; non-set routes at a cents-per-mile rate; and a combination of the two when multi-stop runs were ordered. Apparently, LH was billing multi-stop runs at the cents-per-mile rates, with each delivery being charged as if it were from the point of origin. In other words, if LH started at point A, and delivered to points B through D (even if B through D were in close proximity), LH would bill Lear for three hauls, as if they were A to B, A to C and A to D. By this formulation, LH was billing for miles that weren't actually traveled.

Lear paid some of these dubious charges unwittingly, but when it became aware of LH's calculations, it stopped paying, and withheld some payments as offset against overcharges. The whole mess went to the Eastern District of Michigan.

The court found that LH's billings were improper and in breach of the parties' agreement. LH had a kitchen sink of affirmative defenses, such as waiver, ratification, estoppel, and laches, but each of these failed because Lear didn't have notice of the improper billing until relatively recently before suit.

## HOT RECENT CASES (CONTINUED)

LH also pointed to Carmack preemption. The court noted the statute's language and a number of cases that pointed unequivocally to Carmack preemption for freight charge disputes. However, these decisions were all pre-1995 deregulation. The Sixth Circuit's 2006 opinion in *CGH Transport v. Quebecor World, Inc.* (2006 WL 1117659) implicitly concluded that Carmack doesn't preempt freight charge claims by affirming a lower court without mention the subject. Thus, Michigan state law will govern the claim.

But the *CGH Transport* decision did enforce the federal statute of limitations set forth in 49 USC § 14705(b) (dealing with overcharges) to the state substantive law governing freight charge disputes. LH urged that Lear's claims were time barred. The court partially agreed, finding that charges for the interstate hauls (intrastate transportation isn't covered by ICCTA) performed over eighteen months before suit was initiated were time barred.

### Spoliation: why hanging onto evidence is crucial after trucking accidents.

*Ogin v. Ahmed and Werner Enterprises, Inc.*, 2008 WL 2580374 (M.D. Pa 2008)

Here's a case that carrier claims reps, drivers, private adjusters and insurance companies might find informative. Put simply, spoliation of evidence is the loss or destruction of evidence a party knows or should know is significant to ongoing or potential litigation (there actually are a number of elements that must be demonstrated, as the case clarifies). Courts have wide discretion to fashion a remedy when they conclude a party improperly tossed evidence, ranging from a slap on the wrist to dismissing claims or defenses altogether. A frequently applied sanction is the "adverse inference," or an instruction to a jury that the party destroyed evidence, and that the jury may conclude the lost evidence would have been adverse to the culpable party's interests.

Motor carriers, often at insurance companies' insistence, have response plans their drivers and

other employees are supposed to follow after accidents. Statements, photographs, measurements and other stuff are routine. But as this case demonstrates, preservation of relevant materials, here the original driver's log, should be on that list.

Plaintiffs injured in collision with a rig driven by Ahmed and owned by carrier Werner actually directed the latter to preserve specified items, including the driver's log. The log could demonstrate a number of points, such as whether Ahmed had worked more than allowable hours, or had been given adequate rest. Werner claimed it disposed of Ahmed's log "in the ordinary course of business," and tried to get away with producing log "recaps" of the time period in question. Going through a nice summary of spoliation law and applying it in the trucking accident context, the Middle District of Pennsylvania ruled that the log's destruction was spoliation, and will instruct the jury as to an adverse inference.

### To succeed in a private cause of action under Motor Carrier Act, you have to demonstrate damages.

*Fulfillment Services, Inc. v. United Parcel Service, Inc.*, 528 F.3d 614 (9<sup>th</sup> Cir. 2008)

Shipper Fulfillment Services, on behalf of itself and others similarly situated, sued UPS to recover freight charges charged based on rates listed in the National Motor Freight Classification ("NMFC"). UPS withdrew from NMFC in 2000, but apparently continued quoting rates for certain services based on NMFC schedules. The Motor Carrier Act ("MCA") at 49 USC § 13703 forbids carriers from that practice, and specifically empowers shippers to bring private causes of action in response to violations. That MCA statute also directs court to award attorneys' fees.

Fulfillment's claim failed before the District of Arizona. The Ninth Circuit affirmed dismissal of Fulfillment's claims for reasons different than the trial court, which had concluded that Fulfillment didn't have standing to sue. MCA statutorily confers standing.

## HOT RECENT CASES (CONTINUED)

But nothing in the record suggested the freight charges UPS collected were unreasonable. Thus, the shipper and its cohorts couldn't demonstrate any damages. Fulfillment argued it had been subjected to an unlawful tariff that contained freight charges which might otherwise have been lower, but MCA doesn't create rights to equitable damages for "abstract violations."

UPS sought an award of its attorney fees based on MCA's seemingly clear directive to courts. Reviewing the statute's language in the context of legislative intent and courts' general disinclination toward fee awards, the court concluded that § 13703 was intended to create a right to recover attorney fees only for successful plaintiffs. Consequently, UPS' motion for a fee award was denied.

### State law insurance claim preempted in air carriage based on Carmack analysis.

*Feldman v. United Parcel Service, Inc.*, 2008 WL 2540814 (SDNY 2008)

Here's a short but sweet order from the Southern District of New York modifying its previous ruling in this matter. UPS successfully moved for reconsideration on a couple of points worth tucking away for future reference.

An aggrieved shipper sued UPS, asserting common law negligence and contract liability for UPS' alleged failure to procure cargo insurance coverage. In its first decision, the court had ruled that both negligence and contract theories remain viable. UPS was quick to point out a 2000 Second Circuit decision which limited such claims to contract law. UPS also called the court's attention to Carmack cases which hold that federal law preempts state law claims against carriers for breach of an insurance contracts. This was an air carriage, but the court found no basis to treat the claim different from a trucking claim (a conclusion we need to see more frequently addressed). Like the damaged freight claim itself, the shipper's insurance claim will be governed by federal law.

### Another case law navigational nugget: pleading Carmack doesn't waive subject matter jurisdiction defense.

*Farrah v. Monterey Transfer & Storage, Inc.*, 2008 WL 2185033 (N.D. Cal. 2008)

And while we're gathering precedents for future reference, here's another case making a point you might have wondered about. Shipper Farrah booked shipment of personal goods with carrier Monterey Transfer & Storage. Monterey allegedly lost the freight. Farrah sued the carrier in the Northern District of California, asserting that the freight was intended for final destination in another state (thereby creating federal jurisdiction). However, plaintiff alleged state and common law theories of recovery.

Monterey promptly moved to dismiss the state law claims based on Carmack preemption. In addressing that motion, it became apparent that the shipment was wholly within California. True, a transport's "essential character" governs whether it is inter- or intra-state, and just because one leg is within a state doesn't mean its entire flavor isn't interstate. But Farrah had no evidence of intended carriage beyond the Golden State. The federal court therefore concluded it didn't have subject matter jurisdiction.

But what about Monterey's assertion of Carmack dominion and preemption? Farrah urged that this argument amounted to judicial estoppel, essentially a waiver by the carrier of jurisdictional defenses based on it taking contrary positions. The court rejected that argument. Subject matter jurisdiction cannot be created by estoppel, even if done in bad faith. This one goes back to state court.

**Don't forget to watch for  
Part II of Kirby's *Wake?* in the  
October Surf & Turf.**

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