The *Sompo* Decision: A Look Back Into The Future of Intermodal Cargo Claims

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When the United States Supreme Court issued its decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), and preceded to radically extend maritime law inland to cover intermodal cargo claims, they fail to consider fundamental transportation law. Namely, they did not take note (at least overtly) that Congress had already created a statutory scheme, in the form of the Carmack Amendment, 49 U.S.C.A. § 11706, along with the Staggers Amendment 49 USC § 10502(e), which for nearly a century had already broadly regulated such cargo claims.[23]

And so on Nov. 9th, 2004-- after just one month of consideration following oral argument-- Justice Sandra Day O'Connor wrote, and the Supreme Court ruled unanimously, that the ocean liability regime passed by Congress known as the Carriage of Goods by Sea Act (COGSA) then found at 49 Stat. 1208, 46 U.S.C. App § 1303, could be applied contractually to inland intermodal railroad cargo claims, without shippers ever being offered a Carmack liability option.

The ruling was profound in its effect. Under COGSA the liability of carriers can be limited to $500 per package, a carrier can be exonerated from liability if it exercised due diligence to avoid the cargo damage, and all law suits for cargo damage must be filed within 1 year of the cargo delivery. In contrast, under the Carmack Amendment, full carrier liability is presumed (in the absence of a tightly scripted method of confirming that a shipper has agreed to a lesser released value), carriers are subject to *de facto* strict liability (subject only to a handful of relatively rare exceptions) and while claims can be

[23] The Justices were not solely at fault. Apparently the issue of the Carmack Amendment's applicability to the claim at issues was never put squarely before them by the parties. Indeed, to the contrary, at the *certiorari* stage, cargo interest brief took the position that the Supreme Court should accept the case because it did not involve Carmack.

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contractually required to be filed with the carrier within 9 months, a shipper has two years from declination of their claim before it must fie a law suit.

The anomaly of the Supreme Court's ruling did not go unnoticed by those of us who often represent cargo interests for a living. On April 27th, 2005 in the "Outside Counsel" column of the New York Journal (Volume 233, no. 80) I and my colleague Barbara Sheridan wrote as follows:

> **Carmack Amendment Ignored**
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> Exercising this admiralty jurisdiction, the [Kirby] Court extended principles of the maritime law in order to limit the shipper's recovery for cargo damage from the railroad. Perhaps even more surprising is that the Supreme Court ignored the fact that Congress had already provided for a non-admiralty law liability scheme applicable to railroads, particularly the Carmack Amendment.
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> Thus, with the stroke of a pen, and with no congressional mandate, admiralty lawyers, a plurality of which practice in New York, have suddenly found their area of law vastly expanded and have been called upon to master an entirely new industry over a century after its creation.

The article went on to note the enormous practical significance of the *Kirby* decision for future shippers, given the lack of voluntary incentives for the railroad industry, to offer fair rates to them:

> In holding that the train wreck in *Kirby* fell within the Court's admiralty jurisdiction, the Court thus overlooked an entire statutory scheme that Congress had already enacted to regulate the railroad industry. As noted above, the Court's ruling has the potential of denying shipper's significant rights that should be available to them pursuant to these statutes. This is particularly troublesome in that just four railroads[24] account for 95% of the industry's traffic in this country. William J. Augello, Transportation Logistics and the Law, s*upra,* p. 31. Indeed, these four railroads control over 107,500 miles of railroad track, and, as to be expected, their dominance has been enormously profitable for them; in 2002, they had combined revenue of $35.6 billion. *See* www.oligopolywatch.com/ 2003/

[24] These four railroads are Union Pacific, Burlington Northern Santa Fe, CSX Corporation and Norfolk Southern. William J. Augello, Transportation Logistics and the Law, (TCPC 2001), p. 31, note 50.

> 11/01.html, "Industry brief: US railroads". The net result of having such few railroads control the vast majority of the industry's business is that a virtual oligopoly exists in the industry, thus providing shippers with a single alternative to transport goods by rail in that region.[25] In exchange for such privileges, it can be said that Congress has required those railroads offer their shippers options such as Carmack liability.

It would be two years, however, on July 10th, 2006 before the Second Circuit Court of Appeals, tiptoeing gingerly around the evident oversight of their senior colleagues, would rule that the Carmack Amendment does indeed apply to intermodal rail cargo claims. *Sompo Japan Ins. Co. v. Union Pacific Railroad Co.,* 456 F.3d 54 (2nd Cir. 2006).

In contrast to Justice O'Connor, the Second Circuit took almost a year to write the *Sompo* opinion, which runs to almost 20 full pages on Westlaw. Noting that in *Kirby* the issue of the Carmack Amendment's applicability was not squarely raised, they did not treat it as binding precedent. Rather, they found more persuasive an exceptionally detailed District Court opinion out of the Fifth Circuit, *Berlanga v. Terrier Transp., Inc.,* 269 F. Supp. 2d 821, 829-30 (N.D. Tex. 2003).

The *Sompo* Court ultimately reached the following pertinent transportation law conclusions:

1. Rail claims, whether they be domestic in origin or international intermodal movements, are subject to the Carmack Amendment and the Stagger's Rail Act of 1980.

2. Those domestic statues require, in order for a railroad to obtain a limitation of liability, that it must specifically offer the shipper the option of having full Carmack liability.

3. These principles apply equally to both import and export shipments.

Sompo has since been carefully followed by District Judges in the Second Circuit: *Sompo v. Union Pacific,* 2007 WL 2230091 (S.D.N.Y. 2007) (J. McMahon); *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.,* 2007 WL 541958 (S.D.N.Y. 2007) (J. Kaplan).

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[25] Union Pacific and Burlington Northern Santa Fe largely dominate the West, and CSX and Norfolk Southern dominate the East and South. *See* www.oligopolywatch.com/2003/11/01.html.

One impediment to the Second Circuit reaching its *Sompo* decision even sooner was the fact that four other Circuit Courts of Appeal previously held that the Carmack Amendment generally did not apply to intermodal shipments *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.,* 799 F.2d 697, 701 (11th Cir. 1986); *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.,* 965 F.2d 391, 394-395, (7th Cir. 1992); *Shao v, Link Cargo (Taiwan) Ltd.* 986 F.2d 700, 701-704, (4th Cir. 1993); *American Road Service Co. v. Consolidated Rail Corp.,* 348 F.3d 565, 568 (6th Cir. 2003).

Reviewing those decisions, the Second Circuit concluded, "Most Courts that have answered this question tend to reiterated the Eleventh Circuit's articulation of its holding in *Swift Textiles v. Watkins MotorLines Inc.* .." In short, the other Circuit Courts had engaged in little primary analysis beyond accepting the *Swift Textiles* ruling, which dated back twenty years. The purported ruling in *Swift Textile* was that the Carmack Amendment only applied to intermodal shipments when a separate domestic bill of lading was issued with respect to those shipments, and that had in fact become the law in four Circuits.

The Second Circuit noticed, however -- as had the Judge in *Berlanga*-- a fundamental inconsistency between the facts in the *Swift Textile* case and with the manner in which the Eleventh Circuit had articulated its holding. The holding states that the Carmack Amendment will apply " as long as the domestic leg [of the shipment] is covered by separate bill or bills of lading. But as the Second Circuit noted:

> The court's statement that a domestic bill of lading is *necessary* for Carmack to apply is perplexing to say the least. Indeed, it was the separate domestic bill of lading (covering a purely intrastate journey) in *Swift* that the motor carrier employed, unsuccessfully, to argue that Carmack *did not* apply. Once the *Swift* court had determined that the parties intended a continuous shipment from the foreign place of origin to the final destination, it deemed the separate domestic bill of lading to be irrelevant. Further, the version of Carmack in force at the time of *Swift* explicitly provided that a motor (or rail) carrier's failure to issue a bill of lading did not remove the carrier from Carmack's reach, *see* 92 Stat. at 1359, 1361, 1453, and that provision still exists as to rail carriers, *see* 49 U.S.C. § 11706(a).

> The disconnect between *Swift's* reasoning and the articulation of its holding has not gone unnoticed. *See, e.g., Berlanga,* 269 F.Supp.2d at 829. In fact, recognizing *63 the inconsistency, one court has hypothesized that *Swift's* use of the phrase "as long as" instead of "even if" was due to a typographical error. *See Canon USA,* 1992 WL 82509, at *7. We are therefore reluctant to rely on any line of precedent derived from *Swift's* articulated holding." (Emphasis in original).

The Second Circuit went on to note the large amount of "confusion" caused by *Swift Textile's* articulated holding. For example, in *Capitol Converting*, *supra*, 965 F.2d 391, the Seventh Circuit, having committed themselves to trying to find some logic in the decision, held that Carmack would only apply to a shipment of goods that originated in a foreign country if there was "a separate domestic segment" of the shipment. In point of fact, the Second Circuit noted, that could not have been the basis of the *Swift Textile* holding, because the Eleventh Circuit stated clearly that the shipment in question was a single shipment in "continuation in foreign commerce." *Sompo, supra,* 456 F.3d at 63, n.11. Moreover, if *Capital Converting's* view of the basis for *Swift Textiles* holding was correct, then the Eleventh Circuit should have held that the Carmack Amendment did not apply because "unlike the domestic *interstate* shipment in *Capital Converting*, the domestic shipment in *Swift* was an *intrastate* shipment to which Carmack clearly does not apply." *Sompo*, *supra,* 456 F. 3d 63, n 11. (Emphasis in original).

But the errors did not stop there. As the *Sompo* Court noted, several Courts then went on to adopt the *Capitol Converting* explanation of the *Swift Textile* holding--entirely erroneous as it may be-- and to find on that basis that the Carmack Amendment did not apply to other intermodal shipments. *See Tokio Marine & Fire Ins. Co. v. Kaisha,* 25 F.Supp.2d 1071, 1081 (C.D.Cal.1997); *N.Y. Marine & Gen. Ins. Co. v. S/S "Ming Prosperity",* 920 F. Supp. 416, 425 (S.D.N.Y.1996); *Toshiba International Corp. v. M/V Sea-Land Exp.,* 841 F. Supp. 123, 128. (S.D.N.Y. 1994).

Finally, by way of proving that overlooking relevant transportation law was not the sole province of the United States Supreme Court, the Eleventh Circuit on August 7th, 2006, decided *Altadis USA, Inc. v. Sea Star Line LLC,* 458 F3.d 1288 (7th Cir. 2006). Notwithstanding the fact that the *Sompo* decision had come down almost a month before,

the Eleventh Circuit in *Altadis* failed to distinguish the decision[26] (and thus one can only assume overlooked it) and ruled once again that the Carmack Amendment did not apply to intermodal shipments, absent a separate inland bill of lading. *Id.* at 1291-1293. The shipment in *Altadis* happened to involve motor truck cargo, but the principles set forth in *Sompo* with respect to Carmack's jurisdictional scope should have applied with equal force, assuming that the holding itself was valid.

Interestingly enough, the US Supreme Court granted *certiorari* in *Altadis, but* the case settled before oral argument.

Sompo has generated much discussion. Some trucking law practitioners have published articles lamenting the decision, but not surprisingly, given the decision's detailed research, almost all of the scholarly debate has been favorable. In a paper prepared as part of the New York Forum of Maritime Law Professors' Spring CLE Program at the Association of the Bar of City of New York in May of 2007, entitled "When Ocean Cargo is Damaged in a Train Wreck," the leading maritime law Professor Michael F. Sturley of the University of Texas School of Law described the *Sompo* decision as "a detailed analysis of the question" wherein the Court "carefully examined" the issue of the scope of Carmack's applicability. Sturley went on to say that "that the Second Circuit and the District Court in *Berlanga* were the only courts that had carefully examined the issue." Similarly, the highly respected Benedict's Maritime Bulletin (Volume IV, 3-4, Third/Forth Quarter 2006) published an article entitled "A Challenge to Kirby" which stated that "the reasoning in *Sompo* as to the applicability of Carmack is compelling." And Judge Lewis Kaplan known as one of the most scholarly judges in the Southern District of New York, has described the decision as "an exceptional instructive opinion." *Rexroth Hydraudyne B.V. v. Ocean World Lines Inc., supra,* 2007 WL 541958 (S.D.N.Y. 2007).

At the Tulane Maritime Law Institutes 2007 Conference the question of whether Sompo will ultimately be upheld by the US Supreme Court was put to three leading admiralty law professors; two of the three agreed that it would be so upheld, with the

[26] Again, the transportation bar appears to have let down the bench by failing to bring the *Sompo* decision to the *Altidas* court's attention-- although briefing was indeed completed well before *Sompo* came down.

third stating that he did not know the case well enough to give an opinion. The *Sompo* decision may now be history, but it is also quite likely to be the future.