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Lauren Kantor, Class of 2009

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THE CARMACK AMENDMENT DOES NOT REGULATE THE LIABILITY OF AN NVOCC.

The United States District Court for the Southern District of New York held that the Carmack Amendment does not regulate the liability of an NVOCC. Furthermore, an ocean carrier and trucking company cannot be bound by a forum selection clause provided by a through bill of lading, although they are subject to COGSA's \$500 per package limitation.

Royal & Sun Alliance Insurance PLC v. Ocean World Lines, Inc.
United States District Court for the Southern District of New York
572 F.Supp.2d 379
(Decided August 19, 2008)

Ocean World Lines ("OWL"), a non-vessel operating common carrier ("NVOCC"), issued a through bill of lading to White Horse Machinery, an exporter and shipper, for transportation of packages of printing equipment from Germany to Indiana. A series of clauses in the bill of lading provided that the Carriage of Goods by Sea Act ("COGSA"),¹ which limits the liability of the carrier to \$500 per package, applied throughout the entire time OWL was responsible for the goods (i.e. until the goods reached their final destination). A Himalaya Clause in the same bill of lading extended the carrier's defenses to every other carrier and agent providing services related to the transport of the printing equipment. A choice of law and forum selection provision called for application of United States law in the Southern District of New York. Finally, a Clause Paramount provided that COGSA and its package limitations governed during all parts of the inter-modal transportation.

In regards to the ocean portion of the transport, OWL engaged Yang Ming, a vessel owner. As such, Yang Ming issued a sea waybill which provided that Yang Ming, and no subsequent carrier, would be held liable for any damage to the goods being transported. Another clause in the sea waybill, a Himalaya clause, provided that COGSA applied to all subsequent carriers engaged by Yang Ming. The sea waybill called for the application of English law in an English court. Although the sea waybill purported to apply COGSA limitations, the bill also offered the shipper an option to declare the full-value of the package and not be bound by the package limitation. No such value was declared.

When the packages were damaged during the motor carrier portion of transport, Royal & Sun Alliance Insurance ("Royal & Sun") paid White Horse's claim and subrogated its rights. Royal & Sun then filed the instant action for full value of the packages against OWL, Yang Ming and Djuric Trucking, jointly and severally.

At issue is who is liable, and for how much, "when a shipment of goods transported via ship, rail and truck from a port in Germany to an inland destination in the United States, is damaged during the last leg of the voyage." The issue is complicated because there are two bills of lading, two potentially applicable statutory schemes – COGSA and the Carmack Amendment to the Interstate Commerce Act,² and inconsistent Supreme Court and Second Circuit opinions.³

Both COGSA and Carmack allow limitation on liability clauses in a bill of lading, but they do so in different ways and under different statutory schemes. COGSA limits the carrier's liability to \$500 per package unless the nature and value of the goods are declared by the shipper and inserted into the bill of lading. This provision allows the shipper chose between a lower freight rate and higher insurance rate (if the value is undeclared), or a higher freight rate and lower insurance rate (if the value is declared).

¹ 46 U.S.C. §§ 30701.

² 49 U.S.C. § 14706.

³ See *Norfolk Southern Railway v. Kirby*, 543 U.S. 14 (2004); *Sompo Japan Ins. V. Union Pacific R.R.*, 456 F.3d 54 (2d Cir. 2006); *Project Hope v. M/V IBN SINA*, 250 F.3d 67 (2d Cir. 2001)

COGSA also allows shippers and carriers to extend its provisions beyond tackle-to-tackle, such that they cover the entire inter-modal transport. *Norfolk Southern Railway v. Kirby*.⁴ The District Court reasoned that the instant case was indistinguishable from *Kirby*. The court found that the bills of lading in the two cases contained similar clauses paramount, extended COGSA protections, and limitations of liability for package values. The court, however, did not rest here.

Royal & Sun based its argument on the Second Circuit's decision in *Sompo Japan Ins. V. Union Pacific R.R.*,⁵ where the Court of Appeals held a rail carrier liable to a shipper because Carmack's statutory provisions trumped the parties contract provisions that purported to apply the COGSA package limitations.⁶ The District Court found this matter distinguishable from *Sompo* because, unlike the defendant rail carrier in *Sompo*, OWL is an NVOCC and is not subject to the Carmack amendment. COGSA, not Carmack, governs the liability of NVOCC's with respect to goods delivered during all parts of the inter-modal carriage contemplated by the bill of lading.

Royal & Sun also invoked *Project Hope v. M/V IBN SINA*,⁷ where the Court of Appeals upheld judgment against an NVOCC and trucker, jointly and severally. The court, in that case, found that the Carmack amendment applied to the trucker's inland portion of the carriage and, in any event, the NVOCC's and ocean carrier's bills of lading did not attempt to extend the provisions of COGSA to the inland portion of the voyage. Again, this court found *Project Hope* distinguishable. Not only did OWL's bill of lading extend COGSA's provision to the inland portion of the voyage, but *Sompo* also involved a reverse multi-modal carriage of goods – an export from within the United States. Royal & Sun's claim against OWL, therefore, was dismissed in as much as is sought recovery beyond \$3500.

The court next looked to Royal & Sun's claims against Yang Ming and Djuric, specifically. Yang Ming argued that since its sea waybill limited OWL to bringing suit against it in England, then White Horse and Royal & Sun were similarly limited. Yang Ming's argument, however, assumed OWL had capacity to bind White Horse as its intermediary agent, which it did not. The court wrote that although *Kirby* allowed an intermediary (*i.e.* OWL) to bind a shipper regarding liability limitations for carriers downstream, nothing in *Kirby* can be read to extend that ruling to a forum selection clause and a covenant not to sue.

Furthermore, the choice-of-forum clause in Yang Ming's sea waybill contradicted the choice-of-forum clause in OWL's bill of lading, which called for suit to be brought in the United States District Court for the Southern District of New York. To this end, Yang Ming and Djuric argued that since they were not parties to OWL's bill of lading, that they could not be bound by that clause. The court reasoned that White Horse, which was not a party to Yang Ming's sea waybill, had a reasonable expectation of being able to sue in the Southern District of New York as per OWL's bill of lading. Moreover, it would be unjust and unreasonable to relegate White Horse to a different forum because of the forum selection clause in Yang Ming's sea waybill. White Horse and Royal & Sun, therefore, had the right to sue Yang Ming and Djuric wherever they were amenable to suit, including the Southern District of New York.

Yang Ming also claimed that its sea waybill barred White Horse from suing Djuric. Yang Ming inserted a clause into its sea waybill that purportedly limited a shipper from bringing suit against any carrier other than Yang Ming. OWL's bill of lading, on the other hand, gave White Horse the reasonable expectation that it could sue any carrier responsible for cargo damage. Again, the court cited to *Kirby* and held that OWL had no right to bind White Horse to conditions in Yang Ming's sea

⁴ 543 U.S. 14, 29 (2004).

⁵ 456 F.3d 54 (2d Cir. 2006).

⁶ See 49 U.S.C. § 11706(a) (requiring rail carriers to offer a shipper a choice among different types of liability coverage and affirmatively choose not to pay a higher freight rate for full coverage under a strict liability rule); see also 49 U.S.C. § 14706(a) (applying a similar requirement on motor transporters).

⁷ 250 F.3d 67 (2d Cir. 2001).

waybill aside from the \$500 package limitation. In other words, OWL had no right to forfeit White Horse's right to sue Yang Ming and/or Djuric by accepting contradictory terms in Yang Ming's sea waybill. Therefore, Yang Ming and Djuric's motion to dismiss on these grounds were denied.

Yang Ming and Djuric argued, in the alternative, that their liability should be limited to \$500 per package under Yang Ming's sea waybill, OWL's bill of lading, and the provisions of COGSA that make such limitation clauses binding in the absence of a shipper's declaration of actual value. White Horse undoubtedly agreed to the package limitations. Royal & Sun's subrogated claim for full value of the packages, therefore, is really a claim for windfall. Denying such a claim, however, required the court to reconcile inconsistent Supreme Court and Second Circuit opinions. If the court followed the Supreme Court's decision in *Kirby*, then Royal & Sun would not be entitled to such windfall recovery because COGSA controlled. On the contrary, if the court followed the Second Circuit's decision in *Sompo*, then Royal & Sun would be entitled to windfall recovery because, in that instance, Carmack trumped COGSA. Factually, *Kirby* and *Sompo* are indistinguishable. The Second Circuit's only justification for not following *Kirby* was that the Supreme Court failed to mention Carmack in its earlier opinion.

The court ultimately decided to follow *Kirby* for several reasons. First, Carmack was designed to protect the American farmer from railroad monopolists; not to benefit any of the parties involved in this case. Second, to introduce Carmack, and forms that incorporate Carmack, in addition to COGSA, would complicate and confuse matters for shippers and carriers, and add to the expense of international trade. Last, *Kirby*, simply, is the higher authority.

In conclusion, the court limited Royal & Sun's recovery to the COGSA's statutorily proscribed \$3500. The court granted OWL judgment against Yang Ming and Djuric, jointly and severally, to the extent of OWL's liability to Royal & Sun, since Djuric bears direct responsibility for the loss under Yang Ming's sea waybill.

Lauren Kantor
Class of 2009