

**SUPREME COURT APPLIES RULES OF OCEAN COMMERCE,
NOT RAIL COMMERCE,
TO CONTAINERIZED IMPORT CARGO DAMAGED IN A TRAIN WRECK**

By Mark J. Andrews

mark.andrews@strasburger.com

(Partner, Strasburger & Price, LLP, Washington, D.C.)

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For generations, the respective liabilities of sea carriers and inland carriers for cargo loss and damage have differed sharply. With the advent of containerized cargo moving by sea and land on a single “through bill of lading,” the differences between the maritime rules (“COGSA”) and the U.S. inland rules (“Carmack”) have increasingly troubled the waters of international commerce. Carmack is generally understood to be a more “cargo friendly” regime than COGSA because (among other things) liability levels tend to be higher and the time limit for bringing suit is longer.

In 2004, the U.S. Supreme Court’s *Kirby* decision held that whenever intermodal cargo movements under a through bill included a substantial segment of sea transportation, they were subject to maritime law (which under our Constitution is generally federal law) rather than to state law. But both COGSA and Carmack are bodies of federal law, and *Kirby* did not decide which of these took precedence on inland segments. After *Kirby*, different federal appeals courts answered this question in different ways. Notably, the appeals courts for the Second and Ninth Circuits (respectively covering New York and West Coast ports) held that Carmack prevailed, while the Eleventh Circuit (covering the Georgia and Florida ports) gave primacy to COGSA.

For containerized through-bill shipments in the import trades, the Supreme Court now has supplied the answer in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, decided June 21, 2010 (the “*K-Line*” case). The short answer, according to a 6-3 decision reversing the Ninth Circuit, is that COGSA controls. The majority opinion gives three basic reasons for this choice of law. First, Carmack by its terms applies only when the “receiving carrier” (the one to which the shipper tenders cargo) is a carrier subject to the jurisdiction of the Surface Transportation Board. An ocean carrier receiving cargo from an overseas shipper manifestly does not meet this definition. Second, Carmack had never been applied to cargo from overseas origins prior to a 1978 recodification, in which Congress muddled the statute’s verbiage but disclaimed any intent to change its substantive scope. Third, giving primacy to COGSA promotes greater uniformity of legal rules for all segments of a multimodal shipment.

The *K-Line* decision does not directly reach the question of which body of law would apply to containerized *export* movements on through bills, but at least the second and third justifications given above (for applying COGSA to imports) would seem to apply as well to exports. It is also true that all the import shipments directly before the Court in *K-Line* were moving by rail rather than truck – probably because the governing statute gives

motor carriers greater latitude to contract out of Carmack (thus mooted the choice-of-law issue) than is enjoyed by rail carriers. But all three of the arguments used in the *K-Line* majority opinion would appear to support primacy for COGSA in water-motor as well as water-rail cases.

Interestingly, the *K-Line* majority included two Justices usually considered ideological opposites – Breyer and Scalia. This may have happened because the rationale of promoting legal uniformity along the supply chain would appeal to Breyer (the author of *Rowe*, a landmark 2008 decision expanding federal preemption of state motor carrier laws), while arguments for reliance on the pre-1978 statutory text of Carmack would appeal to Scalia.

The dissenting opinion was authored by Justice Sotomayor, the Court's only alumna/alumnus of the Second Circuit. Perhaps she felt free to "take one for" her old team because the Second Circuit's *Sompo* decision (favoring application of Carmack) was not being directly reviewed in *K-Line*. Notably, however, even Sotomayor rejected the Ninth Circuit's suggestion that an ocean carrier became a "rail carrier" subject to Carmack merely by operating over short segments of private railroad trackage within a port area.

The views expressed above are those of the author, and not necessarily of Strasburger & Price, LLP.