CNA Ins. Co. v. Hyundai Merch. Marine Co., 747 F.3d 339, (6th Cir. 2014) (holding: (1) Carmack Amendment did not apply to road and rail portions of single, intermodal journey; (2) subcontracting railways were intended beneficiaries of shipper and carrier's service contract; (3) Carmack Amendment applied to shipper's breach of contract claim against carrier; (4) district court's error in applying Carmack Amendment as general principle was harmless; and (5) district court's rationale for denying prejudgment interest was insupportable).

Respondent, Hyundai Merchant Marine Co. and two of its subcontractors, Norfolk Southern Railway Company (Norfolk Southern), and Burlington Northern Santa Fe Railway Company (BNSF), appealed the Western District of Kentucky Court's ruling which found them liable for the damage sustained to cargo during its transportation overseas. The Plaintiff, CNA Insurance Company (CNA), compensated the owner of the cargo, Corning, for damages to the cargo, and was subrogated to Corning's right to sue for recovery. Although CNA won the initial award against Hyundai, it was denied prejudgment interest, for which it cross-appealed. The appellate court affirmed in part, reversed in part, and remanded for reconsideration consistent with its issued opinion. The appellate court acknowledged that the Western District of Kentucky was the wrong venue for this case, but did not address it, because the parties not only proceeded in the Western District of Kentucky, but they also waived any objection or error rights.

On February 21, 2006, two of Corning's containers filled with flat glass sheets sustained damage while in transit from Harrodsburg, Kentucky to Tainan, Taiwan. Corning hired Hyundai Merchant Marine (Hyundai) exclusively to transport its cargo overseas. Hyundai had contracted several other carriers to transport the cargo. Except for the straight bill of lading that Corning provided for each container to each carrier, none of the bills of lading were exchanged until the containers reached the sea port. Thus, prior to shipment, Corning did not declare a value for this cargo. The damage of the cargo was noticed and reported after it reached its destination, and two subsequent surveys of the damage determined that the visible bulging of the nose of the two containers was due to aggressive humping of the Flatcars by the rail carriers. Further, both surveys concluded that Corning's method of stowing and packing had been suitable for the shipping, and thus did not contribute to the damage. CNA, Corning's insurer, paid Corning $664,679.88 on the claim and was subrogated to Corning's right to sue for recovery. CNA then filed suit in the Southern District of New York, naming three defendants: Hyundai, Norfolk Southern, and BNSF (hereinafter "the Carriers"). CNA claimed breach of the Service Contract, liability for bailment, and

negligence. The court found that the evidence supported the jury's award of damages against all three defendants for the full value of the freight. The carriers appealed the jury's award. CNA cross-appealed, contesting the court's denial of prejudgment interest.

The appellate court first determined that the district court erred by applying the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706, to this case. The court determined that Carmack did not apply to the road and rail legs of an intermodal overseas export shipped under a single through bill of lading.

As guidance, the court considered previous Supreme Court decisions, particularly *Kirby* and *Kawasaki.* The court applied a conceptual approach established under *Kirby*, when it stated that the Service Contract governing the carriage from Harrodsburg to Tainan was a "maritime contract" due to the substantial sea carriage involved. Accordingly, the maritime contract preempted the applicability of Carmack, and thus it should had been enforced on its own contractual terms. The court also strengthen its decision by acknowledging the initial intent of the Congress under COGSA: to allow parties to structure their contracts of international maritime commerce.

Second, the court agreed with the district court's ruling denying CNA's tort claims (negligence and bailment) against Hyundai. Under both federal maritime law and New York law, CNA could not allege a tort cause of action based on Hyundai's breach of duties that arose solely out of the contract. Both courts agreed that CNA's sole cause of action was for breach of the Service Contract. Consequently, the court pointed out that some portion of the District court's error was ultimately harmless within the context of a proper analysis.

The court concluded that the district court erred by denying summary judgment for the rail carrier defendants North Southern and BNSF, subcontractors for Hyundai, after they were charged for the breach of contract. In analyzing whether subcontractors were liable for damage, the court looked at the terms of the contract and intent of the parties to the contract (Hyundai and CNA). Although the court acknowledged that Hyundai was CNA's intermediary, it stressed that Hyundai was not CNA's agent for purposes of connecting it with multiple subcontractors. However, the court stated that the Service Contract deemed Hyundai an independent contractor entirely liable to CNA for damage to the cargo, including any damage to the cargo caused by subcontractors. Consequently, the court reversed and vacated the district court's decision against Norfolk Southern and BNSF.

The court further examined the extent of Hyundai's liability in a straight breach of the Service Contract pursuant to federal maritime law, under which the court must analyze the specific written clauses of the

Service Contract. The court started with the Clause Paramount, Form Bill of Lading § 2(B), which extended COGSA's applicability to the inland transportation by providing "when the goods are in the custody of [Hyundai]." The appellate court reaffirmed the district court's decision, stating that the Clause Paramount did not apply because the damage occurred to the cargo in custody of a rail carrier subcontractor. The court further supported its decision by analyzing the Service Contract, specifically the clause indicating Hyundai's liability for its subcontractors:

> [W]ith respect to . . . damage caused during the handling, storage, or carriage of the Goods by [Hyundai]'s Subcontractor, such liability shall be to the extent to which such Subcontractor would have been liable to [CNA] if it had made a direct and separate contract with [CNA] in respect of such handling, storage, or carriage.

The court articulated that pursuant to this contractual provision, Hyundai was liable for the damage to the extent that its subcontractors would have been. Under the Bill of Lading § 5(B)(2), the parties agreed to a separate scheme to govern Hyundai's liability for damage to the cargo under circumstances in which a subcontractor, such as a road or rail carrier, damaged the goods. Consequently, according to the court, if a road or rail carrier had a separate contract with the shipper for carriage, it would have been subject to Carmack. Thus, the court, contrary to the district court's usage of Carmack as a general principle, applied Carmack only to determine the extent of Hyundai's liability for the damage when cargo was in its subcontractors' custody, which was in agreement with the district court's judgment against Hyundai in favor of CNA.

The court, contrary to the district court's usage of Carmack as a general principle, applied Carmack only in establishing the extent of Hyundai's liability under a straightforward breach of a contract action. Finally, the court addressed the district court's denial to provide CNA with recovery of pre-judgment interest. The court stated that the district court erred in applying Carmack as a primary source for making its decision, and remanded the claim for reconsideration by the district court.

Justice Kathleen M. O'Malley issued a partial dissent disagreeing with the majorities' ruling that Carmack should be applied in establishing Hyundai's liability to Corning (hence to CNA). She suggested that Hyundai acted as an authorized agent of CNA, and thus should have been held to the same liability standards as other subcontractors.

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