Forget What You Intended: Surprisingly Strict Liability and COGSA versus Carmack

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INTRODUCTION

International shipping has evolved from a luxury to a necessity in recent decades, becoming a booming industry due in large part to the

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containerization movement.[1] As an industry grows and expands across the world, various and often conflicting legal regimes emerge, and the expansion of the global marketplace has been no different.[2] International carriers have attempted to combat uncertainty and conflicts of laws in a number of ways, most notably by use of Himalaya Clauses in through bills of lading.[3] A Himalaya Clause within a bill of lading "seeks to extend to non-carriers partial immunity or other protections afforded to the carrier by the bill of lading."[4] Although the United States Supreme Court stressed the importance of certainty and predictability in the international shipping industry in *Norfolk Southern Railway Co. v. Kirby*,[5] the current circuit split over the applicability of the Carmack Amendment[6] to inland portions of multimodal shipments creates neither certainty nor predictability. This paper will analyze the background of the laws involved, specifically the Carriage of Goods by Sea Act (COGSA),[7] Carmack,[8] and the cases that currently comprise the circuit split, and propose a rational framework for the harmonization of the law in this increasingly important area.

Part I will provide the background information related to the passage of the laws that currently affect the analysis. Part II will analyze the Supreme Court's decision in *Kirby* and point out the portions of the opinion that are relevant to an understanding of contractual extension of COGSA and waiver of Carmack. Part III will provide a brief synopsis of each case involved in the present circuit split and the rationale for the leading cases out of the Eleventh and Second circuits. Finally, Part IV will develop the rational framework necessary for the harmonization of this area of the law.

I. Background of Law

Containerization began in 1956 when fifty-eight aluminum truck bodies were shipped as an experiment, which resulted in a completely

1. *See* Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem*, 79 Tul. L. Rev. 1461, 1462 (2005).

2. *See id.* at 1462-70.

3. Attilio M. Costabel, *The "Himalaya" Clause Crosses Privity's Far Frontier Norfolk Southern v. James N. Kirby, Pty Ltd., 125 S. Ct. 385, 2004 AMC 2705 (2004)*, 36 J. Mar. L. & Com. 217, 217 (2005) (defining a Himalaya Clause as one "found routinely in contracts of carriage by sea that extends certain carrier's exonerations to parties not part of the contract of carriage.").

4. Robert Force, A.N. Yiannopoulos & Martin Davies, Admiralty and Maritime Law 97 (Beard Books 2007) (2004) (citing Marie Healy, *Carriage of Goods by Sea: Application of the "Himalaya Clause" to Subdelegees of the Carrier*, 2 Tul. Mar. L.J. 91 (1977)).

5. Norfolk So. Ry. Co. v. Kirby, 543 U.S. 14, 22-23 (2004).

6. 49 U.S.C. § 14706 (2006).

7. 46 U.S.C. §§ 30701-30707 (2006).

8. 49 U.S.C. § 14706.

new and vastly more efficient business method for international shipping.[9] Prior to containerization, cargo had to be individually loaded and unloaded from one carrier to another.[10] This now outdated process proved to be inefficient, and the modern world of international shipping and multimodal transport was born.[11] Multimodal is defined as the carriage or transportation of goods by multiple modes, including air, rail, truck, and ocean vessels. The ability to transfer cargo from one mode to another in a uniform container has transformed the world as we know it. The increasing volume of cargo being transported under a "through" bill of lading has caused some concern, especially in the United States, because different laws apply to different modes of transportation.

While the legal schemes applied to shipments have evolved throughout the twentieth century, there are some laws that still appear to conflict with the customs and intent of the parties contracting for international shipments.[12] In 1893, Congress enacted the Harter Act,[13] which was intended to combat inconsistent liability regimes in the international shipping world. Specifically, the Harter Act prohibits carriers from entering into certain exculpatory clauses in contracts for the carriage of goods, but does not provide specific defenses to cargo loss or damage.[14] Jurisdictionally, the Harter Act only applies if at least one of the ports involved is a U.S. port.[15] Without defining "proper delivery," the Harter Act mandates that the statute apply from the time the goods are delivered to the carrier until "proper delivery" is made.[16] Fortunately, cases have given some guidance and defined the term "proper delivery" to mean "upon a fit and customary wharf."[17] "Proper delivery" has also been deemed to have occurred when the carrier "gives notification to the consignee, makes the cargo accessible to the consignee, and allows the consignee a

9. MARC LEVINSON, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER 1 (2006).

10. Arthur Donovan, *Intermodal Transportation in Historical Perspective*, 27 TRANSP. L.J. 317, 317 (2000).

11. *Id.*

12. ROBERT FORCE, ADMIRALTY AND MARITIME LAW 52-54 (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/admiralt.pdf/$file/admiralt.pdf.

13. 46 U.S.C. §§ 30701-30707 (2006).

14. § 30704 (preventing a carrier from exculpating itself from "loss or damage arising from negligence or fault in loading, stowage, custody, care, or proper delivery" of cargo in its possession); § 30705 (prohibiting a carrier from relieving itself from the obligation to "exercise due diligence to—(1) make the vessel seaworthy; and (2) properly man, equip, and supply the vessel"); § 30706 (providing a carrier with defenses such as errors in navigation, dangers of the sea, and acts of God if the carrier has exercised due diligence to make the vessel seaworthy).

15. § 30702(a).

16. § 30701; Tapco Nig., Ltd. v. M/V Westwind, 702 F.2d 1252, 1255 (5th Cir. 1983).

17. *Tapco*, 702 F.2d at 1255 (quoting Allstate Ins. Co. v. Imparca Lines, 646 F.2d 166, 168 (5th Cir. 1981)).

reasonable opportunity to take possession of the cargo."[18]

In 1936, Congress incorporated the Hague Rules of 1921, as amended by the Brussels Convention of 1924, into U.S. domestic law when it enacted the Carriage of Goods by Sea Act (COGSA).[19] COGSA applies to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States."[20] COGSA establishes a liability scheme based on negligence, and permits a carrier to limit its liability for lost or damaged cargo to $500 per package.[21] However, in order to take advantage of this limitation, "common law principles require a carrier to provide a shipper with a fair opportunity to declare a value greater than $500."[22] Section 1301(1)(e) of COGSA contains what is known as the "tackle-to-tackle" provision, which provides that COGSA only applies during "the period from the time when the goods are loaded on to the time when they are discharged from the ship."[23] However, 49 U.S.C. § 1307 extends the protections of COGSA when the parties agree that COGSA will govern liability "subsequent to the discharge from the ship on which the goods are carried by sea."[24] This extension is accomplished through the use of a "clause paramount" in the bill of lading, or the inclusion of a "Himalaya Clause" in the bill of lading, which extends the $500 per package limitation to noncarriers and subcontractors.[25] Combined, these two contractual options allow parties to extend COGSA protections to the entire shipment, including periods of inland transport.

COGSA and the Harter Act both cover carriage of goods by sea, but carriage of goods on land is generally covered by the Carmack Amendment to the Interstate Commerce Act (ICA).[26] Congress enacted the ICA in 1887, and also established the Interstate Commerce Commission (ICC), in order to create uniform law related to interstate shipments.[27] Nearly twenty years after the ICA, Congress passed the Carmack Amendment which infused common law principles into the liability

18. FORCE, *supra* note 12, at 56.

19. § 30701; FORCE, *supra* note 12, at 58.

20. § 30701.

21. § 30701 hist. n. tit. I, § 4(5) (setting the $500-per-package limitation).

22. Gen. Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1024 (2d Cir. 1987). *See generally* Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212 (3d Cir. 2006) (discussing recent developments concerning the Fair Opportunity Doctrine).

23. § 30701 hist. n. tit. I, § 1(e).

24. § 30701 hist. n. tit. I, § 7.

25. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 541-42 & 542 n. 33 (West Publ'g Co. 2004) (1987).

26. *See* Joseph C. Sweeney, *Crossing the Himalayas: Exculpatory Clauses in Global Transport Norfolk Southern Railway Co. v. James N. Kirby, Pty, Ltd., 125 S. Ct. 385, 2004 AMC 2705(2004)*, 36 J. MAR. L. & COM. 155, 186-87 (2005).

27. Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887).

scheme.[28] Congress enacted Carmack in order to create "a national scheme of carrier liability for goods damaged or lost during interstate shipment and to 'relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.'"[29] Specifically, the Carmack Amendment governs any rail carrier or motor carrier that falls within the jurisdiction of the ICC, now the Surface Transportation Board.[30] The Carmack Amendment generally "governs transportation between two states or between the United States and a place in a foreign country 'to the extent the transportation is in the United States.'"[31] Carriers subject to Carmack are essentially held to a strict liability standard as long as the plaintiff can prove its prima facie case.[32]

In 1980, Congress passed the Staggers Rail Act of 1980 (Staggers Act).[33] Congress's purpose for the Staggers Rail Act was "to rid railroads of unnecessary and inefficient regulations that [had] impeded the railroads' ability to compete with other modes of transportation."[34] The Staggers Act provided sweeping deregulation, including transportation "provided by a rail carrier as part of a continuous intermodal movement."[35] Important to the focus of this paper, the Staggers Act has been interpreted as requiring that rail carriers offer an option of full Carmack coverage.[36] For example, the Seventh Circuit held that a carrier must offer "alternative terms," meaning full Carmack coverage or some lesser negotiated terms, in order to avoid strict and unmitigated liability.[37] Now

28. Act of June 29, 1906, ch. 3591, 34 Stat. 584 (codified as amended in scattered sections of 49 U.S.C.).

29. Crowley, *supra* note 1, at 1464 (quoting Reider v. Thompson, 339 U.S. 113, 119 (1950)).

30. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified in scattered sections of 49 U.S.C.).

31. Crowley, *supra* note 1, at 1464-65 (quoting 49 U.S.C. §§ 13501(1)(C), 13501(1)(E) (2006)); *see also,* 49 U.S.C. § 10501(a)(1)(F) (2006) (approved Feb. 1, 2010) ("[T]he Board has jurisdiction over transportation by rail carrier that is . . . between a place in . . . the United States and a place in a foreign country."); 49 U.S.C. § 13501(1)(E) (2006) ("The [Surface Transportation] Board [has] jurisdiction . . . over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier . . . between a place in . . . the United States and a place in a foreign country to the extent the transportation is in the United States . . . .").

32. Crowley, *supra* note 1, at 1465; *see also*, 49 U.S.C. § 11706 (2006) (approved Feb. 1, 2010) (establishing a rail carrier's liability for damaged cargo); 49 U.S.C. § 14706(a)(1) (2006) (establishing a motor carrier's or freight forwarder's general liability for damaged cargo).

33. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 49 U.S.C.).

34. Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc., 996 F.2d 874, 877 (7th Cir. 1993) (citing H.R. REP. No. 96-1430, at 80 (1980) (Conf. Rep.)).

35. 49 U.S.C. § 10502(f) (2006) (approved Feb. 1, 2010).

36. *Tokio Marine*, 996 F.2d at 879; Am. Trucking Ass'ns v. ICC, 656 F.2d 1115, 1124 (5th Cir. 1981).

37. *Tokio Marine*, 996 F.2d at 880; *accord* Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.,

that the background laws have been discussed and a foundation laid in the law, the next section will discuss the Supreme Court case that established the applicability of federal law to through bills of lading, but failed to address the specific conflict between COGSA and Carmack.

II. Norfolk Southern Railway Co. v. Kirby

In 2003, the Supreme Court decided *Norfolk Southern Railway Co. v. Kirby*, where a shipper sued an inland railroad carrier for cargo damage related to the derailment of a train on its way to the ultimate destination of Huntsville, Alabama.[38] Kirby, an Australian manufacturing company, contracted with International Cargo Control, an Australian freight forwarder, for the shipment of ten containers of machinery from Australia to Huntsville, Alabama.[39] International Cargo Control issued a through bill of lading, which included a Himalaya Clause and a Clause Paramount, to Kirby and listed the ultimate destination as Huntsville, Alabama.[40] The clauses included in the through bill of lading essentially extended the application of COGSA and its limited liability to the inland portion of the multimodal transportation. International Cargo Control hired Hamburg Süd, a German shipping company, to carry the goods to the United States.[41] Hamburg Süd then issued International Cargo Control a second and separate through bill of lading which contained both clauses.[42] Unfortunately, Hamburg Süd does not provide land transportation and therefore contracted with Norfolk Southern Railway Company (Norfolk) to provide rail transportation for the final leg of the journey from the port to Huntsville, Alabama.[43] Tragically, the train derailed on the way to Huntsville, causing significant damage to Kirby's cargo.[44]

The Supreme Court considered two issues, the first of which required the Court to determine whether a shipper is bound by contracts entered into by the freight forwarder.[45] The second issue required the Court to determine whether a multimodal through bill of lading, which limits liability, can be relied upon by a subcontractor who is not in privity with the freight forwarder or shipper.[46] Before reaching a conclusion on these is-

456 F.3d 54, 60 (2d Cir. 2006) ("If an exempt rail carrier fails to offer the shipper the option of coverage for the actual loss or injury to the property, then the shipper may sue the carrier under Carmack.").

38. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 18 (2004).
39. *Id.* at 19.
40. *Id.* at 19-20.
41. *Id.* at 21.
42. *Id.*
43. *Id.*
44. *Id.*
45. Brief of Petitioner at i, *Kirby*, 543 U.S. 14 (2004) (No. 02-1028).
46. *Id.*

sues, the Court held that federal law applied because the contract fell within the parameters of maritime jurisdiction and was not inherently local.[47] The Court stated that "[i]f a bill's *sea* components are insubstantial, then the bill is not a maritime contract."[48] Because the *Kirby* case involved through bills of lading and the primary portion of the journey was by ocean, the Court held that it had admiralty jurisdiction over the dispute.[49] After expressing the need for uniformity and efficiency in applying one law to contracts for international shipping, the Court held that the matter was not inherently local.[50]

With respect to the first two issues presented to the Court, it noted that:

> The same liability limitation in a single bill of lading for international intermodal transportation often applies both to sea and to land, as is true of the Hamburg Sud bill. Such liability clauses are regularly executed around the world. . . . Likewise, a single Himalaya Clause can cover both sea and land carriers downstream, ... Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. . . . [W]hen "a [maritime] contract . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." . . . Hamburg Sud would not enjoy the efficiencies of the default rule [of limited liability under COGSA] if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated.[51]

Additionally, the Court clarified the applicability of Himalaya Clauses by holding that a railroad carrier, although not named in the Himalaya Clause, is the intended beneficiary of a broadly written Himalaya Clause.[52] While the Supreme Court clarified the scope of Himalaya Clauses, established the application of federal law to through bills of lading involved in multimodal shipments, and confirmed that subcontractors who are not in privity with the cargo owner or freight forwarded may still rely on the protections of a Himalaya Clause, the Court did not address the conflict between COGSA and Carmack.[53] Without guidance from the Supreme Court, a circuit split has developed surrounding this conflict of liability schemes. This circuit split will be discussed in the next section.

47. *See Kirby*, 543 U.S. at 22-29.
48. *Id.* at 27.
49. *Id.*
50. *Id.*
51. *Id.* at 28-29 (citations omitted).
52. *Id.* at 32.
53. *Id.* at 29.

III. The Circuit Split

Over the past few decades, numerous district courts and six circuit courts have ruled in varying ways on the applicability of the Carmack Amendment to the inland portion of multimodal shipments covered by through bills of lading. The first section will discuss the approach taken by the Eleventh, Fourth, Sixth, and Seventh Circuits. The next section will discuss the approach endorsed by the Ninth and Second Circuits. Comparisons will be made between the conflicting approaches in the body of each section.

A. Swift Approach

The case that created the circuit split comes from the Eleventh Circuit in *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*[54] The Eleventh Circuit held that "when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey . . . will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading."[55] The holding in *Swift* is based on the Supreme Court's decision in *Reider v. Thompson*, where the Court applied Carmack to the domestic leg of a voyage that had a separate bill of lading.[56] *Swift* was reaffirmed in *Atladis USA, Inc. v. Sea Star Line, LLC*, where the Eleventh Circuit held that Carmack did not apply to the domestic leg of a shipment covered by a through bill of lading, extending COGSA to the inland portion of the shipment for which a separate bill of lading had been issued.[57]

In *Shao v. Link Cargo (Taiwan) Ltd.*, a shipper sought recovery for the loss of a multimodal shipment covered by a through bill of lading from Taiwan to Baltimore, Maryland because the cargo was accidentally sent to a warehouse in Florida and subsequently was destroyed by a fire.[58] The Fourth Circuit, citing *Swift,* held that the Carmack Amendment "does not extend . . . to shipments from a foreign country to the United States unless a domestic segment of the shipment is covered by a

54. Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986).

55. *Id.* at 701.

56. *See* Reider v. Thompson, 339 U.S. 113, 117 (1950) ("The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated. . . . Thus it is not significant that the shipment in this case originated in a foreign country, since the foreign portion of the journey terminated at the border of the United States. The obligation as receiving carrier originated when respondent issued its original through bill of lading at [the discharge port]. That contract of carriage was squarely within the provisions of the [Carmack Amendment].") (citations omitted).

57. Atladis USA, Inc. v. Sea Star Line, LLC., 458 F.3d 1288, 1294 (11th Cir. 2006).

58. Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 701 (4th Cir. 1993).

separate domestic bill of lading."[59] Unfortunately, the Fourth Circuit provided little original analysis and accepted the Eleventh Circuit's position without much discussion.

In *American Road Service Co. v. Consolidated Rail Corp.*, a subrogee sought recovery for damages paid on goods damaged by the inland rail carrier.[60] The shipment was multimodal and covered by a single through bill of lading from Germany to Detroit, Michigan.[61] American Road Service, after compensating the shipper for his loss, sought recovery under the Carmack Amendment against the inland carrier.[62] The Sixth Circuit held that the Carmack Amendment only covers those "shipment[s] over which the Interstate Commerce Commission . . . has jurisdiction . . . [and] . . . the ICC's jurisdiction does not extend to a shipment under a through bill of lading unless a domestic segment of the shipment is covered by a separate domestic bill of lading."[63]

Similarly, in another case dealing with a multimodal shipment covered by a through bill of lading, the Seventh Circuit held that the Carmack Amendment "does not extend to shipments by water, rail or motor carriers from a foreign country to the United States, . . . unless a domestic segment of the shipment is covered by a separate domestic bill of lading."[64] Like the Fourth and Sixth Circuits, the Seventh Circuit cited with approval the Eleventh Circuit's opinion in *Swift* and gave little further discussion to the issue.[65] As has been demonstrated by the previous paragraphs, the Eleventh Circuit is the seminal case for the circuit split, it is the only circuit to provide a rationale for its position, and it has been cited with approval by three sister circuits. The next section will analyze the other side of the circuit split, the Ninth and Second Circuits.

B. Ninth and Second Circuit Approach

Contrary to *Swift,* and without citing authority or providing analysis, the Ninth Circuit held, in *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.*, that the Carmack Amendment "encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading, . . . to the extent that the shipment runs beyond the dominion of [COGSA]."[66] In *Neptune*, a cargo owner sought recov-

59. *Id.* at 703.

60. Am. Rd. Serv. Co. v. Consol. Rail Corp., 348 F.3d 565, 566-67 (6th Cir. 2003).

61. *Id.*

62. *Id.* at 567.

63. *Id.* at 568 (decided before the Surface Transportation Board replaced the ICC).

64. Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391, 394 (7th Cir. 1992) (citations omitted).

65. *Id.*

66. Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co., 213 F.3d 1118, 1119 (9th Cir. 2000).

ery for damage to cargo shipped pursuant to a single through bill of lading.[67] While *Swift* was decided nearly 15 years prior to *Neptune*, the Ninth Circuit does not mention or distinguish the opinion laid down by its sister circuit.[68] The Fourth and Seventh Circuit opinions were also on the books at the time of the *Neptune* decision.

The Second Circuit provided reasoning and solidified the circuit split in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, where thirty-two tractors shipped by the Kubota Tractor Corporation suffered damage when their train derailed in Texas.[69] The tractors were shipped pursuant to three separate through bills of lading and were found to have "covered the entire journey from start to finish, including both the ocean and land legs."[70] The bills in question contained both a "Period of Responsibility Clause" and a Himalaya Clause.[71] Both clauses professed to extend the benefits of COGSA to all subcontractors of Mitsui OSK Line Limited, the original carrier, including Union Pacific Railroad.[72] In direct conflict with the *Swift* decision, the Second Circuit held that a shipment from a foreign country to the United States that is shipped pursuant to a through bill of lading is governed by both Carmack and the Staggers Act, which impose nearly strict liability upon Union Pacific.[73] The court reasoned that COGSA only applied ex contractu to the inland portion and was trumped by Carmack and Staggers due to their status as federal statutes.[74]

The *Sompo* court specifically questioned the Eleventh Circuit's holding in *Swift* and the requirement of a separate domestic bill of lading for Carmack application.[75] The court noted that the requirement of a separate bill of lading was irrelevant once the *Swift* court held that the intent of the parties for the continuous voyage would take precedence.[76] The court also noted that the version of Carmack relevant to the *Swift* decision "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 . . . ."[77] The *Sompo* court agreed with the *Swift* court on how these cases should be analyzed and applied the same two-step analysis for deciding when to

67. *Id.*
68. *Id.* at 1119-20.
69. Sompo Japanese Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54, 55 (2d Cir. 2006).
70. *Id.* at 56.
71. *Id.* at 56-57.
72. *Id.*
73. *Id.* at 69.
74. *Id.* at 76.
75. *Sompo*, 456 F.3d at 62.
76. *Id.*
77. *Id.*

apply Carmack.[78] After determining that Carmack applied to the inland portion of Kubota's shipment, the court held that while COGSA allows parties to extend its protections beyond the tackles, such extension must give way to conflicting laws such as Carmack.[79] In support of this proclamation, the court cited several cases that supposedly stand for the proposition that federal law takes precedence over COGSA extended by contract beyond the tackles.[80] The Second Circuit also attempted to distinguish *Sompo* from *Kirby* by explaining that the issue of Carmack's applicability was not reached by the Supreme Court in the *Kirby* decision.[81] While the Second Circuit makes a compelling argument based on statutory language, the next section will explain why Carmack does not and should not trump contractual agreements to extend COGSA protection beyond the tackles.

IV. Carmack Should Not Apply

The circuit split has brought international scrutiny upon the United States and its varying treatment of contractual realities. While there are four circuits that have held Carmack inapplicable to domestic inland segments of multimodal shipments subject to through bills of lading, they all rely upon the Eleventh Circuit's opinion in *Swift,* and provide little original analysis or reasoning for Carmack's inapplicability.[82] While some may view *Swift* and its progeny as lacking the necessary reasoning or justification to make Carmack inapplicable, there are a number of reasons that should be articulated when deciding such an internationally important issue. Carmack should not apply to domestic inland segments of multimodal shipments subject to through bills of lading for the following reasons: Carmack's own language must be given effect; Supreme Court precedent requires it; judicial economy and economic certainty demand a bright-line rule; and the *Kirby* decision, when applied to such situations, calls for the inapplicability of Carmack.

A. Carmack Language

The Carmack Amendment provides that "[a] rail carrier providing

78. *Id.* at 63 (The court described the two-step test as follows: "[W]e must first determine the nature of the shipment in question—whether it is a single continuous intermodal shipment or multiple shipments consisting of separate ocean and domestic legs. Then we must determine whether Carmack applies to the shipment at issue.").

79. *Id.* at 74-75.

80. *Id.* at 71.

81. *Sompo*, 456 F.3d at 74.

82. *See* Altadis USA, Inc. v. Sea Star Line, LLC, 458 F.3d 1288, 1294 (11th Cir. 2006); Am. Rd. Serv. Co. v. Consol. Rail Corp., 348 F.3d 565, 568-69 (6th Cir. 2003); Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 703 (4th Cir. 1993); Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391, 394 (7th Cir. 1992).

transportation or service subject to the jurisdiction of the [Surface Transportation] Board . . . shall issue a receipt or bill of lading for property it receives for transportation . . . ."[83] But, the statute also states that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier."[84] Similarly, the rules governing motor carriers provide that "[a] carrier providing transportation or service subject to [the Board's] jurisdiction . . . shall issue a receipt or bill of lading for property it receives for transportation . . . ."[85] But again, the statute contains contradictory language, stating that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a carrier."[86]

In *Sompo*, the Second Circuit relied on the above language in 49 U.S.C. § 11706, but failed to give any effect to the first sentence, specifically 49 U.S.C. § 11706(a)(1).[87] Section 11706(a)(1) contains unambiguous language that a carrier must issue a domestic bill of lading to fall within the Board's jurisdiction and be subject to Carmack.[88] The argument is simple according to the statute. A carrier that does not issue a separate bill of lading for the inland portion of a multimodal shipment, subject to an internationally issued through bill of lading, is not governed by the Carmack Amendment because the Surface Transportation Board lacks jurisdiction over the carrier.

B. Supreme Court Precedent

The Eleventh Circuit, in *Swift*, properly relied upon the Supreme Court's decision in *Reider v. Thompson*.[89] In *Reider*, a cargo owner sought recovery of damages from the railroad carrier who damaged the cargo, which originated in Buenos Aires, Argentina, during its passage from New Orleans to Boston.[90] The facts of this particular case included a separate domestic bill of lading issued by the railroad carrier. The Supreme Court held that the domestic rail portion of the shipment was governed by Carmack, even though it originated in a foreign country, because the shipment was not subject to a through bill of lading.[91] Without a through bill of lading, the ocean portion of the shipment terminated upon issuance of the domestic bill of lading in New Orleans.[92] The Court also noted that the Carmack Amendment applied because jurisdiction

83. 49 U.S.C. § 11706(a) (2006).
84. § 11706(a).
85. 49 U.S.C. § 14706(a)(1) (2006).
86. § 14706(a)(1).
87. *Sompo*, 456 F.2d at 59-60.
88. 49 U.S.C. § 11706(a)(1).
89. Swift Textiles Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697, 700-01 (11th Cir. 1986).
90. Reider v. Thompson, 339 U.S. 113, 114-15 (1950).
91. *Id.* at 117.
92. *Id.*

was invoked through the issuance of a domestic bill of lading for the inland segment of the shipment.[93] Finally, and most importantly, the Court specifically distinguished the *Reider* situation from the case of *Alwine v. Pennsylvania Railroad Co.*, a case where the Carmack Amendment was held not to apply to the inland segment of a shipment subject to a through bill of lading because issuance of a separate domestic bill of lading terminates the ocean voyage and subjects the inland carrier to the Carmack Amendment.[94] The Court's emphasis on the fact that the shipment was covered by a separate domestic bill of lading and its distinguishing of the *Alwine* case both form the foundation for the inapplicability of Carmack to the inland segments of multimodal shipments subject to through bills of lading.

C. Judicial Economy and Economic Certainty

Carmack should not apply to the inland segments of multimodal shipments subject to a through bill of lading because it would unnecessarily increase litigation and create uncertainty through conflict between contractual terms and domestic laws. It would also require judicial determination as to the exact point in time when the ocean carrier and the inland carrier exchange the risk of loss for the goods. No point is delineated by statute, and determining the exact point in time may require increased litigation. If Carmack did not apply to inland carriers working pursuant to a through bill of lading, then all carriers would be subject to a single uniform liability scheme. Additionally, a bright-line rule would assist the shipping industry by providing clarity and predictability in their contractual relationships.

The current circuit split creates uncertainty for carriers entering into multimodal shipping contracts and creates disparate treatment of land versus ocean carriers. If Carmack is determined to be inapplicable to the multimodal shipments subject to through bills of lading, all carriers would be treated equally, and contractual terms would be given the proper respect. Also, the shipper would still be protected by the fair opportunity doctrine under COGSA because carriers would have to offer shippers a fair opportunity to declare a higher value for cargo before invoking COGSA's $500-per-package limitation of liability.[95] Finally, shippers would be protected because a carrier cannot exculpate itself from liability for negligence in the carriage of goods.[96]

93. *Id.* at 118.

94. *Id.* at 117-18.

95. *See, e.g.*, Couthino, Caro & Co. v. M/V Sava, 849 F.2d 166, 169 (5th Cir. 1988); Komatsu, Ltd. v. States S.S. Co., 674 F.2d 806, 809 (9th Cir. 1982).

96. 46 U.S.C. § 30701 hist. n. tit. I, § 3(8) (2006) (defining the limitation of liability for negligence).

D. THE *KIRBY* DECISION

In *Kirby*, the Supreme Court issued a decision providing guidance on several important issues related to international multimodal shipments.[97] First, the Court declared that federal law applies to the inland segment of the shipment because "[a]pplying state law to cases like this one would undermine the uniformity of general maritime law."[98] The need for a single liability limitation applied to both land and ocean carriers was explained because "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a . . . contract's meaning."[99] The Court also stressed the importance of efficiency by noting that an ocean carrier "would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility."[100] In addition, the Court explained that the purpose of COGSA, the desire to promote efficiency in international ocean shipments, would be defeated if more than one law applied.[101]

The Court's reliance on uniformity and efficiency apply with great force to the tension between Carmack and COGSA. Carmack should not apply to inland segments of multimodal shipments subject to a through bill of lading, with COGSA applying to the other segments of the shipment, because this would destroy uniformity in maritime law.[102] The *Kirby* Court acknowledged the application of COGSA to an entire shipment covered by a through bill of lading when it noted that a single liability scheme is often applied to both land and ocean carriers under a single bill of lading.[103] Furthermore, confusion would abound within the international shipping industry if laws contradictory to the terms of the contract are applied. The confusion is enhanced because Carmack and COGSA apply completely different liability schemes, have different requirements and obligations for carriers, and have different defenses to liability. As the Supreme Court noted, "[c]onfusion and inefficiency will inevitably result if more than one body of law governs" a single through bill of lading.[104] Carmack should not apply to international multimodal shipments subject to a through bill of lading which purport to subject the entire shipment to the extended protection of COGSA.

97. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 28-29 (2004).
98. *Id.* at 28.
99. *Id.* at 29.
100. *Id.*
101. *Id.*
102. *Id.* at 28.
103. *Id.*
104. *Id.* at 29.

Conclusion

The containerization movement has drastically increased the number and size of international shipments. International shippers desire certainty and uniformity in the laws applied to their contracts. The conflict between Carmack and COGSA is preventing this certainty and uniformity. The circuit split has brought international scrutiny upon the United States and its varying treatment of contractual realities. While some may view *Swift* and its progeny as lacking the necessary reasoning or justification to make Carmack inapplicable, there are a number of reasons that should be articulated when deciding such an internationally important issue. Carmack should not apply to domestic inland segments of multimodal shipments subject to through bills of lading for the following reasons: Carmack's own language must be given effect, Supreme Court precedent requires it, and judicial economy and economic certainty demand a bright-line rule. Additionally, the *Kirby* decision, when applied to such situations, calls for the inapplicability of Carmack. For the reasons already discussed above, the intent of the parties to a contract for a multimodal shipment subject to a single through bill of lading should be respected and COGSA protections extended to the exclusion of the Carmack Amendment.