Comments

Piloting in Post-*Kirby* Waters: Navigating the Circuit Split Over Whether the Carmack Amendment Applies to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading

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I. Introduction

Multimodal carriage of goods has become the state of the art in international trade. Contracts for carriage of goods now frequently involve a through bill of lading, whereby the same contract governs the entire shipment, even though multiple carriers and multiple modes of transportation are used. Unfortunately, the United States lacks a uniform regulatory scheme covering multimodal carriage of goods. What the United States does have is a cluster of statutes that relate to land, air, and sea transportation individually. The interplay between these statutes has produced much confusion. The Supreme Court recently resolved some of this confusion by announcing that state law does not apply to through bills of lading that qualify as maritime contracts in *Norfolk Southern Railway Co. v. Kirby*.[1] However, *Kirby* still leaves much unresolved and a recent circuit split over the applicability of the Carmack Amendment,[2] a land-based statute, does nothing to resolve the ambiguity surrounding multimodal carriage of goods.

In announcing its opinion in *Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co.*,[3] the Second Circuit departed from the established rule that the Carmack Amendment to the Interstate Commerce Act only applies to the domestic inland leg of an international multimodal shipment of goods when a separate bill of lading is issued.[4] In coming to its conclusion, the Second Circuit rejected the holdings of the Pennsylvania Supreme Court, the Fourth, Sixth, Seventh and Eleventh Circuits, and narrowly interpreted the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*.[5] The problem with *Sompo* is not its departure from well-established precedent. The problem with *Sompo* is that when the court looked to the contractual extension of Carriage of Goods by Sea Act's[6] (COGSA) terms and the Carmack statutory re-

1. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 22-23 (2004).
2. 49 U.S.C. §14706 (2000).
3. Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54 (2d Cir. 2006).
4. *Id.* at 68.
5. *Kirby*, 543 U.S. at 22-23.
6. Carriage of Goods of Sea Act [hereinafter COGSA], 46 App. U.S.C. §§ 1300-1315 (2000) (transferred to 46 U.S.C. §30701).

quirements, it saw two dramatically different schemes of liability whose terms could not be reconciled. By holding that the carrier's through bills of lading did not meet the limitation of liability requirements of Carmack,[7] *Sompo* creates enormous uncertainty in the world of international carriage of goods. As a result of this decision, inland carriers are now exposed to unlimited liability if they are operating under any of a number of standard through bills of lading. Ultimately this confusion is part of a larger problem: the lack of a multimodal statutory regime. The burden of developing such a scheme lies at the feet of the legislature. Until the legislature takes action, all parties involved in this billion-dollar industry need to know that the contracts they are operating under are eventually going to be enforced and may be subject to the Second Circuit's holding that could allow for greater liability than the parties contemplated.

This article will address the two statutes at issue in the current circuit split: COGSA and the Carmack Amendment. Because the split primarily concerns the applicability of the Carmack Amendment, I will pay particular attention to that statute's legislative history and judicial interpretation. Next, I will outline the facts and opinion of *Sompo*. While I agree with the Second Circuit on the issue of whether Carmack applies, it is my contention that the Second Circuit went astray at several key points in its analysis. I also believe that the Circuit's holding unreasonably confuses an already complex issue. Only Congress can properly fix this state of affairs by developing a unified statute to govern the liability of multimodal carriage. But, until the issue is legislated, courts should be loath to make this bad situation worse. As such, in this article I suggest a course of action for circuit courts that have not yet dealt with the issue, and I put forward steps that the Supreme Court should take to resolve this circuit split.

II. Multimodal Carriage of Goods in the United States – Confused Seas

In the mid-eighties, commentators began predicting that standard containers would dominate the international shipping regime.[8] Today, "increasing volumes of cargo are moving under multimodal 'through' bills of lading issued by ocean carriers and intermediaries, such as freight forwarders and nonvessel owning common carriers (NVOCCs), providing the shippers an efficient, stream-lined method of moving goods from 'door to door.'"[9] The United States' cargo liability regime is out-of-date

7. *Sompo*, 456 F.3d at 76.

8. *See* Marva Jo Wyatt, *Contract Terms in Intermodal Transport: COGSA Comes Ashore*, 16 Tul. Mar. L.J. 177, 177 (1991).

9. 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).

and unsuited to deal with multimodal carriage.[10] While the Supreme Court made a positive step when it swept aside state law in *Norfolk Southern Railway Co. v. Kirby*, there is still significant uncertainty over how the several federal statutes that govern transportation relate to multimodal carriage of goods.[11]

A. The Carriage of Goods by Sea Act and *Kirby*

Shipments to and from the United States under bills of lading and similar documents of title are governed by COGSA,[12] the U.S. enactment of the Hague Rules.[13] COGSA only applies to the time the goods are physically on board the vessel, or from "tackle-to-tackle."[14] However, COGSA allows the parties to contractually extend its provisions to areas where they would not normally apply.[15]

Under COGSA, a shipper claiming damages must establish a prima facie case by showing that the goods in question were delivered to the carrier in good condition and were received damaged, or not received at all ("good order, bad order").[16] A COGSA carrier is obligated to exercise due diligence to make the vessel seaworthy, properly man and equip the vessel, and ensure that the vessel's holds are fit for the carriage of cargo.[17] But, a carrier may completely exonerate itself by establishing one of several affirmative defenses available under COGSA.[18] COGSA also limits the carrier's liability to $500 per package.[19] But, the statute provides that this limitation of liability is applicable "unless the nature and value of the goods have been declared by the shipper before shipment and inserted into the bill of lading."[20] Therefore, so long as a shipper does not declare a higher value on the bill of lading, the carrier's liability will be limited to $500.

The Supreme Court announced a sweeping decision in 2004 that established that general maritime law preempted state law and that maritime law governed contracts such as through bills of lading involved in

10. *Id.*

11. *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 27-28 (2004); *See also* Crowley, *supra* note 9, at 1494-96.

12. COGSA, 46 App. U.S.C. §§ 1300-1315 (2000) (transferred to 46 U.S.C. §30701).

13. Robert Force, Admiralty and Maritime Law 58 (Federal Judicial Center) (2004).

14. COGSA, 46 App. U.S.C. § 1301(e) (2000) (transferred to 46 U.S.C. §30701); *See also* Force, *supra* note 13, at 63.

15. COGSA, 46 App. U.S.C. § 1312 (2000) (transferred to 46 U.S.C. §30701); *See also* Force, *supra* note 13, at 63.

16. COGSA, 46 App. U.S.C. § 1303(6) (2000) (transferred to 46 U.S.C. §30701).

17. *Id.* at §1303(1); *See also* Force, *supra* note 13, at 64.

18. Force, *supra* note 13, at 59.

19. COGSA, 46 App. U.S.C. § 1304(5) (2000) (transferred to 46 U.S.C. §30701).

20. *Id.*

the multimodal shipment of goods.[21] *Norfolk Southern Railway Co. v. Kirby* involved a shipment from Australia to Huntsville, Alabama on a through bill of lading that contained a Clause Paramount extending its COGSA $500-per-package limitation to inland carriage, as well as a Himalaya Clause[22] extending its liability limitations to additional parties.[23] The goods were damaged during the inland voyage and the land carrier sought to limit its liability under the through bill of lading.[24] Faced with an issue raised by the Court on its own accord only three months before oral argument, the Court held that state law did not apply to the case because the bill of lading was a maritime contract, and therefore federal maritime law applied.[25] The Court announced that the test for whether a contract was a maritime contract turned on whether the water portion of the voyage was "substantial."[26]

In deciding the case the Court established that federal courts have admiralty jurisdiction over multimodal bills of lading no matter how far inland the damage or loss occurs.[27] The Court further held that federal maritime law, not state law, governed the contract dispute.[28] In coming to its conclusion, the Court applied the two-step analysis from *Kossick v. United Fruit Co.* to hold that federal law controls contract interpretation when (1) the contract is a maritime contract and (2) the dispute is not inherently local.[29]

In order to answer the first prong of the *Kossick* test, the Court examined the nature and character of the multimodal contracts in this case and determined that their principal objective was maritime commerce.[30] The Court also recognized that the conventional tackle-to-tackle approach of COGSA had not kept up with changes in the industry:

> While it may once have seemed natural to think that only contracts embodying commercial obligations between the 'tackles' (i.e., from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations. The international transportation industry 'clearly has moved into a new era – the age of multimodalism, door-to-door transport based on efficientuse of all available modes of transportation by air, water, and land.' . . . The popularity of that

21. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 27-30 (2004).
22. *Id.* at 19-20.
23. *Id.* at 20.
24. *Id.* at 21.
25. *Id.* at 27-29.
26. *Id.* at 27.
27. *See Kirby*, 543 U.S. at 28.
28. *Id.* at 28-29.
29. *Id.* at 23 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961), *denied*, 366 U.S. 941).
30. *Id.* at 25.

> efficient choice, to assimilate land legs into international ocean bills of lading, should not render bills for oceancarriage nonmaritime contracts.[31]

The Court announced that the following rule regarding whether a contract is a maritime contract: "[S]o long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract."[32]

Turning to the second prong of the *Kossick* test, the Court determined that there was nothing inherently local about this dispute to justify interference with the uniformity of federal maritime law.[33] The Court noted that "[a]pplying state law to cases like this one would undermine the uniformity of general maritime law."[34] The Court further declared that, "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."[35]

Therefore, the Supreme Court held that through bills of lading are maritime contracts so long as the water leg of the voyage is substantial, and federal maritime law governs the interpretation of these contracts, not state law.[36] By so doing, the Court affirmed the standard industry practice of contractually extending COGSA's terms to inland carriers.[37]

B. Charting the Carmack Amendment's Course

Congress passed the Interstate Commerce Act (ICA) in 1887, which established the Interstate Commerce Commission (ICC) and empowered the Commission to regulate railroad rates, amongst other activities.[38] The Carmack Amendment to the ICA of June 29, 1906 placed responsibility for damages on the initial railroad line with respect to transportation wholly within the United States.[39] The addition of Section 20 in the Carmack Amendment was made in an effort "to create a national scheme of carrier liability for goods damaged or lost during interstate shipment under a valid bill of lading."[40] Congress intended "to relieve shippers of the burden of searching out a particular negligent carrier from among the

31. *Id.* at 25-26 (citing Thomas J. Schoenbaum, Admiralty and Maritime Law 589 (4th ed. 2004)).

32. *Id.* at 27.

33. *Kirby*, 543 U.S. at 27 (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955), *denied*, 349 U.S. 907).

34. *Id.* at 28.

35. *Id.* at 29.

36. *Id.* at 27-28.

37. *See id.* at 28 (citing Thomas J. Schoenbaum, Admiralty and Maritime Law 589 (4th ed. 2004)).

38. Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54, 58 (2d Cir. 2006).

39. Alwine v. Pa. R.R. Co., 15 A.2d 507, 510 (Pa. Super. Ct. 1940).

40. Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 704 (4th Cir. 1993).

often numerous carriers handling an interstate shipment of goods."[41]

In *J. H. Hamlen & Sons Co. v. Illinois Central Railroad Co.*, the District Court for the Eastern District of Arkansas held that this legislation was not applicable to transportation to a foreign country.[42] Congress responded to the court's decision by passing the Cummins Amendment of March 4, 1915[43] which extended the applicability of the statute to include transportation to a foreign country on a through bill of lading.[44] The ICC analyzed the scope of this Amendment in the Bills of Lading Cases.[45] In these cases, the Commission announced that the first Cummins Amendment "extended the territorial application of the provisions of the Carmack amendment to the transportation of goods within the territories of the United States, the District of Columbia, or to goods exported to adjacent foreign countries."[46]

Congress changed the statutory scheme again on March 4, 1927 when it passed the Newton Amendment.[47] The Newton Amendment made the delivering carrier on a through bill of lading liable for damages occurring on a preceding carrier.[48] The Newton Amendment did not change the language defining its application but rather kept the "to a foreign country" language present in the previous amendment.[49]

Congress later changed Section 1 of the ICA, which deals with the general scope of the ICA, namely the jurisdiction of the ICC.[50] These changes were apparently made in reaction to the state court decision in *Woodbury v. Galveston, Harrisburg & San Antonio Railway Co.*[51] In *Woodbury*, a rail passenger lost baggage during a voyage which was to take the passenger from Canada into the United States and then back into Canada.[52] The Texas court held that state law applied to this case because the ICC did not have jurisdiction over such a voyage.[53] After the announcement of the Texas court's decision, Congress set about to change the language of Section 1 to include transportation "from or to any place in the United States to or from a foreign country, but only in so

41. Reider v. Thompson, 339 U.S. 113, 119 (1950).
42. J.H. Hamlen & Sons Co. v. Ill. Cent. R.R. Co., 212 F. 324, 327 (E.D. Ark. 1914).
43. 49 U.S.C. § 20(11) (now included in 49 U.S.C. § 11707).
44. *Alwine*, 15 A.2d at 510.
45. Bills of Lading, 52 I.C.C. 671, 671 (April 14, 1919).
46. *Id.* at 683.
47. 49 U.S.C. § 20(11) (now included in 49 U.S.C. §11707).
48. *Alwine*, 15 A.2d at 510.
49. *Id.*
50. *Id.*
51. Woodbury v. Galveston, H. & S.A. Ry. Co., 209 S.W. 432, 435 (Tex. App. 1919) [hereinafter, *Woodbury*], *rev'd* Galveston, H. & S.A. Ry. Co. v. Woodbury, 254 U.S. 357 (1920) [hereinafter, *Galveston*].
52. *Woodbury*, 209 S.W. at 433.
53. *See id.* at 435.

far as such transportation . . . takes place within the United States."[54] This change in statutory language was adopted two months after the Supreme Court announced the reversal of the Texas court's decision.[55]

In *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, the Supreme Court reversed the Texas opinion and held that the ICA did indeed apply to transport into the United States from a foreign country.[56] The Court noted that the statute applied to "any common carrier . . . engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country."[57] The Court went on to state that a "carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States."[58] Application of the ICA, therefore, did not revolve around the direction of the transport, but rather the "nature of the transportation as determined by the field of the carrier's operation."[59] In coming to this conclusion, the Court noted that such reasoning was "in harmony with that placed upon the words of § 1 of the Harter Act."[60] Namely, that the Harter Act's language that the ICA applied to "any vessel transporting merchandise or property from or between ports of the United States and foreign ports," was construed to include vessels bringing cargos from foreign ports to the United States.[61]

Two months after the Supreme Court's decision was announced, Congress finally passed a revised wording of Section 1, resulting in the ICA's jurisdiction extending to transportation "from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States."[62] While the Supreme Court had interpreted the prior language in a way that made Congress's action unnecessary, apparently the momentum from the Texas decision pushed the change in statutory language through. While making this amendment to the ICA, Congress also revised portions of Section 20 but failed to broaden the text of the section to match the updated language of Section 1.[63]

The unchanged wording in Section 20 became an issue in *Alwine v.*

54. *Alwine*, 15 A.2d at 510.
55. Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54, 66 (2d Cir. 2006).
56. *Galveston*, 254 U.S. at 359-60.
57. *Id.* at 359.
58. *Id.*
59. *Id.* at 360.
60. *Id.*
61. *Id.* (citing Knott v. Botany Mills, 179 U.S. 69, 75 (1900)).
62. Alwine v. Pa. R.R. Co., 15 A.2d 507, 510 (Pa. Super. Ct. 1940); *see also* Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54, 66 (2d Cir. 2006).
63. *Sompo*, 456 F.3d at 66 (citing Transportation Act of 1920, ch. 91, 41 Stat. 456, 474(1920) (current version at 114 Stat. 1888 (2000)).

Pennsylvania R.R. Co. where a shipment of cattle from Canada was damaged en route to Pennsylvania.[64] The cattle were shipped under a through bill of lading that extended its protections to the delivering carrier and stated that each carrier was only to be held responsible for damages occurring during its leg of the voyage.[65] The cattle were injured while in the custody of a proceeding carrier, but the buyer sued the delivering carrier arguing that the ICA's liability rules applied and that the delivering carrier could be held liable for damage occurring at any leg of the voyage.[66] The settled rule at the time of *Alwine* was that each connecting carrier on a through route was only liable for damage that occurred during its leg of the voyage.[67] The court noted that the through bill of lading granted no more protection to the carriers than that available under common law.[68] Therefore, the court stated, unless ICA's Section 20 liability rules applied, the delivering carrier could not be held liable for damage that occurred on a previous leg.[69]

The *Alwine* plaintiff argued that the reasoning in *Woodsbury* applied with equal force to Section 20, namely that the language "to a point in an adjacent foreign country" should be read to apply with even force to shipments *from* an adjacent foreign country.[70] The *Alwine* court declined to read Section 20 in such a way. The court cited two reasons for its opinion. First, the court noted that the ICC had interpreted the Cummins Amendment as "extend[ing] the territorial application of the provisions of the Carmack Amendment to . . . goods exported to adjacent foreign countries."[71] Therefore, if Congress intended the ICC to be the agency in charge of enforcing the ICA, and the ICC thought that Section 20 only applied to exports, then the Pennsylvania Supreme Court was not going to issue a conflicting opinion. Second, the Alwine court inferred that because Congress amended Section 1's language and neglected to change identical language in Section 20, Congress clearly no longer intended the two statutes to be co-extensive.[72] Therefore, the Alwine court decided that while the ICA extends the ICC's jurisdiction to imports and exports under Section 1, the ICA's liability provisions only extend to exports under Section 20.

The Supreme Court again took up the question of the applicability of

64. *Alwine*, 15 A.2d at 508.
65. *Id.*
66. *Id.*
67. *Id.* at 509.
68. *See id.* at 511.
69. *Id.* at 563.
70. *Alwine*, 15 A.2d at 561.
71. *Id.* at 564 (quoting 52 I.C.C. 671, 683 (Apr. 14, 1919)).
72. *Id.* at 563.

Carmack in *Reider v. Thompson.*[73] *Reider* involved a shipment from Buenos Aires to Boston.[74] The ocean carrier issued a bill of lading that listed the destination of the goods as New Orleans.[75] After the arrival of the goods in New Orleans, a land-based carrier issued a bill of lading for transport from New Orleans to Boston.[76] In the Fifth Circuit opinion, a divided court held that, (1) the transaction was intended to be a single, continuous shipment from a foreign country to a point in the United States.[77] In support of this finding the court relied on a Supreme Court decision in *United States v. Erie R. R. Co.*[78] that held that the ICA had jurisdiction to control rates in a case where the goods were shipped from a foreign country to a point in the United States and the shipper intended the shipment to be single and continuous despite the fact that multiple modes of transportation were used.[79] The circuit court, relying on the Pennsylvania opinion in *Alwine*, held that (2) the Carmack Amendment did not apply to shipments from a foreign country to a point in the United States.[80] The Supreme Court disagreed.

The Supreme Court stated in *Reider* that the question of whether the transaction fell within the liability provisions of the ICA must be answered by reference to the bills of lading.[81] The test was "not where the shipment originated, but where the obligation of the carrier as receiving carrier originated."[82] The Court went on to emphasize that it was of no significance that the shipment originated in a foreign country, because the foreign portion of the voyage terminated when the ship moored up in New Orleans.[83] What was left, therefore, was merely an interstate shipment from New Orleans to Boston, covered under a domestic bill of lading that clearly fell within the liability provisions of Section 20.[84]

In *Reider*, the Court distinguished *Alwine* by pointing out that the Pennsylvania Supreme Court was dealing with an import case involving a through bill of lading.[85] Because *Reider* did not involve a through bill of lading,[86] the Court expressly abstained from determining whether the *Al-*

73. Reider v. Thompson, 339 U.S. 113, 114 (1950).
74. *Id.*at 115.
75. *Id.*
76. *Id.* at 116.
77. Reider v. Thompson, 176 F.2d 13, 15 (5th Cir. 1949), *vacated*, 339 U.S. 113 (1950).
78. United States v. Erie R.R. Co., 280 U.S. 98 (1929).
79. *Reider*, 176 F.2d at 17.
80. *Id.* at 15.
81. *Reider*, 339 U.S. at 117.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 118 (This point is debatable, as language in the Fifth Circuit opinion suggests that the goods were indeed shipped on a through bill of lading. *See Reider*, 176 F.2d at 14).

wine case was correctly decided.[87] After *Reider*, therefore, the established rule was that where a shipment commenced in a foreign nation and involved an ocean voyage and a separate, domestic land leg, but no through bill of lading, Section 20 of ICA applied. And for courts outside of Pennsylvania, the rule that imports shipped under a through bill of lading were not covered under Section 20, was only persuasive authority.

In 1978, as part of a larger overhaul of the ICA, Congress amended the ICA, and replaced the "from . . . to" language with the word "between."[88] Carmack now read as applying to "transportation in the United States between a place in . . . the United States and a place in a foreign country."[89] The expressed legislative intent of this revision was to recodify the statute, and restore without substantive change the applicable laws enacted prior to May 16, 1978.[90] The language previously found in Section 20(11) was codified at 49 U.S.C. § 10730. Use of the word "between" is a notable change to the statutory language as it replaced the directional language previously used in section 20.

Swift Textiles, Inc. v. Watkins Motor Lines, Inc., was the first appellate court case to tackle the ICA's changed language and was authored by the esteemed admiralty judge Judge John R. Brown, sitting by designation in the Eleventh Circuit.[91] Swift involved an intermodal shipment from Switzerland to LaGrange, Georgia.[92] The goods were transported by rail to Hamburg where they were loaded onto a ship.[93] The ocean carrier issued a bill of lading that covered the voyage from Hamburg to Savannah, Georgia.[94] The ship berthed in Charleston, South Carolina, where the goods were unloaded and shipped to Savannah under the ocean bill of lading.[95] Once in Savannah, the goods were turned over to a broker who arranged for transport from Savannah to LaGrange.[96] The land-based carrier for this trip across the Georgia countryside issued a new bill of lading.[97] Unfortunately, the goods were damaged while en route to LaGrange and the land carrier sought to apply the statute of limitations in the Carmack Amendment to the intrastate portion of the

87. *Reider*, 339 U.S. at 118.

88. Amendments to the Interstate Commerce Act, Pub. L. No. 95-473, § 10501(a)(2)(G), 92 Stat. 1337, 1359 (1978); *See also* Berlanga v. Terrier Transp., Inc., 269 F.Supp.2d 821, 826-27 (N.D.Tex. 2003).

89. 49 U.S.C. § 10501(a)(2)(F) (1996).

90. *See* Amendments to the Interstate Commerce Act, Pub. L. No. 95-473, § 10501(a)(2)(G), 92 Stat. 1337.

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

92. *Id.* at 698.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Swift*, 799 F.2d at 698.

voyage.[98] In *Swift*, Judge Brown began by noting that:

> The Carmack Amendment applies when the ICC has jurisdiction over the shipment in question, 49 U.S.C. § 11707(a). Among the shipments over which the ICC has jurisdiction are shipments "between a place in . . . the United States and a place in a foreign country to the extent the transportation is in the United States."[99]

The court rejected the argument that the voyage from Savannah to LaGrange was a purely intrastate journey and not covered by the Carmack Amendment.[100] Judge Brown instead applied the "intent" test for determining the nature of an intermodal shipment.[101] Citing language from *United States v. Erie R. R. Co.*,[102] Judge Brown stated that the proper focus of determining whether the voyage was a continuous unified shipment turned on the shipper's intent at the time of initiating the voyage.[103] The court said that the shipment itself had the character of an international shipment and therefore was properly under the jurisdiction of the ICC and the Carmack Amendment despite that a bill of lading had been issued for the purely intrastate portion of the journey.[104]

The carrier asserted that under the Supreme Court's decision in *Reider v. Thompson*, inland transport not covered under a through bill of lading should be handled as a separate and distinct shipment.[105] Therefore, the carrier argued, its shipment was not some part of a shipment from a foreign nation but was rather a purely intrastate voyage where Carmack did apply.[106] Judge Brown rejected this assertion and stated that the Supreme Court in *Reider* had identified that the interstate voyage at issue there was "new, separate, and distinct" from the ocean leg of the voyage based on the intent of the parties by examining the bills of lading.[107] Here, however, Judge Brown found that the domestic shipment was not separate based on the fact that the shipper intended the domestic leg of the voyage to be a continuation of the international ocean leg.[108] Judge Brown then went on to articulate the Court's holding by stating, "[w]e therefore hold that when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a

98. *Id.* at 698-99.
99. *Id.*; 49 U.S.C. § 10521(a)(1)(E) (1994) (the 'continuation of foreign commerce' provision).
100. *Swift*, 799 F.2d at 700.
101. *Id.*
102. United States v. R. R. Co., 280 U.S. 98, 102 (1929).
103. *Swift*, 799 F.2d at 699.
104. *Id* at 700.
105. *Id.*
106. *Id.*
107. *Swift*, 799 F.2d at 700; *See also* Reider v. Thompson, 339 U.S. 113, 117 (1950).
108. *Swift*, 799 F.2d at 701.

specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment *as long as* the domestic leg is covered by separate bill or bills of lading."[109] This articulation of *Swift*'s holding would become the basis of disagreement between the circuits.

The first courts to examine the issue after *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.* came to dramatically different conclusions. The District Court for the Northern District of Illinois, in *Capitol Converting Equipment, Inc. v. LEP Transp., Inc.*,[110] used *Swift*'s holding to conclude that Carmack did not apply to a shipment that was shipped on a through bill of lading, where a separate bill of lading was not issued to cover the land leg of the voyage.[111] But another district court sitting in the Northern District of Illinois rejected this conclusion in *Canon USA, Inc. v. Nippon Liner Sys., Ltd.*[112] The Canon court agreed with *Swift*'s use of the "intent test" to determine whether the land leg of an intermodal shipment was covered by the Carmack Amendment.[113] However, the court took issue with *Swift*'s articulated holding, stating that, the "'as long as' language is inconsistent with the court's underlying reasoning and explicit language. Indeed, one must wonder if the 'as long as' language is a typographical error and whether the court in fact meant to say 'even if' the domestic leg is covered by separate bill or bills of lading."[114] The *Canon* court went on to hold that Carmack applied to the land leg of an intermodal shipment covered by a through bill of lading regardless of whether a separate bill of lading was issued for the inland voyage.[115]

The Seventh Circuit solved this division among district courts when it took up *Capitol Converting Equipment, Inc. v. LEP Transp., Inc.* on appeal.[116] The court made no mention of *Canon*'s holding, nor did it devote any attention to the apparent disconnect between *Swift*'s articulated holding and its reasoning.[117] However, the court agreed with *Swift*'s articulated holding and declined to apply Carmack to an intermodal shipment on a through bill of lading where the inland leg was not covered by a separate bill of lading.[118]

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109. *Id.* at 701.

110. Capitol Converting Equip., Inc. v. Lep Transp., Inc., 750 F.Supp. 862, 862 (N.D.Ill. 1990).

111. *Id.* at 864.

112. Canon USA, Inc. v. Nippon Liner Syst., Ltd., No. 90-C-7350, 1992 WL 82509, at *8 (N.D. Ill. Apr. 17, 1992).

113. *Id.* at *6.

114. *Id.* at *7.

115. *Id.* at *8.

116. 965 F.2d 391, 394 (7th Cir. 1992).

117. *Id.*

118. *Id.* at 394-395.

A year later, the Fourth Circuit joined the Seventh and Eleventh in *Shao v. Link Cargo (Taiwan) Ltd.*[119] The Fourth Circuit agreed with the articulated holding of *Swift*, noting that the Carmack Amendment only applied to shipments from a foreign country where a separate domestic bill of lading is issued.[120] A decade later, the Sixth Circuit also found *Swift* persuasive in *American Road Service Co. v. Consolidated Rail Corp.*[121]

While the Fifth Circuit has yet to weigh in on the issue, in *Berlanga v. Terrier Transportation, Inc.*,[122] a Texas District Court took issue with *Swift*'s articulated holding and the line of precedent it established in the Fourth, Seventh, and Sixth Circuits.[123] The Texas court noted that the present version of the Carmack Amendment was subject to the Board's general jurisdictional standard.[124] "Today, the Amendment's applicability turns on whether the Secretary or the STB exercises jurisdiction over the shipment, not on the direction of the shipment."[125] The court noted that the prior statutory language seemed to imply some directional element, perhaps explaining prior courts' difficulty interpreting the statute.[126] But, in the revised version of the statute, Congress clearly stated that the Board and Carmack apply to motor carriers that ship goods "between a place in . . . the United States and a place in a foreign country."[127] The Texas court went on to point out the inconsistency between *Swift*'s articulated holding and its "intent test" reasoning.[128] For the Texas court, in the face of such plainly applicable statutory language, case law based on *Swift*'s questionable holding was not persuasive.[129] Therefore, the court held that Carmack applied to the domestic leg of a shipment from Mexico City to Plano, Texas covered under through bill of lading.[130]

It is uncertain whether the Ninth Circuit has actually weighed in on this issue. In *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.,* the court was faced with a case where goods were shipped from Jakarta, Indonesia to Memphis, Tennessee under a through bill of lad-

119. 986 F.2d 700, 703 (4th Cir. 1993).
120. *Id.*
121. 348 F.3d 565, 568 (6th Cir. 2003).
122. 269 F.Supp.2d 821 (N.D.Tex. 2003).
123. *Id.* at 829-30.
124. *Id.* at 826.
125. *Id.* at 827.
126. *Id.*
127. *Id.*
128. 269 F.Supp. 2d at 829.
129. *Id.*
130. *Id.* at 829-830.

ing.[131] The court noted that "in the past we have held that an earlier incarnation of [the Carmack Amendment] applies to *separate* inland bills of lading for shipments to or from overseas ports."[132] The court then goes on to say that "language of the statute also 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 the Carriage of Goods by Sea Act.[133] However, in making this second assertion, the court cites no prior precedent.[134] In fact, it does not appear that the applicability of Carmack was even raised as an issue and therefore was not actually before the court.[135] Furthermore, the Ninth Circuit had established a precedent of enforcing through bills of lading containing a Himalaya clause that contractually extended COGSA's regime inland in *Sea-Land Serv., Inc. v. Lozen Int'l, LLC* even before the Supreme Court endorsed such a holding.[136] However, in *Lozen*, Carmack was not applicable because the through bill of lading covered a foreign-to-foreign shipment of goods from Mexico to England even though the parties intended to ship the goods by rail across the entire continental United States.[137] Regardless of the Ninth Circuit's willingness to extend COGSA inland, *Neptune*'s apparent endorsement of the application of Carmack to the inland portion of a multimodal shipment under a through bill of lading should be considered dicta because the only issue on appeal in *Neptune* was the proper calculation of damages available under Carmack.[138]

The most recent appellate court case involving the application of Carmack was announced three weeks after the Second Circuit announced its decision in *Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co.* The Eleventh Circuit reaffirmed its position that the Carmack Amendment applied to the inland portion of a multimodal shipment only where the inland leg was covered under a separate bill of lading in *Altadis*

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

132. *Id.* (emphasis added) (citing F.J. McCarty Co. v. Southern Pac. Co., 428 F.2d 690, 692 (9th Cir. 1970).

133. *Id.*

134. *See id.* at 119. *See also* Altadis USA, Inc. *ex rel.* Fireman's Ins. Co. v. Sea Star Line, LLC, 458 F.3d 1288, 1288 (11th Cir. 2006).

135. Brief of Defendant-Appellant, Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co., 213 F.3d 1118 (9th Cir. Feb. 24, 1999) (No. 98-17387); Brief of Plaintiff-Appellee, *Neptune*, 213 F.3d 1118 (9th Cir. Mar. 31, 1999) (No. 98-17387); Brief of Defendant-Appellant, *Neptune*, 213 F.3d (9th Cir. Apr. 13, 1999) (No. 98-17387).

136. Sea-Land Serv., Inc. v. Lozen Int'l, LLC, 285 F.3d 808 (9th Cir. 2002) (holding COGSA may be contractually extended to apply to an inland carrier).

137. *See id.* at 817.

138. *See* 213 F.3d at 1120.

USA, Inc. ex rel. Fireman's Ins. Co. v. Sea Star Line, LLC.[139] Probably due to criticism of *Swift*'s wording, the court treated *Swift*'s articulated holding as dicta but reaffirmed the fact that Carmack demanded a separate inland bill of lading based on the fact that the Sixth, Seventh, and Fourth Circuits were in accord with this opinion.[140] The court also placed considerable emphasis on the fact that the Supreme Court stated in *Reider* that the "test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated."[141]

C. Limiting Liability Under Carmack

In order to alleviate some of the oppressive effects of the original ICA regime, Congress embarked on a deregulation effort, enacting the Staggers Rail Act of 1980.[142] Staggers reorganized the provisions of the ICA and the Carmack Amendment "which, among other things, authorized the ICC 'to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.'"[143] The ICC used this authority to exempt rail carriers that operate on one leg of a continuous intermodal movement from some of the ICC's regulatory schemes.[144]

Congress again revised the statutory scheme in 1995, replacing the ICC with the Surface Transportation Board.[145] Using its power to exempt carriers, the Board created some exemptions but did not allow carriers to contract out of all of its regulations. In particular, these carriers must still satisfy the requirements of 49 U.S.C. § 10502(e), which states:

> No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.[146]

As mentioned above, Section 11706 is the prior Section 20, which governs the liability of rail carriers. It provides that the "rail carrier and any other carrier that delivers the property and is providing transporta-

139. *See* 458 F.3d at 1288.
140. *Id.* at 1291-2.
141. *Id.*
142. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. § 10101) [hereinafter Staggers].
143. *Sompo*, 456 F.3d at 59 (summarizing 49 U.S.C. § 10502(f)).
144. *See* 49 C.F.R. § 1090.2 (2007).
145. *Emerson Elec. Supply Co. v. Estes Express Lines, Corp.*, 451 F.3d 179, 185-86 (3d Cir. 2006).
146. 49 U.S.C. § 10502(e).

tion or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property."[147] Therefore, an exempt carrier may limit its liability by contracting alternate terms so long as it meets the ICA's requirements.

Prior to statutory amendments made in 1995, in order to limit liability under Carmack, a carrier must have: "(1) maintain[ed] a tariff within the prescribed guidelines of the Interstate Commerce Commission; (2) obtain[ed] the shipper's agreement as to [the shipper's] choice of liability; (3) given the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue[d] a receipt or bill of lading prior to moving the shipment."[148] Presently, carriers wishing to limit their liability must: (1) file certain tariffs with the Surface Transportation Board for transportation of property in noncontiguous trade and household goods - carriers that are not required to file these tariffs must still "provide to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices, upon which any rate . . . is based";[149] (2) obtain the shipper's agreement as to the shipper's choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment.[150]

Cases dealing with the issue of providing alternate terms tend to turn on the Carmack Amendment's third requirement that carriers wishing to limit their liability must give the shipper reasonable opportunity to choose between different levels of liability.[151] This requirement is satisfied by the presence of a "declared value box" on the bill of lading, but only in cases where declaring an increased value would result in actually increasing the carrier's liability under the contract.[152] Bills of lading that give the option of declaring a higher value but do not actually give the option of increasing the carrier's liability do not meet the standard set forth in the Carmack Amendment.[153]

III. Announcing a Split

In *Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co.,*

147. 49 U.S.C. § 11706(a).
148. *Emerson*, 451 F.3d at 186.
149. 49 U.S.C. § 13710(a).
150. *See* Emerson, 451 F.3d at 186-8.
151. *See id.*
152. *Emerson*, 451 F.3d at 188 (citing Nat'l Small Shipments Traffic Conference, Inc. v. United States, 887 F.2d 443, 444 (3d Cir. 1989); Hollingsworth & Vose Co. v. A-P-A Transp. Corp., 158 F.3d 617, 619 (1st Cir. 1998)).
153. *Id.*

the Second Circuit departed from the established rule that the Carmack Amendment to the Interstate Commerce Act only applies to the domestic inland leg of an international multimodal shipment of goods when a separate bill of lading is issued. In doing so, the Second Circuit rejected the holdings of the Pennsylvania Supreme Court, the Fourth, Sixth, Seventh, and Eleventh Circuits, and narrowly interpreted the Supreme Court's decision in *Norfolk Southern Railway Company v. Kirby.*

A. *Sompo*'s Facts

The facts of *Sompo* involve all of the usual parties to a multimodal shipment of goods – a shipper, an ocean carrier, a land carrier and an insurance company. Sompo Japan Insurance of America ("Sompo") brought an action against Union Pacific Railroad Company ("Union Pacific"), a land carrier, to recover the cost paid to the insured shipper, Kubota Tractor Corporation ("Kubota")[154] for tractors damaged en route to Swanee, Georgia.[155] Liability for the damaged goods was not in dispute and the only issue at the trial court was the extent of Union Pacific's liability.[156]

Mitsui OSK Line Ltd. ("MOL"), an ocean carrier, shipped thirty-two Kubota tractors, valued at $479,500.00, from Tokyo, Japan to Swanee, Georgia.[157] MOL issued three "intermodal" or "through bills of lading" to Kubota covering the entire shipment from Tokyo to Swanee.[158] The backside of the bills of lading contained various provisions dealing with the liability of MOL and others involved in the transport of the tractors.[159]

MOL's ship got underway from Tokyo and moored up in Los Angeles.[160] After arriving in the United States, the tractors were placed on Union Pacific railcars for shipment to Swanee.[161] Union Pacific issued electronic waybills for this land leg of the shipment but the waybills made no reference to a limitation of liability.[162]

Union Pacific's train derailed in Texas resulting in damage to the cargo.[163] Upon notification of the loss, Sompo paid the insured, Kubota, $479,500 in settlement of the loss.[164] Sompo, as subrogee of Kubota's

154. Hereinafter referred to as Kubota.
155. *Sompo*, 456 F.3d at 55.
156. *Id.* at 55-56.
157. *Id.*
158. *See id.* at 63.
159. *See id.* at 56.
160. *See id.*
161. *See Sompo*, 456 F.3d at 56.
162. *See id.*
163. *See id.*
164. *See id.* at 55.

claims, brought this action.[165]

MOL's bill of lading contained two clauses that purported to extend the Carriage of Goods by Sea Act's $500 limitation of liability to all parties involved in the shipment.[166] The first of these clauses, Clause 4, titled "SUB-CONTRACTING AND INDEMNITY," (otherwise known as a "Himalaya" clause) states:

> (1) The Carrier shall be entitled to sub-contract the Carriage on any terms whatsoever.
> (2) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or Sub-Contractor of the Carrier . . . Without prejudice to the foregoing, every such servant, agent and Sub-contractor shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for their benefit, and in entering into this contract, the Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such servants, agents and Sub-contractors.[167]

Section 1, entitled "DEFINITIONS," defines "Sub-contractor" as:

> owners and operators of vessels and space providers of Vessels other than the Carrier . . . inland carriers, road, rail and air transport operators, any independent contractor directly or indirectly employed by the Carrier in performance of the Carriage, their respective servants or agents, and anyone assisting in the performance of the Carriage.[168]

These two provisions were asserted by Union Pacific as evidence that MOL's bills of lading enabled Union Pacific to avail itself of MOL's applicable defenses.[169] The applicable defense is found in Clause 29, titled "US CLAUSE PARAMOUNT." It states:

> (1) If the carriage covered by this bill of lading includes Carriage to or from a port or place in the United States of America, this Bill of Lading shall be subject to the United States Carriage of Goods by Sea Act 1936 (U.S. COGSA), the terms of which are incorporated herein and shall govern throughout the entire Carriage set forth in this Bill of Lading. Neither clause 5(1)(a), (b), the Hamburg Rules nor the Visby Amendments shall apply to the Carriage to or from the United States. The Carrier shall be entitled to the benefits of the defences [sic] and limitations in the U.S. COGSA, whether the loss or damage to the Goods occurs at sea or not.
> (2) If the U.S. COGSA applies as Clause 29(1) above, neither the Carrier nor the Vessel shall, in any event, be or become liable for any loss or damage to or in connection with the Goods in an amount exceeding $500.00 per

165. *See id.*

166. *See id.* at 56.

167. Sompo Japan Ins. of Am. v. Union Pac. R.R. Co., No. 03 Civ. 1604(RCC), 2003 WL 22510361, at *2-*3 (S.D.N.Y. Nov. 5, 2003).

168. *Id.*

169. *See Sompo*, 456 F.3d at 56.

> package, lawful money of the United States, or in the case of goods not shipped in packages, per customary freight unit, unless the value of the Goods has been declared and inserted in the declared value box on the face hereof, in which case Clause 6(2) shall apply.[170]

Clause 6(2) states,

> Ad Valorem
> Higher compensation may be claimed only when, with the consent of the carrier, the value for the Goods declared by the Shipper which exceeds the limits laid down in this Bill of Lading has been stated in the declared value box on the face of this Bill of Lading and, if applicable, the ad valorem freight has been paid. In that case the amount of the declared value shall be substituted for that limit. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value.[171]

The trial court found that Kubota never declared the value of the goods on the face of the relevant documents as required by Clause 29(2) and Clause 6(2).[172] And therefore, under the through bill of lading, the carrier's liability should be limited to $500 per package.[173]

B. *Sompo*'s Reasoning

The Second Circuit began its analysis by noting that "MOL's through bills of lading gave Kubota a 'fair opportunity' to declare a value for the tractors in excess of $500 per package," thus satisfying COGSA and triggering the statute's limitation of liability.[174] The court went on to address the question of "whether Carmack applies to the inland portion of Kubota's shipment, a carriage of goods by rail shipped under a through bill of lading from a foreign country to a destination in the United States."[175]

The court noted that "Carmack applies to common carriers 'providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board,'"[176] and that, "the Board's jurisdiction over rail carriers applies to 'transportation in the United States between a place in . . . the United States and a place in a foreign country.'"[177] The court acknowledged that the question of whether Carmack applies to a carriage of goods shipped under a through bill of lading was an issue of first im-

170. *Sompo*, 2003 WL 22510361, at *3.
171. Mitsui O.S.K. Lines' Combined Transport Bill of Lading, http://www.mol.co.jp/bl/pdf/bl-ct.pdf.
172. *Sompo*, 456 F.3d at 55.
173. *See id.*
174. *Id.* at 60.
175. *Id.*
176. *Id.*
177. *Id.* at 61 (quoting 49 U.S.C. § 10501(a)(2)(F) (2006)).

pression in the Second Circuit, and that most courts have determined that Carmack does not apply.[178]

The court seemed to place some of the blame for this state of affairs on the Eleventh Circuit case, *Swift Textiles v. Watkins Lines, Inc.*,[179] suggesting that the *Swift* court's holding was misworded.[180] The court went on to affirm *Swift*'s intent-based analysis but rejected its holding that Carmack does not apply to a shipment of foreign goods into the United States under a through bill of lading unless a separate bill of lading is issued to cover the land portion of the shipment.[181]

After addressing the fact that most courts currently followed *Swift*'s supposedly flawed holding, the court addressed the first prong of their inquiry into the application of the Carmack Amendment.[182] In answering the question of whether the nature of the shipment was a single multimodal voyage, as in *Swift Textiles v. Watkins Lines, Inc.*, or multiple shipments consisting of separate ocean and domestic legs, as in *Reider v. Thompson,* the court applied the "intent test" and looked to the parties' intent at the time of contracting for the carriage of goods.[183] The court quickly disposed of this question as it was readily apparent that Kubota intended that the tractors travel from Tokyo to Swanee as evidenced by the through bill of lading.[184] The court noted that the fact that Union Pacific issued separate electronic waybills did not change the nature of the shipment or provide contrary evidence of Kubota's intent.[185] Deciding that this shipment was a single voyage, the Court turned next to the more difficult question of whether Carmack applies to the domestic rail portion of a single-continuous intermodal shipment.[186]

In turning to this question, the Second Circuit announced that it did not blame the current state of confusion in the law on the *Swift* court's articulated holding, but nevertheless rejected the "separate bill of lading" requirement announced in *Swift* and thereby rejected the persuasive precedent of the Sixth, Fourth, Seventh, and Eleventh Circuits.[187] The Second Circuit instead identified the complexity of the issue as stemming from the Carmack Amendment's language and statutory history.[188] Looking at the current version of Carmack, the court noted that the stat-

178. *Sompo*, 456 F.3d at 61.
179. *Id.*
180. *Id.* at 62-63.
181. *Id.* at 63.
182. *Id.* at 60-63.
183. *See id.* at 61, 63, 67.
184. *Sompo*, 456 F.3d at 63.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

ute applies to "transportation in the United States between a place in . . . the United States and a place in a foreign country."[189] The court refused to see such language as implying that the statute plainly applied to both imports and exports and instead said that the language might be read as "distinguishing between exports and imports."[190]

In an attempt to clarify the supposed confusion caused by use of the word "between," the court looked to the most recent change in statutory language.[191] Prior to the 1978 amendments to the ICA, Carmack applied to transportation "from any point in the United States to a point in [an adjacent] country."[192] The court noted that while the District Court for the Northern District of Texas, in *Berlanga v. Terrier Transp., Inc.*, had interpreted this change to mean that Congress intended Carmack to apply to imports and exports by "employing the canon of statutory construction 'requiring a change in language to be read, if possible to have some effect,.'"[193] However, the Second Circuit declined to take the easy way out.[194]

The Second Circuit noted that the District Court for the Northern District of Texas, in *Berlanga v. Terrier Transp., Inc.*, had interpreted this change to mean that Congress intended Carmack to apply to imports and exports by "employing the canon of statutory construction requiring a change in language to be read, if possible to have some effect."[195] Instead, the court pointed out "that the 1978 amendments were adopted in a codification bill enacting the ICA into positive law."[196] Employing yet another canon of statutory interpretation, the court stated "courts should not 'infer that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.'"[197] Pointing to the legislative record, the court noted that the 1978 codification bill was intended to leave the law "substantively unchanged."[198] Therefore, the court declined to place any significance on the amendments of 1978 and instead jumped back to the Carmack Amendment's enactment in 1906 and the cases that followed.[199]

The Second Circuit turned to the confusion over whether the 1915 Cummins Amendment's "to . . . from" language covered both imports

189. *Id.* at 64 (citing 49 U.S.C. § 10501(a)(2)(F) (2006)).
190. *Sompo*, 456 F.3d at 64.
191. *Id.*
192. *Id.* (citing 49 U.S.C. § 20(11) (1971)).
193. *Id.* (quoting Am Nat'l Red Cross v. S.G., 505 U.S. 247, 263 (1992)).
194. *Id.*
195. *Id.*
196. *Sompo*, 456 F.3d 64.
197. *Id.* (quoting Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957)).
198. *Id.* (quoting H.R. Rep. No. 95-1395, pt. 1, at *9 (1978)).
199. *Id.* at 65.

and exports. Looking to the Supreme Court's decision in *Woodbury*, the court noted that at least Section 1 of the ICA covered both imports and exports, and therefore the ICA (and accordingly its successor, the Surface Board of Transportation) had jurisdiction over imports and exports shipped via land transport in the United States.[200] The Second Circuit noted prior courts' general resistance to reading *Woodbury*'s interpretation of Section 1 into the identical Section 20 and placed the blame on the Pennsylvania Supreme Court's opinion in *Alwine v. Pennsylvania R.R. Co.*[201]

The Second Circuit rejected both of *Alwine*'s rationales for declining to extend *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*'s interpretation of Section 1 to Section 20.[202] First, the *Alwine* court placed emphasis on the fact that the ICC itself had interpreted its authority to extend to exports, but had never interpreted its authority to extend to imports. The Second Circuit rejected this rationale because it was unclear if the ICC's announcement was the ICC's official interpretation of the statute.[203] Further, the court pointed out that the ICC never said that its authority did not extend to imports.[204] Therefore, the Second Circuit did not give weight to the ICC's failure to speak on its jurisdiction over imports. Second, the *Alwine* court had inferred that Congress's change in the language of Section 1 after the Supreme Court's decision in *Woodbury*, but failure to change the language in Section 20, meant that Congress no longer intended the two provisions to be coextensive.[205] The Second Circuit soundly rejected this inference since the *Woodbury* opinion's rationale seemed to apply evenly to both sections and because courts should be reluctant to draw inferences from Congress's failure to act.[206]

The Second Circuit also broke from other circuits in its characterization of *Reider v. Thompson*. The Second Circuit chose not to read *Reider* broadly as requiring a separate bill of lading for Carmack to apply. The *Sompo* court noted that *Reider* did not involve a through bill of lading and that the Supreme Court therefore treated the ocean voyage and the interstate land voyage as separate and distinct shipments.[207] The court pointed out that *Reider* could not guide the analysis of the application of the Carmack Amendment to multimodal shipments because the *Reider*

200. *Id.* at 65-66.
201. *Id.* at 66.
202. *See Sompo*, 456 F.3d at 66-67.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 67 (citing Brecht v. Abrahamson, 507 U.S. 619, 632 (1993)).
207. *Id.* (citing Reider v. Thompson, 339 U.S. 113, 117 (1950)).

court specifically reserved that question from its judgment.[208] Therefore, by rejecting *Alwine* and strictly construing *Reider*, the Second Circuit held that Carmack applies to the inland, interstate voyage of a multimodal shipment under a through bill of lading.

The Second Circuit went on to address the effect of the Carmack Amendment's applicability and noted "COGSA only applies to 'the period from the time when the goods are loaded on to the time when they are discharged from the ship.'"[209] But the terms of COGSA may be extended by contract to a greater portion of the voyage.[210] The court pointed out that when such an extension occurs, COGSA applies as a matter of contract and not with the force of statute.[211] Therefore, if there is a conflict between the terms of the Carmack Amendment and COGSA's terms as incorporated into the bill of lading, Carmack must prevail.[212]

As support for this assertion, the *Sompo* court cited several cases that either hold or suggest that contracts extending COGSA must yield to conflicting Harter Act provisions.[213] The Second Circuit held the a "contractual provision extending COGSA's terms inland must yield to Carmack," and therefore Carmack terms, not COGSA's, cover an inland carrier's liability where COGSA has been extended by a through bill of lading.[214]

Having determined that Carmack, rather than COGSA, controls the issue of Union Pacific's liability, as the district court held, the Second Circuit remanded the case for a determination of whether Union Pacific satisfied the requirements of 49 U.S.C. § 10502(e).[215] However, rather than leave the entire issue to be decided on remand, the Second Circuit ruled out the possibility that the primary contract in the case, MOL's through bill of lading, satisfied the Carmack Amendment's limitation of liability requirements.[216] The court noted that in order to limit liability under Carmack, the carrier had to first offer the shipper an opportunity

208. *Sompo*, 456 F. 3d at 67 (citing Reider v. Thompson, 339 U.S. 113, 118 (1950)) (stating, "we need not now determine whether [*Alwine*] was correctly decided. For purposes of this case it is sufficient to note that the Pennsylvania court emphasized that the shipment came into this country on a through bill of lading from Canada. The contract of carriage did not terminate at the border, as in the instant case.")

209. *Id.* at 69 (quoting 46 App. U.S.C.A. § 1301 (1996)) (current version at 46 U.S.C.A. §30701 (2007)).

210. *Id.*

211. *Id.*

212. *Id.* at 70.

213. *Id.* at 71 (citing Uncle Ben's Int'l Div. of Uncle Ben's Inc. v. Hapag-Lloyd Aktiengesellschaft, 855 F.2d 215, 217 (5th Cir. 1988)).

214. *Sompo*, 456 F.3d at 73.

215. *Id.* at 75.

216. *Id.* at 75-76.

to have full coverage.[217] The court dismissed the argument that Carmack was satisfied because the bills of lading gave the shipper the opportunity to declare a higher value.[218] The court said that such a declaration was not enough to satisfy Carmack because the liability scheme under the bills of lading was COGSA's negligence scheme and not the Carmack Amendment's strict liability scheme.[219] Thus, the shipper never had the opportunity to get full Carmack coverage, a requirement that must be met if the carrier is allowed to contract for alternate terms. On remand, Union Pacific must show that its waybills or some other communication satisfied the Carmack Amendment's limitation of liability requirements. Otherwise, Union Pacific will face liability it thought it had limited under its contract with MOL.

IV. Making a Course Correction

The Second Circuit is correct in holding that the Carmack Amendment applies to the inland leg of a multimodal shipment regardless of whether a separate bill of lading is issued. However, the Circuit's holding that MOL's bill of lading does not satisfy the Carmack Amendment's limitation of liability requirements unreasonably confuses an already complex issue. Had the court given more consideration to the policy announced by the Supreme Court in *Norfolk Southern Railway Company v. Kirby*, the Circuit might have come to a different result. While only Congress can fix the current state of multimodal carriage, future courts should seek to issue decisions that do not similarly and unnecessarily cloud the waters of international commerce.

A. The Mistake that Judge John R. Brown Didn't Make in *Swift*

The intent test announced in *United States v. Erie R.R. Co.* is irreconcilable with the test announced in *Reider v. Thompson*. The Supreme Court stated in *Reider* that the question of whether the transaction fell within the liability provisions of the ICA must be answered by reference to the bills of lading.[220] The Court stated that the test was "not where the shipment originated, but where the obligation of the carrier as receiving carrier originated."[221] However, in *Erie* the Supreme Court stated that the nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by "the

217. *Id.*
218. *Id.*
219. *Id.* at 76.
220. Reider v. Thompson, 339 U.S. 113, 117 (1950).
221. *Id.* (citing Rice v. Oregon Short Line R. Co., 198 P. 161, 163 (Idaho 1921)).

essential character of the commerce."[222]

The Supreme Court may have come to the same conclusion in *Reider* if it had actually applied the "intent test" that it announced in *Erie.* The language in *Reider* suggests, however, that the Court focused exclusively on the bills of lading to determine whether the shipment was domestic or foreign. In fact, the word "intent" does not even appear in the Court's opinion in *Reider v. Thompson.* The Court's focus cannot be reconciled with the "intent test" which requires that a determination should hinge on the shipper's intent at the time the first contract of carriage was established. How should an appellate court address future cases on this topic given the confusion created by the Supreme Court's decision?

If *Reider v. Thompson* is the appropriate test, *Swift's* purely intrastate voyage, covered under its own bill of lading, surely did not fall within the jurisdiction of the Carmack Amendment. Like *Reider*'s bill of lading, which terminated in New Orleans, the ocean bill of lading in *Swift* terminated in Savannah, thereby leaving the inland carrier with a mere intrastate trip. Unlike the Supreme Court in *Reider*, however, Judge Brown in *Swift* appears to have applied the appropriate test - the test announced in *Erie.* In *Swift*, Judge Brown explained 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.[223]

This rule appears to be both consistent with the Supreme Court's "intent test" announced in *Erie*, and the Court's announcement in *Reider* that the test was "not where the shipment originated, but where the obligation of the carrier as receiving carrier originated."[224] Even the courts that have taken issue with the *Swift* holding have agreed that Judge Brown's interpretation of the intent test was proper.[225]

Should the Supreme Court elect to resolve this circuit split, its first step should be to clarify that the *Erie* intent test is the applicable test to determine whether a shipment is international or domestic. The Supreme Court should then clarify that *Reider* merely applied the *Erie* test without specifically referencing its language. This clarification would narrow *Reider*'s holding and make the bill of lading relevant to the analysis of the parties' intent, but not dispositive as the *Reider* holding currently sug-

222. United States v. Erie R.R. Co., 280 U.S. 98, 101-102 (1929).

223. Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697, 701 (11th Cir. 1986).

224. *Reider*, 339 U.S. at 117.

225. *See Sompo*, 456 F.3d at 63; CANON USA, INC. v. NIPPON LINER SYS., LTD., NO. 90 C 7350, 1992 WL 82509, at *7-8 (N.D.Ill. April 17, 1992); Berlanga v. Terrier Transp., Inc., 269 F. Supp. 2d 821, 828-829 (N.D. Tex. 2003).

gests. The Court should then sweep aside the line of cases that hold that a separate bill of lading is required in order for Carmack to apply.

B. Holding that the Carmack Amendment Applies is not a Problem

The Texas court in *Berlanga* was right when it stated that, "the statute is clear . . . the case law is not."[226] The Carmack Amendment currently applies "to transportation in the United States between a place in . . . the United States and a place in a foreign country."[227] When the statutory language is clear, courts should not need to look to case law, legislative history, or intent.[228] Furthermore, courts should not attempt to read ambiguity into a statute in order to address issues of legislative intent.[229] Therefore, on its face, the Carmack Amendment simply and unambiguously applies to transportation in the United States between a place in the United States and a foreign country. Because the statute does not contain language that would suggest that a separate bill of lading is required for Carmack to apply to an intermodal shipment, the requirement should not be read into the statute.

C. Holding that the Through Bill of Lading Does not Satisfy the Carmack Amendment is a Problem

The primary document in this international shipment was the through bill of lading issued by MOL. If there ever was a document that reflects a meeting of the minds or the parties' intent, it is this document. The bill of lading was a standard MOL form and its limitation clause met all of the requirements to limit liability under both Carmack and COGSA. Therefore, finding that the MOL bill of lading failed to offer the shipper Carmack coverage was a mistake.

1. Failure to Take Industry Custom into Account

In refusing to uphold the MOL bill of lading, the Second Circuit failed to take into account the realities of the intermodal shipping transaction. The standard intermodal transportation contract involves multi-

226. *Berlanga*, 269 F. Supp. 2d at 827-828.

227. 49 U.S.C. § 10501(a)(2)(F) (2007).

228. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) (noting that "[t]he starting point for [the] interpretation of a statute is always its language"); Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254 (1992) (noting that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). *See also* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 16 (Amy Gutmann ed., Princeton Univ. Press 1997).

229. *See id.* at 16-23; *See also Sompo*, 456 F.3d at 64 (reading the word "between" as ambiguous).

ple parties, various modes of transportation, and many miles. Complex contracts such as these easily produce significant transaction costs. However, the parties involved in the shipping industry have created an efficient system that reduces the transaction costs associated with intermodal carriage. Under the current system, a shipper who needs to transport goods over both land and sea seeks a party who can issue a through bill of lading covering the entire voyage. A through bill of lading may be issued by an ocean carrier or an intermediary such as a freight forwarder or a nonvessel operating common carrier (NVOCC).[230] These entities qualify as "carriers" under COGSA and are frequently the shipper's sole point of contact regarding the intermodal shipment. Once the shipper has agreed to the through bill of lading's terms, the COGSA carrier arranges the inland contract of carriage as required under the through bill of lading. The COGSA carrier, who presumably engages in a large volume of such transactions, uses its commercial leverage to obtain an inland carriage contract at the lowest possible price.

While the Second Circuit does not expressly state that the inland carrier must contract with the shipper, it does place some obstacles in the way of these transactions. The Second Circuit requires the COGSA carrier to expressly offer the shipper (1) unlimited liability with regard to the ocean leg of the voyage as well as (2) unlimited liability with regard to the land leg of the voyage.[231] Contracting parties under the prevailing mode of intermodal shipping transactions, however, already take these requirements into account. As the shipper's limited agent, the COGSA carrier contracts inland terms according to the shipper's terms in the through bill of lading. If the shipper wanted unlimited liability, it would have taken advantage of its opportunity under the through bill of lading. The idea that a shipper would want to contract for unlimited liability for one leg of a voyage but not the other seems commercially unsound.

In fact, commentators familiar with the international carriage of goods suggest that contracting for unlimited carrier liability is so cost prohibitive that it almost never occurs.[232] Rather than pay the high cost of obtaining unlimited carrier liability, shippers purchase cargo insurance from underwriters who are more willing to bear the risk of the transaction.[233] Conceivably, the difference in the cost of full liability under the contract of carriage and full liability under a cargo insurance policy stems from the underwriters' specialization. The underwriter is in a much better position than the carrier to correctly value the risk of insuring a cer-

230. Crowley, *supra* note 9, at 1461.

231. *Sompo*, 456 F.3d at 76.

232. Michael Sturley, *An Overview of the Considerations Involved in Handling the Cargo Case*, 21 TUL. MAR. L. R. 263, 347-348 (1997).

233. *Id.*

tain shipment, and the underwriter's volume of contracts allows it to profit despite having to pay out for claims that arise under specific policies. The current custom of the shipping industry therefore meets the needs of all parties - carriers, shippers, and underwriters - while reducing transaction costs.

Because the Second Circuit rejected the argument that MOL's bill of lading provided limited liability for the inland carrier, some may argue that the inland carrier must now contract directly with the shipper in order to obtain limited liability – a result that was expressly rejected by the Supreme Court. In *Kirby*, the Supreme Court announced an "efficient default," or "limited agency," rule that allowed the issuer of a through bill of lading to serve as the shipper's agent for the limited purpose of extending the terms of the through bill of lading to the inland carrier.[234] The Court reasoned that such a result was consistent with industry custom and was necessary to promote equity in the shipping industry.[235] The Second Circuit should have followed the lead of the Supreme Court and given deference to the needs of the industry and current custom. Introducing new complexities in carrier limitation of liability can only result in complicating an already efficient transaction, increasing transaction costs, and creating confusion in the seas of international commerce.

2. *Failure to Promote Uniformity in the Law*

Congress evidently believes that a carrier's ability to limit its liability is important, because Congress allows carriers to limit their liability under the Carmack Amendment and COGSA. Conceivably, this limitation enables carriers and insurers to keep rates down, and encourages carriers to continue to carry goods. But Congress has not given carriers free reign to limit their liability. Instead, under both Carmack and COGSA, carriers must meet certain requirements before being allowed to limit liability. Meeting these requirements under COGSA and Carmack tends to revolve around the same issue: Was the shipper given an opportunity to have the full value of its goods covered?[236] In *Sompo*, MOL's bills of lading contained a standard "opt out" clause, which gave the shipper the option of obtaining full coverage so long as it declared the true value of

234. *Kirby*, 543 U.S. at 32-36.

235. *Id.*

236. *Compare* Tamini Transformatori S.R.L. v. Union Pacific R. R., No. 02 Civ. 129, 2003 WL 135722, at *4 (S.D.N.Y. Jan. 17, 2003) (stating that liability to the carrier for actual loss under Carmack may be limited by bargaining with the shipper as long as the shipper is given the option of choosing Carmack protection for the full value of the shipment) *with* Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing, 167 F.3d 99, 101 (2d Cir. 1999) (stating that COGSA liability is limited to $500 per package for the carrier only if the shipper has a fair opportunity to declare a higher value).

the goods.[237] The trial court found that the shipper did not declare the true value of the goods as was required under the bill of lading.[238] On appeal, the shipper did not contest this finding. In fact, Sompo acknowledged in its appellate brief that the MOL Bills of Lading offered the shipper unlimited liability.[239] However, the Second Circuit found that it was not enough for the carrier to meet this requirement in order to limit its liability under Carmack.[240]

The Second Circuit found that the MOL bill of lading sought to extend COGSA's liability scheme into the realm of the Carmack Amendment.[241] Stating that Carmack was a strict liability statute and that COGSA was a negligence statute, the Second Circuit held that MOL had not offered the shipper true Carmack liability because the carrier had not actually offered the shipper Carmack's strict liability regime.[242] Therefore, the carrier had not met the limited liability requirements set forth in Carmack.[243] What was the result? Union Pacific, which thought it was operating under a valid limitation of liability agreement when it negotiated its inland carriage rates, would now face unlimited liability - a risk it had likely neither contemplated nor insured against.

While Carmack is rooted in strict liability and COGSA is rooted in negligence, neither Carmack nor COGSA are pure strict liability or negligence regimes. Rather, they are hybrid constructs. Both require "good order" / "bad order" to establish a prima facie case.[244] Both shift the burden to the carrier to show that a statutory affirmative defense applies.[245] While COGSA provides more defenses, several courts dealing with contractual extensions of COGSA have held that certain of these defenses are not available where the defenses conflict with statutes that would otherwise apply.[246] The principle difference between the two statutes is that COGSA provides an affirmative defense for carriers that display due diligence.[247]

A court could easily find that Carmack's requirements were met for

237. *See Sompo*, 456 F.3d at 75-76.

238. Sompo Japan Ins. of Am. v. Union Pac. R.R. Co., 03 Civ. 1504, 2003 U.S. Dist. LEXIS 19757, *8 (S.D.N.Y. Nov. 5, 2003).

239. *Sompo*, 456 F.3d at 76.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Compare* Project Hope v. M/V Ibn Sina, 250 F.3d 67, 74 (2d Cir. 2001) *with* Transatlantic Marine Claims Agency, Inc. v. M/V OOCL Inspiration, 137 F.3d 94, 98 (2d Cir. 1998).

245. *Project Hope*, 250 F.3d at 74; *Transatlantic*, 137 F.3d at 98.

246. *See* Sunpride Ltd. v. Mediterranean Shipping Co., 2004 A.M.C. 1, 119 (S.D.N.Y. 2004) (holding that a carrier may not invoke the COGSA quarantine exception because such an exception would violate §190 of the Harter Act).

247. *See* Nissan Fire & Marine Ins. Co., Ltd., v. M/V Hyundai Explorer, 93 F.3d 641, 646-47

the purposes of providing alternate "limitation of liability" terms, but that COGSA's affirmative defenses could not displace the more stringent liability scheme imposed by Carmack. The Second Circuit held that Carmack controlled the issue of the carrier's liability and the contractual extension of COGSA's affirmative defenses was displaced. By stating that Carmack controlled the issue of liability, the court ensured that the shipper obtained the benefit of Carmack's strict liability scheme, regardless of the contractual terms. Consequently, the terms of the contract, as they relate to substantive liability, should not have carried over to the issue of the carrier's limitation of liability. Had the court distinguished between substantive liability and the limitation of liability, it could have upheld the carrier's limitation of liability because the Carmack Amendment always controls the issue of substantive liability and because the bill of lading's limitation of liability clause gave the shipper the option to obtain full liability.

The Second Circuit could have come to the same result using a different route. Clause 27 of MOL's bill of lading provides that "[i]n the event that anything herein contained is inconsistent with any applicable international convention or national law which cannot be departed from by private contract, the provisions hereof shall be null and void to the extent of such inconsistency but no further."[248] Therefore, while MOL's bill of lading did not explicitly offer the shipper "Carmack strict liability," the terms of the contract ensured that the shipper's statutory rights were protected and were consistent with legislative intent that land-based carriers face strict liability.

Courts that seek to compare federal statutes that potentially overlap should look to provide uniformity, not inconsistency. Here, the court could have found that the bill of lading satisfied the Carmack requirements for limitation, but that inconsistent affirmative defenses were extinguished. Because the terms of a bill of lading can be reconciled with the Carmack Amendment, the court should not have been so quick to throw out this contract and expose the carrier to full liability. This is particularly true in the *Sompo* case, where the parties to the bill of lading were sophisticated business entities that should rarely be released from contractual obligations. Instead of providing uniformity, the opinion of the Second Circuit places a million common carriers' standard bills of lading into question, drives a wedge right down the center of the federal circuit courts, and places international carriage of goods law once again in unknown waters.

(9th Cir. 1996) (explaining the difference between the due diligence requirement imposed by different sections of COGSA).

248. MITSUI O.S.K. LINES SHIPPING RESEARCH, http://www.mol.co.jp/bl/pdf/bl-ct.pdf (Discussing clause 27 of MOL's bill of lading).

D. Navigating by *Kirby* – How to Keep It Between the Buoys

The two circuit courts that dealt with the applicability of Carmack after *Norfolk Southern Railway Co. v. Kirby* came to dramatically different conclusions, not only about Carmack but also about *Kirby*'s role in analyzing conflicts concerning through bills of lading.[249] The Second Circuit in *Sompo* interpreted *Kirby* narrowly, noting that "in *Kirby*, the cargo owner failed to raise the issue of Carmack's applicability."[250] The court went on to state that, "[c]onsequently, *Kirby* only established the principle that maritime contracts should be interpreted in light of federal maritime law"[251] and that "it does not follow from that principle that the only federal law to apply is COGSA."[252] The court therefore came to the conclusion that if a federal statute applied by its terms to the facts of a case, then that statute governs the dispute, not federal common law.[253] Therefore, in *Sompo*, *Kirby* plays no role because *Kirby* does not speak to the applicability of the Carmack Amendment or to a through bill of lading's ability to satisfy the Carmack limitation of liability requirements.

The Eleventh Circuit took a different approach by interpreting *Kirby* broadly. In *Altadis*, the Eleventh Circuit based its holding on the fact that the weight of precedence supported the view that Carmack was inapplicable to the facts of the case.[254] *Kirby*'s reasoning, therefore, was not a necessary element of *Altadis*' holding. Nevertheless, the court felt that it was worth noting that the shipper's argument that Carmack applied was "in tension with [*Kirby*] in that [applying Carmack] would introduce uncertainty and lack of uniformity into the process of contracting for carriage [of goods] by sea, upsetting contractual expectations expressed in through bills of lading."[255] For the Eleventh Circuit, *Kirby*'s holding stands for the premise that "[t]he purpose of COGSA [was] to 'facilitate efficient contracting in contracts for carriage by sea.'"[256] Without uniformity, parties to a contract would have no idea whether their contract's terms would be upheld.

The application of the Carmack Amendment was not an issue in *Norfolk Southern Railway Company v. Kirby*. Therefore, the Supreme Court's decision in *Kirby* cannot guide the issue of whether Carmack applies to the domestic portion of an intermodal shipment of goods between

249. *See Sompo*, 456 F.3d at 71-75; Altadis USA, Inc., v. Sea Star Line, LLC, 458 F.3d 1288, 1294 (11th Cir. 2006).

250. *See Sompo*, 456 F.3d at 74.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Altadis*, 458 F.3d at 1294.

255. *Id.*

256. *Id.* (citing Norfolk S. Ry. Co. v. Kirby Pty Ltd., 543 U.S. 14, 29 (2004)).

the United States and a foreign country. However, if there is one guiding policy that came out of *Kirby*, it is that international commerce demands uniformity and consistency. The Court's holding that maritime law demands uniformity does not mean that courts can reject this requirement when the statute at issue is land-based. Maritime law demands uniformity because of its wide-reaching international and commercial implications. Therefore, the need for uniformity announced in *Norfolk Southern Railway Company v. Kirby* should be extended to equally apply to international carriage of goods cases involving federal land based statutes such as Carmack.

As this article shows above, holding the parties to their bargained-for limitation of liability in *Sompo* would not have eviscerated the liability scheme in Carmack. Instead, upholding the contracted limitation of liability would have promoted uniformity and consistency by reading Carmack and COGSA's limitation of liability requirements as complementary, thereby promoting uniformity in the construction of two related statutes. Enforcing contracts between sophisticated parties also facilitates international carriage of goods by providing reliability and certainty – necessary elements of international trade. If the Supreme Court elects to resolve this split it should reiterate that *Norfolk Southern Railway Company v. Kirby* stands for the general policy that international commerce demands uniformity. Courts faced with potential conflicts between a contractual extension[s] of COGSA should therefore look to provide the "best fit" between the parties' contractual intent and the language of the statute at issue. Only where genuine conflicts exist should the contract's terms be voided - and only those conflicting terms should be voided.

V. Conclusion

Courts faced with the issue of whether Carmack applies to the domestic leg of an international intermodal shipment on a through bill of lading should look to the statute's clear language and find that Carmack applies. However, the *Kirby* court's proclamation that international carriage of goods requires uniformity in order to maintain efficient contracting should guide courts to seek clear rules that maintain as much of the parties' contract as possible. As this article explains, Congress provided that carriers may limit their liability under both Carmack and COGSA. The limitation requirements established in these statutes are remarkably similar and what satisfies one should be read to satisfy the other if the facts of the case so allow. The Supreme Court should make this clear by resolving the circuit split in a way that applies Carmack uniformly but ensures that future courts look to only expel those contract terms that are directly at odds with the statute's requirements. While

only Congress can create a liability scheme that meets the needs of this changed industry, courts should follow a simple policy in the mean time: avoid mining the waters of international commerce at all cost.