

Backtracking through the Himalayas: The U.S. Supreme Court rules connecting railroad's liability is limited by ocean bills of lading

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The highest court in the land, having exercised its discretionary option to review a Circuit Court of Appeals conclusion, recently issued a significant, surface carrier-friendly decision regarding limitation of liability. The U.S. Supreme Court has reversed the Eleventh Circuit's determination that the Norfolk Southern Railway could not avail itself of an ocean bill of lading clause extending a steamship line's limited liability to connecting carriers (*see* April 2003 Legal Lookout article). Per federal statutory law, ocean carriers in international transit may limit their liability to a minimum of 500 bucks per package, and commercial relationships typically induce them to extend that advantage to other service providers involved in through hauls. Non-vessel operating common carriers (NVOCCs) may do the same. The extension typically is accomplished by those teeny words on the backside of standard ocean bills of lading under the "Himalaya Clause."

In this case, shipper Kirby booked freight with intermediary International Cargo Control (ICC) for transit of industrial freight from Australia to Huntsville, Alabama. ICC issued Kirby its house bill of lading, and placed the cargo for transit with ocean carrier Hamburg Süd. In turn, Hamburg Süd issued its bill of lading to ICC (designating Savannah as the port of discharge and Huntsville as the final destination), and hired the Norfolk Southern for the transit's surface leg.

ICC's bill of lading limited its own liability to \$500 if Kirby's freight were lost/damaged at sea, and to 666.67 Special Drawing Rights (an artificial unit of currency, set by the World Bank and often used for liability limitation in foreign transportation contracts) for any loss on land. Hamburg Süd's bill of lading limited its liability to \$500, and contained a Himalaya Clause. Norfolk Southern's train derailed, damaging Kirby's freight to the tune of some \$1.5 million.

When Kirby (and its insurer) sued in the Northern District of Georgia, the railroad urged it was protected by the limitation of liability clauses in both bills of lading. The district court held that Kirby's liability was limited to relative peanuts per the ICC contract of carriage. On appeal to the Eleventh Circuit, Kirby argued that the railroad's liability shouldn't be capped pursuant to a contract (which a bill of lading is) it was not a party to. The court of appeals agreed and reversed the district court. "A special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier," the Eleventh Circuit ruled, and an intermediary contract could bind a shipper only if the intermediary was acting as the latter's agent. Neither was the case here. In other words, Kirby knew nothing about a train, and didn't agree to any railroad's liability being limited.

The Supreme Court granted cert to review whether either bill of lading shielded the railroad. In addressing the issue, the Big Nine first went through an interesting assessment of whether admiralty jurisdiction (which gets maritime disputes into federal court) applies to a railroad loss. The era of intermodal transit has necessarily broadened admiralty jurisdiction's scope, and a contract's primary objective (i.e., ocean transit) governs the issue even if less-salty services are accomplished as part of the deal. Thus, the parties were properly in the federal system.

The high court reversed the Eleventh Circuit. No, a railroad (and by extension, a trucker or other land-based service provider) need not be in privity of contract with a shipper in order to stand under the limitation of liability umbrella hoisted by an ocean carrier. Nor is an agency relationship required. The various circuit courts of appeal had split on these questions, some going one way and some the other. But now, the uniform law of the land is that parties to international water carriage contracts must anticipate that subcontractors of NVOCCS and steamship lines will play roles in the process, and be shielded from full liability to the same extent as the player that issues a Himalaya Clause-containing bill of lading. The court seemed to say, "C'mon, Kirby, how did you think your freight was going to make it from Savannah to Huntsville if not by train?"

In fact, the Norfolk Southern could avail itself of limitations of liability contained in both bills of lading. That's both fair and practical. Carriers otherwise would have persistent headaches trying to learn whether they're dealing with an intermediary, and if so, how many intermediaries, in order to ensure everyone was fully protected. Moreover, if liability was limited in carrier/shipper contracts, but not limited in carrier/NVOCC deals, carriers would want to hit intermediaries with higher freight rates. This might muddy the waters of common carriage principles regarding nondiscrimination in pricing. Lastly, shippers can always make sure someone is there to sue by refusing to agree to their intermediaries' limitation of liability. This option is more realistic now that NVOCCs are on track toward freedom of contract in their relationships with shippers (*see* December 2004 Legal Lookout article).

The Kirby decision may be a significant consideration in Uncle Sam's participation in ongoing negotiations before the United Nations toward an international ocean cargo liability regime (*see* June 2003 Legal Lookout article). Current talks include proposed terms that might dictate liability of surface carriers that operate pursuant to through ocean transit. An international treaty ratified by Congress would trump a Supreme Court decision, but our high court's interpretation of shipping contract relationships and proper liability allocation might influence, if not dictate, where the U.S. stands regarding internationally uniform law.

Ref: Norfolk Southern Railway Co. v. James N. Kirby, Pty, Ltd., 2004 WL 2514422 (2004)