

*An ocean intermediary's bill doesn't protect an inland carrier, or...  
How a railroad slipped through the Himalayas*

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*Marine Digest and Transportation News***

Here's a case to remind us that you really have to dot your i's and cross your t's when dealing with legal documents such as bills of lading.

Australian intermediary International Cargo Control (ICC) booked transit of a cargo of General Motors' machinery, issuing a bill of lading to shipper Kirby for delivery to consignee GM. Ocean carrier Hamburg Sud accomplished the wet portion of the haul from Sydney to Savannah, pursuant to Hamburg Sud's through bill of lading, which named ICC as shipper and, again, GM as consignee.

When the cargo landed stateside, it was transloaded to railroad Norfolk Southern for surface delivery in Huntsville, Alabama. No rail bill was issued; the Norfolk Southern operated pursuant to Hamburg Sud's through ocean bill. A train derailment en route damaged GM's cargo to the tune of some \$1.5 million. Shipper Kirby wanted the railroad to pay up in full, and took the Norfolk Southern to the mat in the Northern District of Georgia's federal court.

Both bills of lading were specifically subject to the U.S. Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (COGSA), with all that statute's carrier-friendly liability defenses and, most importantly, a \$500 per package liability limitation. Both bills also contained Himalaya clauses. Named after the ship in a 1955 English case which first recognized them, Himalaya clauses are standard fare in bills of lading worldwide. They essentially extend to land-based service providers the same liability defenses carriers enjoy under COGSA for lost or damaged cargo.

ICC's Himalaya clause extended the bill's provisions to "any servant, agent or other person including any independent contractors whose services have been used to perform the contract." Hamburg Sud's terms were broader still, extending to "all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever."

At issue: could the Norfolk Southern avail itself of COGSA's \$500/package limitation, which would reduce its exposure to peanuts, by virtue of the Himalaya clause in somebody else's bill of lading? The district court said yes, and agreed the railroad's liability was limited to 500 bucks times ten containers of equipment for a grand total of \$5,000. Kirby, taking umbrage, appealed to the Eleventh Circuit Court of Appeals.

In reviewing the lower court's decision, the appeals court analyzed the various relationships separately. First, was Kirby subject to Hamburg Sud's bill of lading? No,

the court ruled. ICC was the carrier of record to Kirby, not Hamburg Sud. Indeed, Kirby might not even have known about the actual ocean carrier. Moreover, ICC wasn't the shipper's "agent" for purposes of accepting terms on Kirby's behalf. Thus, the ocean carrier's more broadly drafted Himalaya clause wasn't binding on Kirby.

Second, was the railroad's liability limited by ICC's bill of lading?

Uniform maritime law holds Himalaya clauses generally enforceable against shippers named in bills of lading (yes, even intermediary bills). But that doesn't mean courts have to like them. The Eleventh Circuit made clear its distaste for the liability restricting provisions, speaking to how the enforceability of Himalaya clauses "must be narrowly construed and limited to their intended beneficiaries," in order to "temper" their otherwise mountainous effects. The court proceeded to apply its "clarity of language test" used to determine "whether and for whom a Himalaya clause effectively limits liability." That test provides, at least in the Eleventh Circuit's southeastern states jurisdiction, that "language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons," is essential to Himalaya Clause enforceability. Extended liability defenses may then be interposed "only by members of that well-defined class."

ICC's Himalaya clause named "other persons," a term the court found too vague to be enforceable. Moreover, ICC didn't even hire the railroad (Hamburg Sud did). Accordingly, the Eleventh Circuit reversed, and held the Norfolk Southern liable (at least potentially, depending on substantive defenses) for the whole enchilada.

Yes, for those of you with great memories, this case flies right in the face of another appellate decision issued by the Ninth Circuit in 1998 and reviewed in the February 1999 Legal Lookout article. Cognizant of that decision, the *Kirby* court rebutted by pointing to other jurisdictions' reluctance to extend a maritime liability regime to a surface carrier. The Eleventh Circuit also noted, without much specificity, that recent regulatory changes alter the equation somewhat.

So what's an intermediary or carrier to do to protect its subs? The most obvious step, as underscored by the Eleventh Circuit, is to specify inland service providers in Himalaya clause language. It also is incumbent on railroads (and truckers, etc.) to make sure they understand the terms of bills of lading governing their through transport. It might make sense, in certain circumstances, for inland carriers to issue their own bills of lading or enter into separate contractual arrangements regarding indemnity for cargo liability. With transportation relationships depending increasingly on negotiated contracts, liability issues should be considered in the ordinary course.

**Ref: *James N. Kirby, Pty Ltd. v. Norfolk Southern Railway Co.*, 300 F.3d 1300 (11<sup>th</sup> Cir. 2002)**