***Kirby v. Sompo*:**

How the Second Circuit Has Reversed the Supreme Court of the United States

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In November of 2004, a unanimous Supreme Court of the United States in the case of *Norfolk & So. Ry Co. v. Kirby*, 543 US 14 (2004), clearly explained the relationship between maritime law and U.S. domestic transportation law on a multimodal shipment. Kirby was an Australian manufacturer that sold all of the components of a catalytic converting manufacturing plant to General Motors to be installed at their facility in Huntsville, Alabama. There were 10 large components, each of which was placed in a large wooden crate, which in turn would be placed into 10 maritime containers to provide multimodal transportation between the manufacturing facility in Sydney, Australia and the G.M. plant in Huntsville, Alabama. There would be a motor carrier leg from the manufacturing facility to the port in Sydney, ocean transit between Sydney and Savannah, Georgia, and rail transit between Savannah and the G.M. plant in Huntsville, Alabama.

Kirby put up for bids its transit requirements in Australia to find someone to arrange the transportation on its behalf. It hired an international freight forwarder by the name of ICC, which entered into a written contract with Kirby. The international freight forwarder's contract limited ICC's liability to $500 per package, pursuant to the provisions of the Carriage of Goods by Sea Act. Kirby was offered an opportunity to pay a higher rate, i.e. an ad valorem charge to get higher liability, but instead it chose to purchase insurance to cover the difference between the $500 per package and the full value of the components of the plant which it had sold to General Motors for $1.4

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million. The ICC contract further provided that ICC was authorized to make transportation arrangements on Kirby's behalf on any terms it thought prudent.

ICC then contracted with the Hamburg-Sud Lines to provide ocean carriage from Sydney to Savannah, Georgia. In almost identical language, ICC agreed with Hamburg Sud to limit Hamburg Sud Lines' liability to $500 per package, pursuant to the provisions of the Carriage of Goods by Sea Act. Hamburg Sud provided ICC as its shipper with the identical opportunity to declare a higher value, and pay higher transportation charges, which ICC declined because it had no instructions from Kirby to do so, and because it was the low bidder to make the transit arrangements, and that required that the cargo be shipped at the $500 package limitation. The Hamburg Sud bill of lading, however, was an intermodal bill of lading form because it contracted with ICC to deliver the goods to General Motors in Huntsville, Alabama.

Hamburg-Sud in turn contracted with Norfolk Southern to provide the rail transportation between Savannah, Georgia and Huntsville, Alabama, pursuant to a Norfolk Southern exempt circular contract. In that contract Norfolk Southern's liability was equivalent to the lowest limitation of liability of any carrier from origin to destination, with a maximum cap on overall liability of $100,000 per shipment.

Both Hamburg Sud's bill of lading as well as ICC's bill of lading conferred all of the rights and liability limitations to their agents and servants and inland carriers under the standard Himalaya clause.

Everything went well in transit until approximately 100 miles prior to destination, when the Norfolk Southern train was involved in a derailment, and all of the 10 containers and their contents were destroyed. Kirby, of course, received full payment pursuant to its insurance policy, and when Norfolk Southern, the only carrier against whom a claim was filed, offered $5,000, suit was filed against Norfolk Southern in the United States. Kirby's insurer filed a separate suit against ICC in Australia, and a settlement was made pursuant to a confidentiality agreement, the terms of which were never disclosed to anyone.

The suit that was filed in the District Court of Atlanta alleged common law negligence causes of action. Norfolk Southern moved to dismiss the complaint based upon preemption of Carmack and the Carriage of Goods by Sea Act, and the common

law causes of action were dismissed, and an amended complaint was filed for breach of contract and breach of the Carmack Amendment obligations. Summary judgment was thereafter granted in the district court, limiting the liability of Norfolk Southern to $5,000, pursuant to the provisions of the two Himalaya clauses, the $500 package limitation under C.O.G.S.A., and many prior decisions holding that the inland carrier would get the benefit of the maritime contracts where they were hired by the maritime carrier to perform an inland leg of a multimodal shipment.

The Eleventh Circuit reversed, holding that ICC was an independent contractor, and that Kirby was not bound by the Hamburg-Sud bill of lading, and therefore Norfolk Southern was not entitled to limit its liability against Kirby, despite the clear language in the two bills of lading, and despite the opportunity of Kirby and its agent to pay a higher rate and get full liability. It was also argued in the Eleventh Circuit by Professor Sturley that the Australian shipper under the Carmack Amendment was not offered a choice of rates and choice of liabilities by Norfolk Southern, and therefore the limitation of liability was ineffective vis-à-vis Norfolk Southern. The Eleventh Circuit liked the agency argument better because it broke the chain between Kirby and Norfolk Southern, thus giving Kirby's insurance company a windfall recovery against Norfolk Southern.

In the Supreme Court decision, the Supreme Court recognized a long line of Supreme Court cases which stood for the proposition that he who hires someone to make transportation arrangements for his cargo is bound by the agreement made by the parties. In fact, in following that principal laid down by the Supreme Court in 1874 and reaffirmed in 1914 in *Great N. Ry. v. O'Connor*, 232 U.S. 508 (1914). The Second Circuit itself had reaffirmed that principal in the case of *Nippon Fire & Marine Ins. Co. v. Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), where the agent who made the arrangements violated his authority because he was specifically prohibited from shipping at a limited liability, and nevertheless the Second Circuit upheld the limited liability of the two airlines that shipped the computers at a minimum value.

Further, The Supreme Court indicated that if the parties agree that pursuant to the provision in the Carriage of Goods by Sea Act, Sec. 7 the parties were at liberty to extend the Carriage of Goods by Sea Act inland, and both bills of lading did so. Thus, The Supreme Court following many prior precedents came to the conclusion that if the parties

extend COGSA inland, as Congress had intended, and if the maritime bill of lading provides through its Himalaya clause defenses for inland carriers and agents, then international shippers such as Kirby would be bound by the terms of the agreement made on their behalf, and thus The Supreme Court reversed the Eleventh Circuit's decision and held that Kirby's insurer could only recover the $500 per package that it had agreed to when it hired ICC. To be sure, Professor Sturley argued in his Supreme Court brief that the Carmack Amendment and the failure of Norfolk Southern to give Kirby a choice of rates and choice of liabilities prohibited Norfolk Southern from limiting its liability to Kirby. Because of the multimodal nature of the shipment, The Supreme Court brushed away that argument, and another argument in the *Colgate-Palmolive Co. v. Dart S/S Canada*, 724 F.2d 313 (2d Cir. 1983) case where that Court held that local law applied, thus ignoring all of the provisions the parties had agreed to in the maritime contract.

Then along comes *Sompo Japan Ins. Co. v. Union Pacific R.R. Co.*, 456 F.3d 54 (2d Cir. 2006), where the Union Pacific was hired to transport a shipment of cargo that was damaged in transit on Union Pacific. In *Sompo*, the ocean carrier's bill of lading contract limited Union Pacific's liability to $500 per package via the Himalaya clause and Union Pacific's own exempt circular offered the ocean carrier and opportunity to declare a higher value and pay a higher rate but since Sompo's insured did not declare a value to the ocean carrier, the ocean carrier did not declare a value to Union Pacific. Consistent with Kirby the district court judge granted summary judgment limiting Union Pacific's liability to $500 per package.

In the 2d Circuit, the Union Pacific relying on Kirby argued that pursuant to the ocean carrier's bill of lading contract, the extension of COGSA inland, and the Himalaya clause protecting inland carriers, Union Pacific's liability was limited to $500 per package. In reversing the district court, the Second Circuit, in a 50-page pseudo-scholarly opinion held that The Supreme Court was wrong in its analysis, claiming that the Carmack Amendment trumped the contracts entered into by the parties and that the Union Pacific had to offer the shipper, (not its shipper, the ocean carrier), an opportunity to declare a higher value and pay a higher rate.

The Second Circuit did this based on a number of false premises that appear in its pseudo-scholarly decision. First, it erroneously concluded that the issue of Carmack

Amendment was never argued to The Supreme Court by Professor Sturley, and therefore The Supreme Court overlooked the effect of the Carmack Amendment. Can you imagine Professor Sturley failing to make such a basic argument? In fact, he made such an argument, but The Supreme Court found that the actual contracts between the parties governed the transportation at issue.

Second, the Second Circuit erroneously concluded that on multimodal shipments, the Carmack Amendment's provisions clearly applied, whether or not the contracts made for the transportation recognized that fact. The original Carmack Amendment had its own jurisdictional provision. It governed shipments from one state in the United States to another state in the United States, and shipments from one state in the United States to an adjacent foreign country. It never covered shipments from a foreign country into the United States. As far back as the *Alwine v. Pennsylvania R. Co.*, 15 A. 1d 507 (Pa. Sup. Ct. 1940) decision in 1940, and the cases that followed *Alwine*, it has always held that a through shipment made under a Canadian bill of lading into the United States was governed by Canadian law and a Canadian bill of lading. The Second Circuit overruled all those decisions by holding that the recodification of the Carmack Amendment, which was not supposed to change its content, in fact now made any shipment that had any transportation in the United States, even intra-state, subject to the Carmack Amendment.

Third, it overlooked the specific provision in the Carriage of Goods by Sea Act which allows the parties to insert in the contract a provision that COGSA governs domestic U.S. transportation extending COGSA inland (actually, prior to or after the tackle-to-tackle COGSA service).

Clearly, for someone who participated in writing the briefs and constructing the oral argument in The Supreme Court, the *Sompo* decision is wrong on so many levels based upon basic court structure. Even if the Second circuit believed that The Supreme Court made a wrong decision, it was duty bound to follow that erroneous decision until such time that The Supreme Court itself would reverse its position.

Recently, the Eleventh Circuit in the *Altadis USA, Inc. v. Sea Star Line LLC,* 458 F.3d 1288 (11th Cir. 2006) case followed the decision in *Kirby* after having been reversed based upon its decision in the *Kirby* case itself. The Supreme Court accepted *cert.* based upon the conflicts between the circuits, but unfortunately the case was settled before The

Supreme Court could rule. We will have to wait until another day for the Second Circuit to be overruled.